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

Submission No:	19
Submitted by:	Queensland Youth Policy Collective
Publication:	Making the submission and your name public
Attachments:	See attachment
Submitter Comments:	

Queensland Youth Policy Collective

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

Introduction

The Queensland Youth Policy Collective ("QYPC") is a think tank organisation which organises and empowers young people to make contributions to policy debate through advocacy, research and parliamentary submissions. We have over 50 active researchers across Queensland. We are not affiliated with a political party, corporation or university.

We are grateful to have the opportunity to provide comments to the Queensland Parliament Legal Affairs and Safety Committee ("the Committee") regarding the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* ("the Bill"). We are available to give evidence at a Public Hearing if that would be helpful for the Committee. Our Submission deals only with our key issues with the Bill as proposed.

QYPC supports the change of the definition of "consent"

Bill as proposed:

13 Replacement of s 348 (Meaning of *consent*)

Section 348—
omit, insert—

348 Consent

(1) In this chapter, ***consent*** means free and voluntary agreement.

(2) A person may withdraw consent to an act at any time.

(3) 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.

(4) A person does not consent to an act just because they consented to—

(a) a different act with the same person; or

(b) the same act with the same person at a different time or place; or

(c) the same act with a different person; or

(d) a different act with a different person.

…

1. The QYPC considers that the proposed amendment to the definition of consent to "agree" does not change the operation of consent law in Queensland. We nonetheless support the amendment because it communicates to the community what consent is – and is not – and because the new definition is not unnecessarily complicated.

"Free and voluntary agreement" does not change the operation of consent law in Queensland

2. An affirmative consent model is already built into our definition of consent by the amendments to the definition in 2000. Prior to 2000, consent did not encompass notions of an affirmative model of consent. Consent would include where a person was "hesitant, reluctant, grudging or tearful but … consciously permitted" sex because "acquiescence or submission" was tantamount to consent.[1] However, the amendments in 2000 to the *Criminal Code* which required that consent be "free and voluntary" mean that consent is now "more than acquiescence and is not reluctant or grudging".[2]

3. The current definition of consent is best explained by Sofronoff P in *R v Sunderland* (2020) 5 QR 261 at [44]. Those key principles are that:

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1 *R v Winchester* [2014] 1 Qd R 44, 72 [104].
2 *R v Winchester* [2014] 1 Qd R 44.

a) The giving of consent, in the context of a charge of a sexual offence, involves the making of a representation by one person to another, to the effect that the first person agrees to participate in the sexual act that would otherwise be an offence.

b) Such a representation might be made by words or by actions or by a combination of both. Sometimes the words or actions cannot be understood apart from the surrounding circumstances.

c) In cases where the complainant has communicated neither consent nor dissent by words or actions, the inaction cannot be considered in a vacuum. It too must be considered with all of the relevant circumstances surrounding the sexual act. The circumstances involve matters both past and present.

d) Inaction in the context of prior acts or words might mean that the complainant has previously given consent which remains operative until withdrawn. This might be established by evidence of relationship or previous interactions between the complainant and accused.

e) Inaction, when taken with the other circumstances, may be a manifestation of unwilling submission rather than consent. Indeed, continued or sustained inaction for the duration of a sexual act may be a strong indicator of submission rather than consent.

f) Every consent to an act involves a submission; but it by no means follows, that a mere submission involves consent.

g) Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent.

4. Accordingly (as noted in *R v Makary*, by the Queensland Court of Appeal) because consent must be "given" … consent will be valid only if it is communicated in some way by the complainant to the accused.

5. "Free and voluntary agreement" reflects these principles in the common law.

6. The question then naturally follows, should we change the definition even though there will be no practical difference in the application of consent law in the courts?

What is the benefit of amending the definition of consent?

7. The QYPC believes that a codified criminal law has two functions: ***first*** to give legislatures the power to determine what the law is (the *legal function*); and, ***second*** to clearly communicate to society at-large what that law is (the *social function*). In amending the definition of consent, we are not changing the *legal function* of the law. But, the QYPC argues, Parliament is changing the *social function* of the law.

8. Some argue that the addition of the word "agreement" would "unnecessarily complicate the definition".[3] With respect, the QYPC disagrees that the word "agreement" would unnecessarily complicate the definition. The definition has the same legal impact as the

[3] Submission to the Queensland Law Reform Commission, Legal Aid Queensland, Criminal Law Practice.

current definition. Accordingly, the QYPC does not believe that the definition would unnecessarily complicate consent. Further, the new amendment is also not a complicated definition: these words have been adopted elsewhere without problems: in Canada, "voluntary agreement" is required;[4] consent is given in the UK when a person "agrees by choice, and has the freedom and capacity to make that choice";[5] "free agreement" is required in Tasmania; and "agreement" or "agree" is used across Australia (except for Western Australia).

[4] Criminal Code, RSC 1985, c C-46, s 273.1(1).

[5] Sexual Offences Act 2003 (UK) s 74

QYPC strongly encourages the Committee to reconsider the phrase 'fraudulent or false representation' as to STI status in the amendment to consent in s 13

Bill as proposed in s 13 (emphasis added):

> **348AA Circumstances in which there is no consent**
>
> (1) Circumstances in which a person does not consent to an act include the following—
>
> (m) both of the following apply—
>
> (i) the person participates in the act with another person because of a false or fraudulent representation by the other person about whether the other person has a serious disease;
>
> (ii) the other person transmits the serious disease to the person;

9. The phrase "false or fraudulent representation" is confusing. Does this encompass two kinds of representations: one which is false, one which is fraudulent? Or, is the phrase "false or fraudulent" supposed to be a compound descriptor to describe one kind of representation, despite the plain meaning of the word "or"?

'False representation' as to STI status should not vitiate consent

10. Using ordinary principles of statutory interpretation, it seems to the QYPC that the phrase "false or fraudulent representation" criminalises two kinds of representations – one which is fraudulent, one which is false. That is because of the use of the word "or". We note for completeness that some of the members of the QYPC are lawyers.

11. This would mean Parliament will criminalise the unknowing transmission of a serious disease where a person has made a representation and that representation was, in fact, false (though, we acknowledge the mistake of fact may function as an excuse).

