

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

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Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Submission by Legal Aid Queensland

27 October 2023

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission to the Legal Affairs and Safety Committee in relation to the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (the Bill).

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ’s lawyers in the day-to-day application of the law in courts and tribunals. This experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ has provided significant and comprehensive feedback in the public consultations that have underpinned the development of this Bill, including detailed responses to the discussion papers of the Women’s Safety and Justice Taskforce and in relation to the preliminary consultation on implementing the *Hear Her Voice* reports.¹ This feedback stemmed from experienced practitioners within LAQ’s Criminal and Family Law Services and the Public Defender Chambers.

Submission

Amendments to the *Criminal Code*

Consent

LAQ does not consider the amendments contained in proposed s.348AA(l), (m) or (n) (circumstances in which there is no consent) are necessary.

¹ Legal Aid Queensland, *Women’s Safety and Justice Taskforce – Options for legislating against coercive control and the creation of a standalone domestic violence offence*; *Submission by Legal Aid Queensland* (July 2021); Legal Aid Queensland, *Women’s Safety and Justice Taskforce: Discussion Paper 2 Women and girls’ experience of the criminal justice system*; *Submission by Legal Aid Queensland* (July 2021); Legal Aid Queensland, *Women’s Safety and Justice Taskforce: Discussion Paper 3 Women and girls’ experience across the criminal justice system as victim-survivors of sexual violence and also as accused persons and offenders: Submission prepared by the Criminal Law Practice at Legal Aid Queensland* (12 April 2022).

In relation to s.348AA(l), this was given consideration by the Queensland Law Reform Commission's ('QLRC') *Review of consent laws and the excuse of mistake of fact*² in 2018. LAQ submitted at the time, and maintains:

*The offence of rape carrying a maximum penalty of life imprisonment should not be aligned with circumstances relating to the recovery of money. This is fraud, not rape. Including this type of circumstance into the non-exhaustive list under section 348(2) could have the impact of creating separate categories of rape. Work needs to be done regarding education in relation to the circumstances already covered but misunderstood, rather than introducing new categories that traditionally would not be understood by most members of the community as rape. A better way to protect sex workers would be to reform the law of that industry, particularly where at present a sex worker who has someone assisting with protection and recovery of money is breaking the law.*³

LAQ further supports the QLRC's view in its 2023 report *A decriminalized sex work industry for Queensland*,⁴ which concluded,

*...current criminal laws – combined with changes made by our recommended framework for a decriminalized sex-work industry – are adequate to deal with fraudulent promises to pay a sex worker for agreed sexual services.*⁵

Wider reform of the sex work industry, including its decriminalization as recommended by the QLRC will,

*.... help reduce stigma and remove significant existing barriers to sex workers' access to justice. It will be easier for sex workers to screen and negotiate with clients, adopt safety strategies and standard business practices, and access protections and rights under general laws.*⁶

Further, as submissions to the QLRC noted, adding the non-payment of a sex worker *could create a new category of rape relating to the recovery of money, which may be at odds with community understanding.*⁷ This is a real risk given the different circumstances or categories of circumstances now outlined in 348AA(1).

The behaviours outlined in s.348AA(1)(l) and (m) are more akin to offences like fraud and/or grievous bodily harm attracting lesser maximum penalties. These will now be catapulted into the category of a life offence through the insertion of s.348AA. In addition to the above concerns regarding categorising rape, LAQ is concerned about the disproportionate penalty that this will attract, in relation to comparative criminality.

² Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report 78, June 2020)

³ Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report 78, June 2020) 133.

⁴ Queensland Law Reform Commission, *A decriminalised sex-work industry for Queensland* (Report 80, Volume 1, March 2023),

⁵ Queensland Law Reform Commission, *A decriminalised sex-work industry for Queensland* (Report 80, Volume 1, March 2023), 189.

⁶ Queensland Law Reform Commission, *A decriminalised sex-work industry for Queensland* (Report 80, Volume 1, March 2023), 189.

⁷ Queensland Law Reform Commission, *A decriminalised sex-work industry for Queensland* (Report 80, Volume 1, March 2023), 189.

In relation to s.348AA(m), the intentional transmission of a serious disease is already accounted for in the offence of grievous bodily harm,⁸ and this amendment is unnecessary.

Criminal offence of coercive control

The introduction of new offences in LAQ's experience has financial and workload implications for stakeholders, including LAQ's Criminal Law Services specifically in terms of duty lawyer cases and grants of aid. As a domestic violence offence carrying a maximum penalty of 14 years, those charged under this new provision are likely to be at higher risk of being remanded in custody and being sentenced to imprisonment.

LAQ's Criminal Law Services is concerned with the threshold of 'harm' for an offence that attracts a maximum penalty of 14 years imprisonment. In comparison, the offence of Stalking, intimidation, harassment and abuse (maximum penalty up to 10 years) requires 'serious mental, psychological or emotional harm'. Torture (a maximum penalty of 14 years) requires 'the intentional infliction of severe pain or suffering on a person by an act or series of acts done on 1 or more than 1 occasion' (that pain or suffering includes physical, mental, psychological or emotional pain or suffering, whether temporary or permanent). In light of the maximum penalty and nature of the criminality, to ensure consistency with other related offences, the threshold of 'severe' should attach to the harm inflicted pursuant to coercive control.

