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

Submission No:	30
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Publication:	Making the submission and your name public
Attachments:	See attachment
Submitter Comments:	

Feedback by the North Queensland Women's Legal Service on the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023*

Commencement:

We acknowledge the work ahead with implementation activities, including and especially broad community education programs along with crucial training across all aspects of the justice sector and the wider support service industry. Without such education and training, changes will be at best not properly implemented and at worst result in unjust and unintended outcomes.

Amendment of Bail Act

- We support the amendments to ss 11 and 16 of the *Bail Act 1980* to give effect to recommendation 110 of Hear Her Voice 2.

Amendments to Criminal Code

Failure to report offence

- We support the inclusion of s 229BC(4) to explicitly excuse providers of professional sexual assault counselling and medical care from liability for non-reporting of relevant disclosures.

- However, we strongly advocate for the inclusion of legal practitioners to the definition of 'relevant professional' under s 229BC(6). This will allay concerns that legal privilege attaching to disclosures made to a party's lawyer may be overborne by the obligation on the legal professional to report the disclosures. The exemption should also extend to legal support staff who may receive a disclosure when conducting the intake process or otherwise when having contact with a client.

- We make these submissions for the same reasons that other relevant professionals are excluded from liability. That is, to remove any barrier to a young person/child victim of sexual assault engaging with a lawyer and obtaining advice and assistance, and hence being able to operate with autonomy as to determining how their experiences are dealt with and responded to.

Affirmative consent, mistake of fact and stealthing

- We have elected not to comment on the proposed amendments to the meaning of consent extensively, except to say that we support the affirmative consent model and the inclusion of stealthing and fraudulent inducements around sex work and serious disease.

- However we wish to renew our strong opposition to the proposed amendment of s 348A to include ss(3), (4), (5) and (6), and the inclusion of the new ss 348B and 348C. These sections effectively exempt a cohort of people from the requirement of ascertaining whether the other person consents to an act or not. We do not agree that these sections are necessary when there is a specialist court to address such concerns about cognitive impairment and mental health impairment.

- Despite the safeguards, these sections could be misunderstood or, in our opinion, easily misused. We believe there is potential for the rights of victims to again be at the expense of the elevation of rights of a certain cohort of offenders who are held to a different lesser standard than the rest of the community on the issue of consent.

- In summary, we cannot understand why these provisions are necessary when there is already a well-established facility in place to deal with genuine concerns about cognitive impairment or mental health impairment.

Chapter 29A Coercive Control

- We believe amendments are necessary to allay confusion and make this chapter more user-friendly and to make the coercive control offence understandable and successful in addressing coercive control.

Definitions

- We believe some of the definitions relevant to the coercive control offence, found at s 334A (definitions for this chapter) and s 334B (what is domestic violence) and s 1 (definitions) of the Code, and contained in DFVPA lead to confusion and should be uniform.

- **'Domestic violence' -** There is no definition of 'domestic violence' in s 1 of the Code. Section 334A of the Code makes a reference to s 334B. Section 334B then defines domestic violence however, the subsections that provide the non-exhaustive lists of behaviours considered domestic violence found at s 334B ('What is domestic violence') and s 8 of the DFVPA ('Meaning of domestic violence') are not completely the same. The Code list contains five extra (and important) examples at s 334B (3)(j) to (n) that in our view should also be contained in the DFVPA.

- Further, the definitions at s 334B and s 8 carry ambiguity in that ss 334B(1)(f) and s 8(1)(f) could be read as to qualify the preceding subsections in their respective provisions - being ss 334B(1)(a)(b)(c)(d) and (e), and ss 8 (1)(a)(b)(c)(d) and (e). The ambiguity comes about by using the words '*in any other way* controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.' If parliament intends that the behaviours mentioned in the preceding subsections are to be qualified so as to include control and domination *and* causation of fear for a person's safety or wellbeing or that of someone else, then this needs to be explicit. If that is not parliament's intention, then the word 'other' should be removed.

- **'Domestic relationship' -** The definition of 'domestic relationship' is not found in chapter 29A of the Code and is absent from the s 334A 'definitions for the chapter' section, despite being a crucial requirement of s334B and s 334C. The definition of 'domestic relationship' is found by referring to section 1 of the Code, which then has a reference to section 13 of the DFVPA. The Code definition uses an 'example' of the definition in s 13 of the DFVPA to provide a partial definition that one would find in the DFVPA, along with two links to 'section 13'. The complete definition of 'domestic relationship' is finally revealed by defining 'relevant relationship' at ss13 to 20 in the DFVPA. Would it not be simpler to locate the definition of 'domestic relationship' in s334A of the Code and to harmonise the name of such a relationship with that of the DFVPA i.e. 'relevant relationship'.