12. It would therefore be a criminal offence for a person to state they do not have an STI, when in fact, they do, and subsequently infect another through intercourse. They would (excluding the operation of potential defences) commit an offence regardless of whether they knew they had an STI. The person would not need to intend that the representation is false. "False representation" does not require a subjective element: the mental element in the offence is simply that the person has intended to say the words.

13. A serious disease includes most STIs because the definition is so broad:

> a disease that would, if left untreated, be of such a nature as to—
>
> (a) cause or be likely to cause any loss of a distinct part or organ of the body; or
>
> (b) cause or be likely to cause serious disfigurement; or
>
> (c) endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health;

whether or not treatment is or could have been available.

14. Many STIs present themselves in some individuals as asymptomatic. Some STI tests can be fickle: a positive result for some STIs may not appear until weeks after the infection, and, if an STI test is done too late, viral markers can be too low to be registered. A person may only find out they have an STI because they infect another person who subsequently develops symptoms. It would be entirely possible for a person to make a "false" representation as to their STI status, pass a serious disease to another, while, at the time of intercourse, not realising they had an STI.

15. In those circumstances, a person could be charged with rape. They may be able to rely on the reasonable mistake of fact defence (for example, they reasonably believed they did not have an STI due to a negative test, or due to being asymptomatic). However, the QYPC believes that a false representation as to STI status should not be criminalised in this way. This is for two reasons.

16. ***First***, it may discourage people from having conversations about their STI status prior to sex. This is because not making a representation at all, as acknowledged in the Explanatory Memorandum, is not criminalised. So, a person may decide that the easiest way to avoid any criminal charge is to avoid conversations as to safe sex prior to intercourse. It may be that the law – as it often is – is miscommunicated to the public, such that people will be unaware of the mistake of fact defence and its operation. The Explanatory Memorandum states that "the provision is designed to promote honest dialogue". In our opinion, as it is currently drafted, the provision may have the practical effect of discouraging dialogue.

17. ***Second***, a person who only makes a false, but not fraudulent, statement does not have the level of criminal intent to be punishable by the offence of, for example, rape. Queensland might wish to criminalise the making of a false (but not fraudulent) representation as to STI status, but to do so with a maximum sentence of life imprisonment through the offence of rape is unjust.

If the phrase "False or fraudulent" is designed to only encompass a fraudulent representation, the Bill should be changed to simply "fraudulent"

18. We suspect that, despite the words used in the Bill, Parliament does not intend to punish false representations. The Explanatory Memorandum seems to only countenance circumstances in which a person *fraudulently* misrepresents their STI status to another person.

    18.1. The Explanatory Memorandum refers to the offence in the heading as 'Fraudulent representation – serious disease'.

    18.2. The Explanatory Memorandum goes on to state that:

    > "[this amendment] recognises that a person should only be criminally responsible for a sexual offence in circumstances where there are serious consequences such as actual infection flowing from their ***fraudulent conduct***." (emphasis added)

19. If so, the use of the word "or" is used incorrectly. The word "or" is supposed to mean "and".

20. The legal meaning of "fraudulent representation" already encompasses a false statement. "False" adds nothing to the effect of the statue and is confusing.

The interaction between "false representation" and the mistake of fact defence

21. As noted above, the mistake of fact defence would excuse those who reasonably believed they did not have an STI at the time they made a "false" representation. The criminalising of *both* fraudulent and false representations may be designed therefore to criminalise those who knowingly lie about their STI status but do not do so to induce another into sex (i.e. do not so "fraudulently"). For example, imagine a defendant who lied about their STI status. But, they did not lie to deceitfully induce another to have sex with them, but for a different reason, for example, they were ashamed. That person would not have made a "fraudulent representation" because they were not being deceitful to *induce* another into sex. However, under the proposed Bill, such a person would still be liable for a criminal offence as they have made a "false representation" which would not be excused by the mistake of fact defence.

22. If this is the rationale as to why the phrase "false or" fraudulent representation has been proposed (though, we note there is no suggestion of that in the Explanatory Memorandum) we would argue that it is nonetheless confusing to the community.

23. We would suggest that including the phrase "knowingly false" would be helpful. This provision may have profound public health impacts: it is in the community's interest to ensure the Criminal Code does not suggest that a person would be criminally liable for making an honest mistake with respect to their sexual health. Honest dialogue is to be encouraged, and the phrase "false representation" leaves many people confused with how the law applies to their sexual health.

Our recommendation

24. Accordingly, we strongly recommend that the wording of s 13 include the phrase '***knowingly*** false or fraudulent representation' or, otherwise be changed to:

    (m)both of the following apply—

    (i) the person participates in the act with another person because of a ~~false or~~ fraudulent representation by the other person about whether the other person has a serious disease;

    (ii) the other person transmits the serious disease to the person

25. If the Government decides not to change the Bill, we strongly recommend that, when the Bill is passed, the Government release fact sheets to the community and local health centres about the interaction between this new provision and the mistake of fact defence, to ensure health providers and the community understand what is, and is not, criminal conduct, and to encourage open dialogue and regular STI testing.

QYPC recommends that advice should be sought to protect special witnesses in trials

26. The Bill makes two amendments in respect of the definition of 'sexual offence' under the *Evidence Act 1977* (Qld) (**Evidence Act**). The first is that it is omitted from s 21A of the Evidence Act. Second, and sensibly, is its insertion in identical form within the dictionary contained within Schedule 3 of the Evidence Act.

27. It is worth commenting briefly on the importance of the interrelation between interpretation of what constitutes a 'sexual offence' and categorisation of a person as a special witness.

> Simply stated, whether an offence is a sexual offence is one of various determinative factor in whether a person may be categorised as a special witness and therefore be entitled to the commensurate protections under s.21A of the Evidence Act. A special witness is defined to include, amongst other things:
>
> > *(e) a person –*
> >
> > *(i) against whom a sexual offence has been, or is alleged to have been, committed by another person; ...*
>
> [underline additional]

28. That the Evidence Act presently defines and, under the proposals contained within the Bill would continue to define, 'sexual offences' to include 'an offence of a sexual nature' is appropriate. That is because the breadth of the definition ensures that the range of offences which may be contained under various pieces of legislation will, in the ordinary course, lead to the categorisation of a person as a special witness. It is important that such categorisation occurs as the adaptation to the processes for giving evidence as a special witness are designed to minimise the impacts of doing so upon the witness. For example, those processes may spare a special witness from the hardship of confronting the alleged perpetrator of a sexual offence against them.

