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

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
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Email: LASC@parliament.qld.gov.au

Dear Committee Secretary

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

We welcome the opportunity to make a submission to this enquiry. We are academics at the University of Queensland who are engaged in research related to issues of domestic, family, and sexual violence, particularly in the context of the criminal justice system. Our expertise includes, respectively, criminal law, criminal procedure, and the law of evidence (Drs Wallis and Lelliott), law and psychology (Professor McKimmie) and cultural diversity (Dr El-Higzi).

We note the broad scope of the Bill and restrict our submission to the following issues in particular:

1. The proposed amendments to the definition of *consent* in the *Criminal Code* and the application of mistake of fact
2. The introduction of a new standalone offence of coercive control
3. The proposed amendments to trial process, especially jury directions and witness examination.

In addition, we make passing comments with respect to the proposed court-based diversion scheme and the new offence of *engaging in domestic violence to aid respondent.*

***Consent and Mistake of Fact***

We are supportive of reform to the definition of consent in the *Criminal Code*. Critiques of the previous definition are well documented and the changes in the present Bill bring Queensland's law in this area more into line with the other Australian jurisdictions. In particular, movement to the 'agreement' model of consent is overdue, as is expansion of the express vitiating factors (now contained in s 348AA). We also support the insertion of a requirement into mistake of fact requiring the accused to take steps to ascertain whether the other person consented (new s348A(3)).


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Many of the new vitiating factors to consent in s 348AA are uncontroversial. For example, and *inter alia*, where the person is unconscious or asleep, unlawfully detained, where there are false or misleading representations, and where there are mistakes as to identity or the purpose of the act. Nonetheless, we caution that some of the new factors may be perceived as too broad, difficult to evidence in practice, or may raise other concerns. In particular, we observe the following:

1. Section 348AA(1)(f) provides that fear of harm of any type, whether to the person, someone else, or property, means there is no consent. This can be a single incident or ongoing, and the examples of harm include financial, reputational, and to family, cultural, or community relationships. These examples are not a closed list. In this context, there is a risk that this provision is overbroad. It is trite to say that persons agree to engage in sexual acts for many reasons, some of which may (for example) concern a person's reputation in their social groups. We note that the harm required can be of any level (i.e. it does not have to be 'serious'), there appears to be no requirement that it emanates from the accused, nor does the fear need to be reasonable.

2. Much caution should be taken in relation to criminalisation of transmission of disease, particularly when the ambit of 'seriousness' in relation to disease is potentially broad. We note that s 348AA(1)(m) is not limited to sexually transmitted diseases, that people make false representations about illness regularly and for many reasons, and that the 'seriousness' of a disease may depend on the individual.

With respect to these two issues, we emphasise that the criminal law must be, and must be seen to be, clear and just. The legislature must refrain from drawing offences attracting serious penalties too broadly, noting the serious stigma and deleterious consequences that commonly follow conviction for such crimes.

***Introduction of a standalone offence of coercive control***

We cautiously support the introduction of an offence of coercive control. The focus on a pattern of behaviour is appropriate, and consistent with the power and control dynamics that exist in the manifestation of coercive control. Proposed s334B of the *Criminal Code* will define a wide range of behaviours as domestic violence, which helps to give substance to the offence and also assists to challenge misconceptions about the nature of coercive control more generally. Naming this pattern of behaviours as criminal serves an important declarative and educative function as well as providing a practical means to address the wrongdoing of individual perpetrators.

In relation to the proposed wording of the offence itself, we note that the requirement of 'intention' in the new coercive control offence is likely to enliven particular difficulties for a prosecution. The offence will require proof that an accused *intended* to coerce or control. The high threshold of intention stipulated in Queensland (i.e. that it require proof of the 'purpose' of the accused) may make this key element of the offence hard to prove. It may be difficult to attribute this high threshold formulation of intention to the kinds of behaviours that often characterise coercive and controlling relationships, even in accumulation. Similarly, there may be some ambiguity in the interpretation of 'coerce' v 'control' in this context, with the latter term having a potentially broader ambit than the former. In addition, the proposed definition of 'harm' in s334A is broad, prompting a reiteration of our comments (above) regarding parsimony in the criminal law.

More broadly, we reiterate concerns about unintended and disproportionate consequences arising from the criminalisation of coercive control, including issues such as the misidentification of perpetrators, the overrepresentation of First Nations peoples and disproportionate impacts on other unique populations, and the general difficulties of policing, evidencing, and proving beyond reasonable doubt such a complex offence. These are well-traversed in the literature and have been extensively considered in the various reform processes that precede this amendment. To mitigate these concerns, we strongly support the development of an ongoing and well-funded range of initiatives to stand alongside the enactment of the offence. The criminal law can only play a small role in addressing the harms associated with coercive control and may do very little to *prevent* harm, and so continued investment in community education, victim-survivor support services, behavioural change programs, and similar initiatives is vital. In this respect, we note and endorse the utility of the diversion orders scheme set out in the proposed Part 4A of the *Domestic and Family Violence Protection Act* as an early prevention counterbalance to the serious status of the coercive control offence (noting the 14-year maximum penalty it attracts).

More specifically, there is a need to dedicate resources to the ongoing monitoring and evaluation of the effectiveness of the new offence. The complex nature of the offence provision may make it difficult to apply in practice, meaning that it may be less frequently employed and/or which may lead to its inconsistent use across the State. This evaluation should be wide-ranging in scope so as to appropriately consider how the case law develops in this space, as well as considering investigative, procedural, and evidential aspects that may be relevant to the effective prosecution of the offence. Care should be taken to ensure that the offence is capturing appropriate behaviours and is not having a disproportionate effect on any population or undermining key principles of fair process.