Criminal offence of coercive control

- We support the introduction of a new provision in the Code to criminalise coercive control. In our opinion the proposed draft of the new offence can be effective in capturing the specific types of behaviours that are designed to have the effect of one person in a domestic relationship coercing or exerting control over the other person, and to be reasonably likely to cause the other person harm.

- Whilst we support the proposed drafting, we note that extensive feedback over the years by women from all ages has been that control can be established by as little as one serious act of domestic violence. The perpetrator of 'coercive control' need not ever commit another act of domestic violence because the control has been sufficiently established by the initial act. It seems an oddity that such an act with a clear purpose to establish control, under the draft offence could not be 'coercive control' because it is a standalone act.

- By having coercion and control at its heart, the proposed offence stands to hold those who seek to control and coerce others accountable and hopefully provide deterrence to the general community. We say this because, for the offence to be useful, it must be clearly understood by the broad community (and the media) for there to be any meaningful deterrent effect. It must be understood by police officers so they can confidently and accurately charge the offence. It must be understood by lawyers who are assisting defendants, and prosecutors who must satisfy a court of the elements of the offence. It must be understood by judicial officers and crucially, by members of juries so they can be satisfied beyond reasonable doubt of all elements of the offence. And importantly, it must be understood by those charged with the offence and by their victims.

- We believe strongly that the application of the coercive control offence should extend to minors. A sense of male entitlement toward females, underpins coercively controlling relationships. This includes an entitlement to sex and an entitlement to control and own the female. This sense of entitlement forms very early in some males and shapes expectations and behaviours in relationships by both boys and girls.

- It is too late to wait until a person turns 18 years of age to admonish them for using coercive and controlling behaviours within their relationships. The reality is that young people commence relationships well before then and many girls are experiencing significant coercion and control within these relationships. This can include sexual violence and other forms of serious physical violence, and extremely concerning emotional and psychological violence.

- By applying the coercive control offence to minors, a powerful message is being sent that these behaviours are not acceptable in relationships at any time. It is saying to young males that they cannot expect to treat their girlfriends in ways that control and dominate her. It is saying to young females they should not expect to be controlled or dominated in their relationships, and it encourages friends and family members of young people in relationships to call out controlling behaviours. Ultimately, it is about promoting respectful relationships at an early age when a difference can be made, before the controlling and violent behaviours escalate into adulthood.

- Rape, sexual assaults, stalking, strangulation and other serious criminal conduct applies to minors, as do other domestic violence offences and contraventions of protection orders. Put simply, by not applying the coercive control offence to minors, the rights of boys who engage in coercive controlling behaviours are elevated over the rights of girls to expect respectful and equitable relationships.

Court may restrain coercive control

- We renew our previous submissions on these provisions. As follows:

- S 334E is clearly a protective provision, but we question why it is necessary to introduce the new restraint section for the coercive control offence when s 42 of the DFVPA could be strengthened and used to address any risk to the complainant of a coercive control offence, including to any of their children or associates.

- The proposed s 334E restraint would set up an anomaly with the current version of s 42 of the DFVPA (as does the restraint for stalking under s 359F) in that s 42 requires a person to be *convicted* for a domestic violence offence before a protection order can be made or varied against the person, whereas under both s 334E and s 359F a court can make a restraining order if it is 'desirable' to do so whether the defendant is found guilty, not guilty or the prosecution ends in another way. There are other anomalies, which we outline below.

- We note that a breach of the proposed s 334E restraint would result in the same penalty as a breach of a protection order under s 177 (i.e., maximum penalty of 3 years, extending to 5 years if the person has been convicted of a domestic violence offence (including breach of a PPN or a release condition under the DFVPA) within the past 5 years).

- A significant anomaly between s334E and s 42 is that s 42 has specific procedural fairness requirements, whereas the proposed s 334E restraint does not - despite both having the same maximum sentences for contraventions of the respective orders.

- Another difference is that s 42 has a requirement for a court to consider the protection order is either 'necessary or desirable', however s 334E it must be considered 'desirable'.

- In our view, rather than introducing a specific restraint for the coercive control offence that contains inconsistencies with the DFVPA, the far better course of action to address the need for ongoing protection is to amend s 42 of the DFVPA. A charge of the coercive control offence requires a domestic relationship between the defendant and complainant so there will *always* be a relevant relationship to satisfy s 37 of the DFVPA (not so for the s 359F restraint which remains necessary as

a standalone restraint), and there is scope where necessary or desirable to include third parties who may have been the subject of domestic violence-like behaviours used by the defendant to commit the coercive control offence on the complainant.