29. The QYPC considers that the series of amendments proposed by the Bill in relation to the definition of 'sexual offence' will not adversely affect the intended operation of s 21A in relation to victims of sexual offences.

30. However, we would query how the amendment as to false or fraudulent representation as to STI status (in trials for rape or sexual assault) would operate in practice.

31. One of the elements of the offence of rape in those circumstances is that a person contracts a serious illness (STI) from the defendant following intercourse. Accordingly, the prosecution must prove that the complainant contracted the serious illness from the defendant, and, presumedly, not another person. A defendant would have the prerogative to argue in their defence that the complainant acquired the serious illness from another person.

32. The QYPC is concerned that in practice this would result, in effect, a trial of the complainant's promiscuity. We further question how such a trial could operate given the operation of section 4 of the *Sexual Offences Act* (Qld) which prohibits entirely questions and comments about the complainant's sexual reputation.

Recommendation to protect complainants

33. We recommend that the Attorney-General or Director of Public Prosecutions seek advice as to the best practice to protect complainants in trials of offences of rape / sexual assault where consent was vitiated by the defendant allegedly making a false or fraudulent representation as to their STI status. Such advice should consider the wellbeing of the complainant and how this can be balanced against the rights of the defendant.

QYPC supports amending the Bill to criminalise intimate deepfakes

The Bill as proposed:

10 Amendment of s 223 (Distributing intimate images)

Section 223(5), definition *consent*—
omit, insert—

consent means free and voluntary agreement by a person with the cognitive capacity to make the agreement.

11 Amendment of s 227B (Distributing prohibited visual recordings)

Section 227B(2), definition *consent*—
omit, insert—

consent means free and voluntary agreement by a person with the cognitive capacity to make the agreement.

What are deepfakes?

34. Deepfakes are digital photos, videos or sound files of a real person that has been edited to create a realistic but false depiction of them doing or saying something that they did not actually do or say.[6] This can include images or recordings which are wholly generated by AI, rather than editing an existing image.

35. Deepfakes are created using artificial intelligence software which currently achieves the realism of deepfakes through drawing on a large number of photos or recordings of the person to model and create content.[7] Deepfake technology is not inherently harmful, with the underlying technology being utilised for uses as benign as swapping your face with a celebrity to positive uses such as sophisticated algorithms being utilised to synthesise new pharmaceutical compounds and protect wildlife from poachers.[8] However, ready access to deepfake technology presents a growing threat as it can be increasingly used by bad actors for harmful uses, such as the creation of deepfake intimate images (colloquially known as 'deepfake porn').

What are deepfake intimate images?

36. Deepfake intimate images are synthetic media that have been manipulated to make it appear as if a person is engaging in sexual activity. They can be created using existing artificial intelligence and machine learning technology and can be very difficult to distinguish from real images. As such, deepfake intimate images or videos pose a particularly insidious threat that is difficult for potential victims to protect against.

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6 eSafety Commissioner (2022). Deepfake trends and challenges – position statement. *eSafety Commissioner*. Retrieved from https://www.esafety.gov.au/industry/tech-trends-and-challenges/deepfakes

7 Ibid

8 Smith, Hannah, & Manstead, Katherine. (2020). Weaponised deep fakes – National security and democracy. *Australian Strategic Policy Institute*. Retrieved from https://www.aspi.org.au/report/weaponised-deep-fakes.

What are the risks of deepfake intimate images?

37. Deepfake intimate images present various risks,[9] including:

    37.1. deepfake intimate images can cause significant harm to victims. Victims of deepfake abuse often experience emotional distress, humiliation, reputation damage and threats to their safety and well-being;

    37.2. the threat of creation and/or distribution deepfake intimate images can be used to harass, intimidate, and extort victims;

    37.3. deepfake intimate images can be used to spread misinformation and propaganda. For example, perpetrators of deepfake abuse may create deepfakes of celebrities or politicians engaging in sexual activity in order to damage their reputation or spread misinformation; and

    37.4. deepfake intimate images may be used as a tool for perpetrators of domestic violence to hurt, harass or intimidate their victims. [10]

38. Further, women, single people and adolescents, particularly those from culturally and linguistically diverse backgrounds are more likely to be a victim of deepfake intimate images.[11] Additionally, LGBTIQ+ populations are also at increased risk of becoming a victim of deepfake intimate images.[12]

39. Currently, the distribution and threat to distribute intimate images and prohibited visual recordings are criminalised under the Criminal Code. Intimate images and prohibited visual recordings are defined under s 207A of the Criminal Code as:

    intimate image, of a person

    a) means a moving or still image that depicts –

        (i) the person engaged in an intimate sexual activity that is not ordinarily done in public; or

        (ii) the person's genital or anal region, when it is bare or covered only by underwear; or

        (iii) if the person is female or a transgender or intersex person who identifies as female—the person's bare breasts; and

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9 Fallis, Don. (2020). The Epistemic Threat of Deepfakes. Philos Technol, 34(4), 623-643. doi: 10.1007/s13347-020-00419-2; Mustak, Mekhail, Salminen, Joni, Mantymaki, Matti, Rahman, Arafat., & Dwivedi, Yogesh. K. 022). Deepfake: Deceptions, mitigations, and opportunities. *Journal of Business Research*, 154, 113368. https://doi.org/10.1016/j.jbusres.2022.113368.

10 Rini, Regina, & Cohen, L. (2022). Deepfake, deep harms. *Journal of Ethics and Social Philosophy*, 22 *(2)*, p. 143; Karasavva, V., & Noorbhai, A. (2021). The Real Threat of Deepfake Pornography: A Review of Canadian Policy, Cyberpsychology, Behavior, and Social Networking, 203-209. http://doi.org/10.1089/cyber.2020.0272.