Whether the threshold is "serious harm" or "severe harm", LAQ considers the descriptor should remain undefined to allow a jury to determine the threshold in each individual case; allowing for community standards to continue to be the test on such matters.

LAQ is also concerned that the proposed section 334C(5) erodes the presumption of innocence and the burden and standard of proof. If the prosecution is not required to allege the particulars of any act of domestic violence constituting an offence that would be necessary if the act were charged as a separate offence, a defendant is placed at a significant disadvantage in the preparation of their case by not being informed in detail as to the nature and reason for the charge.⁹

LAQ supports the inclusion of the defence in proposed section 334C(10), that the course of conduct was reasonable in the context of the relationship. It also supports the offence being confined to an adult, in recognition that the dynamics of domestic and family violence perpetrated by children differ significantly from adult domestic and family violence behaviour:

- child domestic and family violence offenders are often victims of domestic and family violence themselves, and have experienced trauma
- children exhibiting these behaviours are highly likely to be victims and witnesses of domestic and family violence, historically and currently
- children using violence in the home are likely to be experiencing mental health issues and trauma

⁸ *Criminal Code 1899* (Qld) s 320.

⁹ *Human Rights Act 2019* (Qld) s 32(2)(a).

- there is a lack of awareness about adolescent violence in the home which has an impact on the availability of services and the representation of children and young people in domestic and family violence strategies.

Those issues are better addressed by ensuring education around this offence occurs within schools and family units, to target those children before they become adults.

Amendments to the *Domestic and Family Violence Protection Act 2012*

Court-based perpetrator diversion scheme

LAQ maintains that eligibility to participate in the scheme should not be limited to circumstances where the alleged offence is the only offence of contravening the domestic violence order or police protection notice the defendant has been charged with. While acknowledging proposed s.135C(2)(a) and (b) provides capability to extend that eligibility, this may not be sufficient to overcome the risks of some defendants being disadvantaged, and also risks the diversion scheme being under-utilised.

LAQ also remains concerned that by limiting the scheme to persons never convicted of an offence involving domestic and family violence this will eliminate access to the scheme by potentially worthy candidates. In LAQ's view, defendants with one prior conviction for a domestic violence offence would still arguably be classified as early intervention. Greater flexibility should be incorporated within the suitability assessments, rather than an arbitrary disqualification for defendants with limited history.

LAQ continues to support the legislative requirement for a defendant to acknowledge to the court responsibility for their conduct in order to be eligible for the scheme. The acknowledgment is consistent with other diversionary programs including adult restorative justice conferencing, and the Court Link program; in an attempt to promote participation and minimise unintended consequences.

LAQ has previously provided support for immunity provisions for the scheme, in line with section 151ZA *Penalties and Sentences Act 1992* (Qld), however notes the drafted provisions do not extend that immunity to admissions that might be made while participating in an approved diversion program or counselling. LAQ supports the extension of the immunity provisions to a defendant's participation in the diversion program or counselling, in order to promote full and frank disclosure and encourage active participation in the program or counselling.

LAQ encourages the sufficient funding and resourcing of diversion programs and counselling to ensure the ready availability of these resources to defendant participants. Delays in the provision of these services has the significant potential to disincentivise participation, particularly for first-time domestic violence offenders. LAQ is also cautious that participation in the diversion order scheme does not deprive perpetrators who are in custody and/or on community-based/parole orders from being accepted into a perpetrator program as a result of under-resourcing. LAQ has previously identified that significant work was required to ensure that perpetrator engagement services be appropriately identified to ensure a robust service delivery response.

Amendments to the *Evidence Act 1977*

Jury directions

LAQ has provided extensive submissions in previous consultations advocating against the style of legislated jury directions as is now proposed in sections 103ZY, 103ZZ, 103ZZA, 103ZZB, 132B and 132BAA. LAQ maintains its support for allowance of judicial discretion to direct a jury as appropriate depending on each case before it and opposes the use of mandatory language ‘must’ within the provisions. Drafting these sections in this way not only removes the Court’s discretion to direct as appropriate depending on each case before it, but also removes the ability of the parties to ventilate and argue relevant issues regarding the nature of the direction within the moving feast that is a trial. LAQ supports the retention of a trial Judge’s overarching discretion in the running of criminal trials and the parties’ ability to litigate matters so as to appropriately protect, and act in, the interests of the parties and avoid miscarriages of justice.

LAQ supports the use of the language “may” in the drafting of proposed sections 103ZS, 103ZT, 103ZU, 103ZV, 103ZW and 103ZX, allowing the parties to ventilate and litigate the applicability and utility of such directions, and for the Court to exercise its discretion in relation to whether or not to give such directions and how to frame them.

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