In addition, we encourage a commitment to ongoing professional development and training about the nature of coercive control and its impacts for all relevant justice actors concerned. This includes police, prosecutors, defence lawyers, and the judiciary. Such training should be targeted to build investigative capacities and awareness to ensure that appropriate and relevant evidence is disclosed and collected, as well as to minimise the risk of re-traumatisation of victim-survivors through the justice process. It is also worth noting that there is very little research available about the criminal justice experiences of culturally diverse communities in relation to domestic violence in the Queensland context, This suggests the need for ongoing research to inform the development of specific training so that, for example, first responders are aware of cultural norms and other issues that may have an impact on the willingness of a victim-survivor to engage with the justice system and/or which may result in the misidentification of victims and/or perpetrators in specific contexts. In this respect, we also briefly note the new offence of *engaging in domestic violence or associated domestic violence to aid respondents* contemplated in proposed s179A of the *Domestic and Family Violence Protection Act*, which may have some unique impacts on specific populations in Australia.

Finally, there is a need for bespoke community legal education campaigns to be designed and disseminated in order to raise awareness of the new legislation and its application. These campaigns should be codesigned with specific communities, such as multicultural communities, First Nations people, young people, people with disabilities, and LGBTQIA+ communities, and tailored to take into consideration the cultural norms of communities and their specific needs and concerns. This may include, for example, delivering information in different languages and/or in multiple formats (written, audio, and video), as well as ensuring that the content of information is not only focused on the proposed offence and the nature of coercive control under the law, but also informs communities about the processes for reporting, how evidence is collected, how the legal system and trial process operates, and the penalties attached. An ongoing investment in these educational

programs should be considered to sustain the conversation over time. In addition, additional funding and support should be directed to meaningfully assist relevant parties to navigate the legal system according to their specific needs. This might include, for example, ongoing investment in legal support services for both victim-survivors and defendants, and for other ancillary measures such as access to interpreters and measures to enhance accessibility.

***Trial Process, especially Jury Directions and Witness Examination***

We note the repeal of the *Criminal Law (Sexual Offences) Act* and welcome the consolidation of the substance of that Act into the *Evidence Act.* This assists a great deal in making the relevant applicable law in this context clearer and more accessible to all relevant parties. In this context we also briefly note the extension of the admissibility of preliminary complaint evidence to DV offences. We consider this to be an appropriate extension to enable appropriate contextualisation of a complainant's behaviours in response to an offence. It also helps to promote consistency across the criminal justice regimes that exist for domestic violence and sexual offences. This should continue to be a goal of law reform in this space, given the overlap between domestic violence and sexual offending. Consistency in procedure across the system has important implications for both victim-survivors and for the development of an efficient and effective justice system and may help to support the development of specialist skills and knowledge among relevant justice actors and community support services.

We further note the various ways in which the proposed amendments attempt to manage the trial process in relation to sexual offences. This includes greater clarification about the nature of improper questions, further protections against questioning on sexual activity, and the inclusion of a range of directions that serve to better inform juries about what they may and may not consider when assessing specific kinds of evidence. There is also a clear prohibition set out against 'class' directions regarding the reliability of child complainants in these cases. We consider these amendments to be useful ways to clearly articulate the rules relevant to the appropriate management of trials.

In addition, various provisions dealing with jury directions are directed towards challenging many of the stereotypes and misconceptions that jurors may hold about the nature of sexual offending and the behaviours of complainants and defendants in this context. Although this is a positive step, the evidence base regarding the effectiveness of many types of educational directions is still developing, and much is still unknown. Some research suggests that some of the directions proposed may have unintended consequences. For example, directing jurors that a complainant's demeanour (whether they are emotional or not) is *not* an indicator of their credibility can undermine the credibility of an emotional complainant rather than restore the credibility of an unemotional complainant[1]. Similarly, there is some evidence from other research that expert testimony or directions that speak to the capability of a witness to give credible evidence (e.g., child witnesses) *does* support jurors in evaluating evidence appropriately[2].

[1]See, e.g. Nitschke, F. T., McKimmie, B. M., & Vanman, E. J. (2022). The effect of trauma education judicial instructions on decisions about complainant credibility in rape trials. *Psychology, Public Policy, and Law*. https://doi.org/10.1037/law0000353

[2] See, e.g. Goodman-Delahunty, J., Cossins, A., & O'Brien, K. (2010). Enhancing the credibility of complainants in child sexual assault trials: The effect of expert evidence and judicial directions. Behavioral Sciences & the Law, 28(6), 769–783. https://doi.org/10.1002/bsl.936 and Goodman-Delahunty, J., Cossins, A., & O'Brien, K. (2011). A comparison of expert evidence and judicial directions to counter misconceptions in child sexual abuse trials. Australian & New Zealand Journal of Criminology, 44(2), 196–217. https://doi.org/10.1177/0004865811405140

This suggests that general directions about myths and stereotypes being inaccurate may not be particularly instructive, but rather focusing on the capabilities of complainants to give reliable evidence may be more beneficial. The distinction between credibility (which many stereotypes relate to) and reliability is important but often misunderstood when trying to assist jurors—credibility relates to often inaccurate inferences drawn from a person's behaviour and demeanour, while reliability is a function of the quality of how a person's account is elicited and recorded. This again calls attention to the need for regular monitoring and evaluation to assess the effect of these changes.

We thank you for your consideration. We would be pleased to speak further to this submission, should you have any additional enquiries.

Yours sincerely


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