11 Reissman-Penn, Hailey. (2023). What are the problems with deepfake porn? *Futurity*. Retrieved from https://www.futurity.org/deepfake-porn-2951052-2/?utm_source=flipboard&utm_content=topic%2Fgenerativeai

12 Ibid.

b) includes an image that has been altered to appear to show any of the things mentioned in paragraph (a)(i) to (iii); and

c) includes an image depicting a thing mentioned in paragraph (a)(i) to (iii), even if the things has been digitally obscured, if the person is depicted in a sexual way.

prohibited visual recording, of a person, means –

a) a visual recording of the person, in a private place or engaging in a private act, made in circumstances where a reasonable adult would expect to be afforded privacy;

b) a visual recording of the person's genital and anal region, when it is bare or covered only by underwear, made in circumstances where a reasonable adult would expect to be afforded privacy in relation to that region.

40. Notably, both definitions do not use the word "picture" which is defined under section 1 of the Criminal Code as an "…image, including [a] computer generated image." The definitions of intimate image and prohibited visual recording do not explicitly include reference to computer generated images (which would encompass deepfakes) despite it being included explicitly in the definition of the word "picture." The word "picture" is utilised in numerous sections of the Criminal Code, including sections relating to child exploitation material, the abuse of persons with an impairment of the mind and obscene publications and exhibitions. This is problematic as criminal statutes are to be read strictly, and so currently Queensland has no criminalisation of deepfakes.

41. The proposed amendments to the criminal code under the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* are in relation to intimate images and prohibited visual recordings and only seek to update the definition of consent to the affirmative consent model.

42. QYPC advocates that this suite of reforms is a critical junction to explicitly outlaw deepfake (i.e.: computer generated) intimate images. Currently, there is no clear and specific criminal offence for deepfake intimate images in Queensland. QYPC acknowledges that there are a number of existing laws that could potentially be used to prosecute perpetrators of deepfake intimate images, such as provisions in the Criminal Code in relation to image-based sexual abuse, cyberbullying and stalking. Additionally, the *Criminal Code Act 1995* (Cth) criminalises the crime that arises when deepfake intimate images depict a person who has not given their consent for the distribution of such content.[13] Further, QYPC also acknowledges that there are also a number of civil remedies potentially available to victims of deepfake intimate images, such as defamation, invasion of privacy, or emotional distress.

43. However, QYPC recommends that the greatest impact of addressing and deterring the creation and distribution of deepfake intimate images is through explicitly criminalising it in the Criminal Code, particularly to communicate to society that such conduct is condemned. Further, given the nature and intention of the wide suite of reforms the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation*

[13] Hii, Andrew, & Craig, Bryce. (2023). Deepfakes are still the scourge of synthetic media. *Gilbert + Tobin.* Retrieved from https://www.gtlaw.com.au/knowledge/deepfakes-are-still-scourge-synthetic-media

Amendment Bill 2023 is proposing, QYPC argues that this Bill presents the best opportunity to outlaw deepfake intimate images explicitly.

44. When discussing artificial intelligence software and its uses – for both good and bad – a common sentiment from advocates and critics alike is "this is the worst it will ever be." This refers to how artificial intelligence technology will undoubtedly improve significantly over time, and, in essence, artificial intelligence technology is currently at its "worst" or least developed state right now. Despite this, artificial intelligence technology already presents many challenges to regulate.[14] Whilst there have been some attempts to limit the use of artificial intelligence to generate deepfake intimate images, such as the artificially intelligent text-to-image model, Stable Diffusion, censoring nudity or the social media site Reddit banning certain groups for using artificial intelligence to generate deepfake intimate images, their impact on limiting the amount of or ability to generate deepfake intimates images has been limited.[15] We have seen recently that the advancement and accessibility of artificial intelligence technology is developing at an exponential rate and, with that, the challenges in regulating and protecting potential victims from the harms of artificial intelligence technology (such as deepfake intimate images) will also increase exponentially.[16]

Why should we explicitly codify the criminalisation of deepfake intimidate images?

45. Criminal statues are to be read strictly. So, currently Queensland has no criminalisation of the creation deepfakes in itself (other offences, listed above, require that the deepfakes amount to 'bullying' or 'stalking'). The use of the word "altering" is not sufficient: true deepfakes are entirely new images. The creation and distribution of such images should, in itself, be a serious offence.

46. Further, legislation is a powerful tool in shaping cultural norms. It seems to the QYPC that the government is seeking to use this amendment to shape cultural laws: many of the provisions in the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* codify existing case law, criminalise offences that may indirectly be addressed under existing legislation or criminalise offences that may not make a substantial impact on conviction rates. For example, under clause 13 of the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023*, the offence of stealthing will be criminalised. Stealthing, much like similar sexual offences, will be difficult to successfully prosecute and there have been only a handful of cases that have been brought before the courts in the jurisdictions that have criminalised stealthing (though, as we write in this submission, we do support the introduction of the offence of stealthing). This is a reality that is acknowledged by even the staunchest advocates of these reforms, such as Chanel Contos in her book "*Consent Laid Bare: Sex, Entitlement and the Distortion of Desire*." It is important – as Contos argues – to criminalise and explicitly address these offences in legislation is that legislation plays a significant role in shaping cultural norms and communicating within society what behaviour will, and will not, be

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14 Australian Human Rights Commission. (2023). The need for human rights-centred AI. *Australian Human Rights Commission*. Retrieved from https://humanrights.gov.au/our-work/legal/submission/need-human-rights-centred-ai

15 Reissman-Penn, Hailey. (2023). What are the problems with deepfake porn? *Futurity*. Retrieved from https://www.futurity.org/deepfake-porn-2951052-2/?utm_source=flipboard&utm_content=topic%2Fgenerativeai

16 Viola, M., Voto, C. Designed to abuse? Deepfakes and the non-consensual diffusion of intimate images. *Synthese* 201, 30 (2023). https://doi.org/10.1007/s11229-022-04012-2

tolerated. Legislation presents not only the opportunity to make legal changes but also the opportunity to make cultural changes.

Our recommendation: include an amendment to criminalise deepfake intimate images

47. As such, QYPC recommends the explicit inclusion of a specific criminal offence in relation to deepfake intimate images. This is in line with the approach of other jurisdictions that have existing offences relating to the distribution or threat of distribution of intimate images (other known as 'revenge porn'), such as Victoria.

48. Victoria has criminalised the distribution or threat of distribution of intimate images since 2014 but explicitly criminalised deepfake intimate images in section 22 of the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* which specifies:

> an image may be –
>
> still, moving, recorded or unrecorded; and
>
> digitally created by –
>
> generating the image; or
>
> altering or manipulating another image.

49. We support Queensland adopting the same. The inclusion of a specific criminal offence for deepfake intimate images will not only send a clear message that deepfake intimate images will be punished in Queensland, but also assist in future-proofing the Criminal Code – providing a foundation and precedent to build future reforms off as artificial intelligence technology develops at a rapid rate.

QYPC believes all suspicions as to a child sexual offence should be reportable

The Bill as proposed (s 9):

> **Amendment of s 229BC (Failure to report belief of child sexual offence committed in relation to child)**
>
> (1) Section 229BC(4)(c), 'becomes an adult'—
> *omit, insert—*
>
> turns 16 years
>
> (2) Section 229BC(4)—
> *insert—*
>
> (e)both of the following apply—
>
> (i)the adult gains the information—
>
> as a relevant professional while acting in the adult's professional capacity; and
>
> in the course of a confidential professional relationship with the child in which there is an express or implied obligation of confidentiality between the adult and the child;
>
> (ii) the adult reasonably believes there is no real risk of serious harm to the child or any other child in not disclosing the information to a police officer.

50. The QYPC has two principal concerns with making it a reasonable excuse to fail to report a belief of a child sexual offence where an adult *reasonably believes* there is no real risk of serious harm in not disclosing the information: *first*, neither the Bill nor the *Criminal Code* in its current form defines 'serious harm'; *second,* relevant professionals are unlikely to have enough information to determine whether the child or other children are at risk of serious harm.

51. First, neither the Bill nor the *Criminal Code* in its current form defines 'serious harm'. Without a clear, objective test within the *Criminal Code* to determine what constitutes 'serious harm', relevant professionals may be uncertain how to evaluate whether a child may suffer such harm were the adult not to disclose the information to the police. Even if an adult were to believe there is a real risk of a child suffering harm, they might not disclose the information to a police officer because they are under the incorrect impression that the potential harm is not 'serious' enough.

52. In particular, the QYPC believes that 'serious harm' should be defined to include not only sexual or physical harm, but also mental and emotional harm over the course of the person's lifetime (not just their childhood). Australians who experienced child sexual abuse are nearly twice as likely as the general Australian population to develop post-traumatic stress disorder, 1.65 times more likely to develop a generalised anxiety disorder, 2.12 times more likely to develop a severe alcohol use disorder, and 1.66 times more likely to develop a

major depressive disorder.[17] If the matter is never reported to the police, victims may not be given access to the most appropriate counselling and support services from government and non-governmental organisations.

53. Second, relevant professionals are unlikely to have enough information to determine whether the child or other children are at risk of serious harm. An adult who has only received a partial disclosure from a child – or has seen or heard something to cause a suspicion – is not necessarily able to make an accurate and informed assessment about whether that child is at an ongoing risk of harm. That is to say, they may not be able to ascertain whether they 'reasonably believe' there is harm or not, as all they have is a suspicion. They are even less likely to accurately determine whether other children they may never have met or spoken to may be at risk of serious harm.

54. The police would almost certainly be in a much better position to comprehensively investigate the alleged abuse and determine whether that child or other children are at an ongoing risk of harm. Given the severe consequences of child abuse, the QYPC supports the removal of this caveat such that adults must report any suspicions of child abuse.

55. The QYPC recommends that:

    a. This legislation be implemented on the proposed dates.

    b. This legislation include both incarceration and community-based diversionary responses be employed to rehabilitate perpetrators of DFV.

    c. Police powers and responsibilities in relation to arrests and making DVO's be informed by cultural-guidance policies to reduce misidentification.

    d. Culturally led training regarding DFV be provided to officers.

    e. Funding be secured to improve facilities and programs for victims of DFV to ensure proper support.

[17] David M Lawrence et al, 'The association between child maltreatment and health risk behaviours and conditions throughout life in the Australian Child Maltreatment Study' (2023) 218(S6) *Medical Journal of Australia* S34.

QYPC supports Coercive Control Legislation but encourages culturally appropriate policing of Indigenous communities

56. Coercive Control is an ancient form of abuse that is finally being recognised as the prevalent, and insidious criminal matter that it is. Coercive control involves repeated actions and omissions which target a victim's independence, freedom, self-esteem, safety, sense of security, and autonomy. Coercive control is known as 'the context in which domestic and family violence occurs'.[18] Here the victims susceptibility to abuse is 'a function of the degree to which [their] capabilities for defence, resistance, escape, or to garner support have been disabled by a combination of exploitation, structural constraints and isolation'.[19] Queensland will be joining jurisdictions across Australia and throughout the world in making sweeping changes to criminalise such behaviour.

57. The QYPC supports the criminalisation of coercive control and the legal introduction of required affirmative consent, where systematic reform to the criminal justice system assists these laws in achieving the relevant policy objectives.

58. The QYPC notes the foreseeability that the criminalisation of coercive control is highly likely to disproportionately affect First Nations Women due to the frequent misidentification of victims and perpetrators.

Disparities for Indigenous Communities

59. Aboriginal and Torres Strait Islander women are at much higher risk of being sexually abused as they are part of various minority demographics as they are often young, female, have minimal income, and face both housing and employment insecurity. It is not people's inherent identities that cause them to be vulnerable or disadvantaged, but rather institutions and practices that have a discriminatory and/or disproportionate impact on particular groups of people.

60. To understand the experiences of Aboriginal and Torres Strait Islander women, we must recognise the sexism and racism that been institutionalised within the government and acknowledge the clear disparities between non-Indigenous and Indigenous communities in their experience of violence. To not recognise the governments' previous role in perpetuating abuse against these communities will allow for further marginalisation and oppression and allow the circle of violence to continue.[20]

61. A 2018 study into cases recorded as domestic abuse or violence show Indigenous and Torres Strait Islander women are 35 times more likely to experience domestic and family violence than non-Indigenous women.[21] Further, Indigenous women are also 31 times more likely to be hospitalised as a result of abuse inflicted within domestic and family violence than

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18 Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). Accurately identifying the "person most in need of protection" in domestic and family violence law (Research report, 23/2020). Sydney: ANROWS.

19 Evan Stark, Coercive Control: How many entrap women in personal life (Oxford University Press, 2007) 205.

20 Emma Buxton-Namisnyk, 'Does an intersectional understanding on international human rights law represent the way forward in the prevention and redress of domestic violence against Indigenous women in Australia?' (2018) 18(1) Australian Indigenous Law Review, 119–137.

21 Harry Blagg et al, ANROWS, Innovative models in addressing violence against Indigenous women: Final report (2018) https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/02/19024934/4.3-Blagg-Final-Report.pdf

other women.[22] Since an increase in the use of Domestic Violence Orders to determine prevalence of domestic abuse in specific communities, more recent results are overrepresented. This is frequently as police themselves can issue these orders, and often do within Indigenous communities, to the perpetrator, victim, or both.[23]

62. There is a disconcerting steep increase in incarceration rates of Indigenous women, particularly where these women have been the victim of domestic abuse and have used violent resistance as a defence strategy. Many Indigenous women have expressed discomfort and mistrust of the police service and government, leaving few alternatives to defend against abuse. This problem needs to be addressed at the root with systemic change and supportive policies.

Misidentification of Indigenous Victims

63. The introduction of the coercive control bill has the potential to introduce net-widening and harm to diverse, vulnerable communities. Where victim-survivors of domestic violence in First Nations communities are frequently misidentified, this amendment may significantly contribute to the increasing incarceration rate of Indigenous women. Victim-survivors may be misidentified through the police misinterpreting a situation due to linguistic and cultural differences informing bias. The abuser may also deliberately manipulate the scene to appear as the victim, often leading to wrongful arrest. In the testimonies coming from the Independent Commission of Inquiry into Queensland Police Service's **("QPS")** Responses to Domestic and Family Violence, widespread and systematic racism and sexism were identified as prevalent problems within the QPS.[24] Such factors are believed to influence the arresting patterns of Indigenous women in domestic abuse situations.

64. The risk of misidentification of victims is increased where victim-survivors experience reluctance to speak with police or linguistic differences of which make effective communication difficult.[25] Some victims may have prior convictions, adverse behavioural issues due to addiction or mental health issues, or naturally defensive mannerisms due to the painful history of the Indigenous communities and Australian government agencies. These factors are all likely to contribute to the misidentification of a victim where their complex identity does not conform to the older idea of a "victim".

65. When experiencing a heightened emotional state during confrontation, many people express fear and anger outwardly which can create temporary difficulty in identifying aggressive or defensive behaviours. It seems, however, that where a victim-survivor does not fit the inflexible "ideal" of a docile, cooperative, articulate, and collected victim with

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22 Steering Committee for the Review of Government Service Provision. (2011). Overcoming Disadvantage Key Indicators 2011 Report. Productivity Commission. https://www.pc.gov.au/research/ongoing/overcoming-indigenous-disadvantage/2011/key-indicators2011-report.pdf.

23 Heather Douglas and Robin Fitzgerald, 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People' (2018). 7(3) International Journal for Crime, Justice and Social Democracy.

24 Gillespie, Eden. (2022). *Queensland police misidentify domestic violence victims as attackers, inquiry told.* Retrieved from https://www.theguardian.com/australia-news/2022/jul/19/queensland-police-misidentify-domestic-violence-victims-asattackers-inquiry-told

25 Victorian Aboriginal Legal Service. (2022). *Addressing Coercive Control Without Criminalisation: Avoiding Blunt Tools that Fail Victim-Survivors*, 25-26. Retrieved from https://www.vals.org.au/wp-content/uploads/2022/01/Addressing-Coercive-Control-Without-Criminalisation-Avoiding-Blunt-Tools-that-Fail-Victim-Survivors.pdf

no antecedents, they are too often mistakenly identified as the perpetrator. First Nations women are significantly more likely to be incorrectly identified as the perpetrators of domestic violence as a result of the aforementioned risk factors being disproportionately active in Indigenous communities and due to systemic bias against those who do not conform with this "ideal victim" archetype.

66. Queensland Domestic Violence Death Review and Advisory Board data released in 2020 confirmed the epidemic of misidentification of victims in Indigenous domestic violence situations. In 44.4% of all domestic-violence related deaths of Indigenous women recorded for the period, the deceased women had been identified as respondents or perpetrators in a domestic violence protection order in one or more instances. The prevalence of such misidentification is clear in that nearly all Indigenous domestic family violence **("DFV")** related deaths recorded in this period, involved a deceased who had been recorded as the respondent in a DFV claim prior to death.[26]

67. In their analysis of the NSW Joint Select Committee on Coercive Control, Davis and Buxton-Namisnyk highlight the common practice of Indigenous men using the threat of calling child services to take away mothers' children as a form of control and manipulation to more easily enable their abuse. Whilst the introduction of the proposed coercive control laws criminalise this behaviour, it is remiss in considering the implications of inviting police into the home during these moments, and the likelihood of abused mothers being put on notice to child-protection services due to mandatory reporting despite being a victim.[27]

68. Whilst the introduction of Coercive Control laws to criminal legislation is entirely necessary, supported, and crucial to widen the net and catch abusers, these changes may unfortunately also catch Indigenous victim-survivors in the net in the place of real perpetrators of abuse. Focusing only on the introduction of this legislation, and not on addressing the underlying causes for DFV or systemic racism and sexism in the QPS, will guarantee unequal application of this law to Indigenous parties.

Recommendations

69. The criminalisation of coercive control provides police with extensive powers to investigate and charge people with this offence without taking action to prevent such violence or address any underlying causes of domestic and family violence. Whilst the criminalisation of coercive control is a necessary step to ensure the safety and security of victims of abuse, this change will only reduce harm where paired with measures to attack the cause of such abuse.

70. This amendment is largely informed by recent introductions of coercive control to Scottish legislation. Currently, the most commonly imposed penalty of breach of such legislation is a community-based diversionary response which can include conditions regulating residential choices and extended participation in treatment programs. There has no been no such mention of rehabilitative programs to be used in Queensland, and thus the underlying causes of domestic abuse remain unacknowledged.

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[26] Nancarrow, H., Thomas, K., Ringland, V., & Modini, T. (2020). Accurately identifying the "person most in need of protection" in domestic and family violence law (Research report, 23/2020). Sydney: ANROWS.

[27] Megan Davis and Emma Buxton-Namisnyk, 'Coercive Control Law Could Harm the Women it's Meant to Protect', *The Sydney Morning Herald* (Sydney, 2 July 2021).

71. Further, the introduction of this legislation to Scotland followed a two-decade long investment in community education on domestic abuse and DFV prevention strategies being implemented nationally.[28] For this legislation to be effective in reducing DFV, similar strategies and national DFV education must be implemented.

72. The availability to access support for perpetrators such as behavioural change programs and professional aid services is restricted socio-economically, and geographically to the Indigenous communities in need. Support for victim-survivors also dwindles where this is a lack of funding for housing, community support, and social services. In not misidentified or killed, Indigenous women who are subject to coercive control remain isolated even after the perpetrator is incarcerated.

Alternative offences to crime of coercive control

73. The QYPC, as we have advised the Committee previously, supports coercive control legislation. However, in 2021, when the coercive control laws were first proposed, many community groups opposed coercive control laws and argued the Bill should be delayed. With this context in mind, if the Government decides not to proceed with coercive control legislation once more, we note that such conduct is already criminalised by a number of offences, which, for completeness, we have outlined below.

74. Under the proposed s 334F, the crime of unlawful stalking, intimidation, harassment or abuse may be an alternative to the crime of coercive control if that offence is established by the evidence. Pursuant to s 359B of the Criminal Code, a person commits the offence of unlawful stalking, intimidation, harassment or abuse if they engage in conduct that is intentionally directed at a person and would cause the person apprehension or fear or violence or that would cause detriment to the person.

75. While QYPC generally supports the formulation and introduction of the proposed s 334F – and indeed agrees that the offence under s 359B shares considerable overlap with many coercively controlling behaviours – we consider that the offence of torture may function as an alternative to coercive control if the government decides not to proceed with coercive control laws.

76. Section 320A of the Criminal Code provides that a person who tortures another person commits a crime. In this context, torture refers to the intentional infliction of severe pain or suffering by an act or series of acts done on one, or more than one, occasion.[29] 'Pain or suffering' includes that which is physical, mental, psychological or emotional, whether temporary or permanent.[30]

77. To establish guilt, the prosecution must prove, beyond reasonable doubt, that the accused intended their acts to inflict severe pain and suffering on the victim.[31] This requires an actual, subjective intention on the part of the accused; suffering as a consequence of the acts (without intention for the suffering to arise) is insufficient.[32]

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28 Smee, B. (2021). 'Coercive control laws could harm vulnerable women, advocates in Queensland warn'. The Guardian. 7 May 2021.

29 *Criminal Code 1899* (Qld) s 320A(2).

30 *Criminal Code 1899* (Qld) s 320A(2).

31 *R v Ping* [2005] QCA 472 at [27].

32 *R v Ping* [2005] QCA 472 at [27].

78. Although the underlying rationale for the offence's introduction was not necessarily as a prosecutorial and deterrent means for domestic and family violence, academics have endorsed its applicability to, and suitability for criminalising, coercively controlling behaviours.[33] Indeed, it has been suggested that the offence's "potential application to variants of coercive behaviour that constitute domestic violence would seem fairly clear, without any contortion of the legislative language".[34] Notably, Professor Evan Stark, a sociologist and forensic social worker who developed the concept of coercive control described it to be synonymous with '*intimate terrorism*'.[35]

79. The criminalisation of both physical and psychological harm under s 320A remains consistent with the current understanding of coercive control as a pattern of domination that includes both emotional manipulation and physical violence to ensure compliance.[36] Additionally, coercive control is often a predictor of severe physical violence.[37] The offence of torture is particularly apt in such circumstances where a victim of coercive control is experiencing the infliction of milder or sporadic physical violence that would not meet the threshold serious violence offences, including an act intended to cause grievous bodily harm and other malicious acts (s 317) or assault occasioning bodily harm (s 339). In respect of the elements of torture, it is acknowledged that pain or suffering is subjective, and one person may experience greater pain or suffering from the same pain-provoking factor than another person.[38] This may serve as a positive, reinforcing factor in a victim's likelihood to acknowledge and report ongoing abuse by decreasing fears that they will not be believed or that the impact of the degradation experienced will be diminished or dismissed.

80. Finally, torture carries a maximum penalty of 14 years imprisonment, which is identical to the punishment provided for under the proposed s 334C for coercive control. In comparison, the crime of unlawful stalking, intimidation, harassment or abuse is liable to a maximum penalty of imprisonment for 5 years,[39] or 7 years where a domestic relationship exists between the perpetrator and victim.[40] Accordingly, these offences would function as an appropriate alternative to coercive control.

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33 Andreas Schloenhardt et al, '20 Years of Torture: Reflections on s 320A of Queensland's Criminal Code' (2019) 43(1) *Criminal Law Journal* 58, 59-60, 63-4.

34 S Kift, 'How Not to Amend a Criminal Code' (1997) 22 *Alternative Law Journal* 215, 218 as cited in Andreas Schloenhardt et al, '20 Years of Torture: Reflections on s 320A of Queensland's Criminal Code' (2019) 43(1) *Criminal Law Journal* 58, 60.

35 Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, 2007) 373-4.

36 House of Representatives Standing Committee On Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into family, domestic and sexual violence* (2021) [4.7], [4.16].

37 House of Representatives Standing Committee On Social Policy and Legal Affairs, Parliament of Australia, *Inquiry into family, domestic and sexual violence* (2021) [4.5].

38 Supreme and District Court of Queensland, *Practice Direction No 182.1 of 2017 – Benchbook – Torture: s 320A,* March 2017.

39 *Criminal Code 1899* (Qld) s 359E(2).

40 *Criminal Code 1899* (Qld) s 359E(4).

The QYPC considers that laws with respect to non-payment of a sex worker are being continuously and unnecessarily amended

Bill as proposed:

348AA Circumstances in which there is no consent

Circumstances in which a person does not consent to an act include the following—

…

(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;

81. The QYPC strongly believes that it should be an offence under the *Criminal Code* to make a false or fraudulent representation that the person will be paid or receive some reward to induce them into engaging in a sexual act. However, such conduct is already criminalised by two offences contained in the Criminal Code: by the procurement offence (maximum 14 years imprisonment) and by fraud (maximum 5 years imprisonment).

218 Procuring sexual acts by coercion etc.

A person who—

a) by threats or intimidation of any kind, procures a person to engage in a sexual act, either in Queensland or elsewhere; or

b) by a false pretence, procures a person to engage in a sexual act, either in Queensland or elsewhere; or

c) administers to a person, or causes a person to take, a drug or other thing with intent to stupefy or overpower the person to enable a sexual act to be engaged in with the person;

commits a crime.

Maximum penalty—imprisonment for 14 years.

408C Fraud

A person who dishonestly—

(b) obtains property[41] from any person; or

(h) makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;

[41] *Property* includes sexual services, as property includes "credit, service, any benefit or advantage, anything evidencing a right to incur a debt or to recover or receive a benefit, and releases of obligations": s 408C (3)(a).

… commits the crime of fraud.

Maximum penalty—5 years imprisonment.

82. Therefore, we note that the conduct which would be criminalised by the amendment is already criminal.

83. In Queensland, the laws surrounding sex work, fraud and rape has changed multiple times since 1990s. The amendments have been considered at length by many scholars.[42] For example, s 218 of the *Criminal Code* formerly provided that:

> "Any person who – …
>
> By any false pretence procures a woman or girl, who is not a common prostitute or of known immoral character, to have unlawful carnal connection with a man, either in Queensland or elsewhere
>
> … is guilty of a misdemeanour …
>
> A person cannot be convicted of any of the offences defined in this section upon the uncorroborated testimony of one witness."

84. That requirement of corroboration was narrowed in 1992,[43] when uncorroborated evidence by the complainant did not prevent conviction, but the judge must issue a warning to the jury, and then the section was removed in 1997.[44] In 1992, Queensland expanded the offence to include all sexual acts.[45] Queensland then expanded the category of fraud from 'nature of the act' to encompass 'purpose of the act' in 1994.[46] In 1992, Queensland legislated to criminalise where a person acquires sex services fraudulently through the *Prostitution Laws Amendment Act 1992* (Qld) s 9. This was then subsequently removed.

85. The QYPC does not see the merit in passing further amendments to laws surrounding non-payment of a sex worker in circumstances where the conduct which would be criminalised by the amendment is already criminal by virtue of ss 218 and 408C of the *Criminal Code*. In fact, we believe classifying this as rape may have the effect of complicating – rather than clarifying – the definition of 'rape' for the courts, juries and the wider community.

86. If non-payment of a sex worker were considered rape, that could mean that, in any situation where a sex worker performed services other than for upfront payment, whether that situation amounts to rape may not be conclusively determined before, during or even immediately after sexual contact occurs. Instead, it would depend on whether a customer fails to pay as required minutes, hours, days or perhaps even weeks afterwards (depending on the specific payment agreement). These examples illustrate that the non-payment of a

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42 For example: Jonathan Crowe, 'Fraud and Consent in Australian Rape Law' (2014) 38(4) *Criminal Law Journal* 236; Andrew Dyer, 'Mistakes That Negate Apparent Consent' (2019) 43(3) *Criminal Law Journal* 159; Neil Morgan, 'Oppression, Fraud and Consent in Sexual Offences' (1996) 26(1) *Western Australian Law Review* 223; Ian Leader-Elliot and Ngaire Naffine, 'Wittgenstein, Rape Law and the Language Games of Consent' (2000) 26(1) *Monash University Law Review* 48.

43 Prostitution Laws Amendment Act 1992 (Qld) s 9.

44 Criminal Law Amendment Act 1997 (Qld) s 29.

45 Prostitution Laws Amendment Act 1992 (Qld) s 9.

46 Criminal Law Amendment Act 2000 (Qld) s 24.

sex worker is quite distinct from other 'circumstances in which there is no consent' within proposed s 348AA.

87. Furthermore, we query the circumstance in which a customer pays a brothel for services (rather than the sex worker directly), the sex worker may receive a wage from their employer regardless of whether the customer later refuses to pay the business. It seems counter-intuitive that in those circumstances a sex worker who suffers no financial detriment could still be a victim of rape because of a customer's non-payment.

Summary of recommendations

88. We recommend the following in respect of the Bill:

a) We support the change of the definition of "consent" by s 13 to explicitly incorporate the affirmative consent model. We support this amendment because, while this does not change the legal effect of consent, it is a better expression to the community as to what consent is;

b) We strongly encourage the Committee to reconsider the phrase "fraudulent or false representation" as to STI status in the amendment to consent in s 13; and if the Government does not change the Bill, that the government produce fact sheets for media, health centres and the community about what is and is not criminal conduct in relation to discussions around sexual health;

c) We recommend that the Director of Public Prosecutions or the Attorney-General seek special advice as to how to protect special witnesses in trials concerning sexual assault occasioned where a defendant has allegedly misrepresented their STI status. This is because the QYPC predicts that such trials may in practice amount to trials of the complainant's promiscuity;

d) We support amending s 10 and s 11 of the Bill to criminalise intimate deepfakes, as wholly computer generated intimate deepfakes are not in themselves criminalised;

e) We believe all suspicions as to a child sexual offence should be reportable; and

f) We support Coercive Control legislation, but we encourage culturally appropriate policing of Indigenous communities. We suggest that incarceration and community-based diversionary responses be employed to rehabilitate perpetrators of DFV. We have also recommended a number of alternative charges if the Government decides once more not to proceed with coercive control legislation.