- We do not disagree with the offence of unlawful stalking, intimidation, harassment or abuse being available as an alternative conviction for the crime of coercive control under s334F, if that offence is established by the evidence.

- We support the amendments of ss 564 and 572.

Amendments to Domestic and Family Violence Protection Act:

Amendment of s 37

- We support an amendment to s 37 to provide a court must consider the appropriate period for the duration of an order. However, a notation at s 97 should be inserted to explicitly state that a Court can make an order for a period in excess of five years if it is necessary or desirable to protect the aggrieved from domestic violence or a named person. We believe this inclusion is necessary, as a perception persists with judicial officers that a protection order can only be made for five years or less (despite the current wording of s 97.)

- There are certainly some matters where protection orders in excess of five years are clearly appropriate. Once such example is that of a client of our service who was a victim-complainant in extremely serious domestic violence criminal charges (including multiple rapes and assaults.) The perpetrator was sentenced to six years of actual imprisonment and a protection order was made at sentence. However, the duration of the order was only for a period of five years. This meant there was no protection for the victim or her children when her former partner was to be released. Our client was extremely anxious, and her anxiety became debilitating at the thought of potential retribution. Her mental health deteriorated significantly as the release date approached. This unfortunate situation could have been avoided if the learned District Court judge had considered the circumstances of the matter and made a protection order that was effective for an appropriate period of time after the release of the perpetrator. We can only surmise that the presiding judicial officer was under the impression that five years was the maximum duration of a protection order.

Insertion of new s 47B

- We welcome the inclusion of the section to make it a requirement for the Court to consider the making of a temporary protection order at the first hearing of an application. Whilst this is the practice of most magistrates in Cairns and Townsville, it should be a uniform requirement by courts under the DFVPA.

Insertion of new s 113 (3A)

- Given the intention behind the inclusion of the new s 113 (3A) and the limited circumstances in which it will be used, we have no issue with the insertion of this section.

Media application for transcript - insertion of ss 157D, 157E, 161A and amendments of ss 159, 160

- We agree with these sections that provide for accredited media entities to publish de-identified information regarding proceedings under the DFVPA and to apply for access for a copy of record of a proceeding. We note there is no requirement for the applicant to serve a copy of the application on the parties and police and a right to be heard at the hearing of the application, as first proposed, however we do not disagree with the current draft of the provision.

Diversion orders scheme

- Is it parliament's intention to exclude a charge for contravention of release conditions pursuant to s 179 DFVPA from the operation of the diversion orders scheme? If not, ss 135B and 135C must be amended to include a contravention of release conditions. If the intention is not to include a contravention of release conditions, we submit that they should be included.

- We are very supportive of the diversion orders scheme. Many penalties for first contravention charges are insignificant and there is no further oversight of the offender, nor is the offender encouraged to undertake any program that may lead to the offender gaining insight and changing problematic behaviour. Offenders usually experience very little deterrence after such an outcome in the judicial system. Section 135B (2) clearly enunciates the objectives of the diversion orders scheme and we fully support each of those objectives.

- We do, however, strongly believe it is a missed opportunity for the scheme not to apply to offenders under the age of 18 years. Diversion to age-appropriate respectful relationship/ behaviour change programs for young people already using intimate partner violence and controlling behaviours or tailored counselling, could equip this cohort with better relationship skills going into adulthood. To allow for this, the words 'who is an adult' should be removed from s135B(1).

- We note s135B(3) that the scheme only applies if an approved provider who can provide an approved diversion program or counselling is available. It is obvious for the diversion order scheme to be successful in its objectives, 'approved diversion programs' and 'approved providers' must be accessible to both male and female defendants, including in rural and regional areas. For instance, there is only one approved provider in Cairns for men who wish to consent to intervention orders. There are no approved providers specifically for First Nations men despite significant numbers of this cohort being respondents to applications for protection orders in the Cairns and Townsville domestic violence courts.

- We understand that there no approved providers in Queensland who offer programs for women wishing to consent to intervention orders. We are also not aware of any such programs offered to minors. If the diversion order scheme is introduced without approved providers offering approved diversion programs to women, then a structural unfairness arises. Women would not be able to access the scheme and hence, would not have the opportunity to be diverted for less serious contraventions of protection orders or police protection notices. This means they would not have the opportunity of avoiding impactful legal consequences, such as conviction and criminal history. This may have implications for these women's employment, eligibility to hold blue or yellow cards and other unintended consequences.

- We have already made submissions above about extending the diversion order scheme to young people and making available suitable approved diversion programs for that cohort.

- We support the court having broader discretion to determine eligibility for the scheme - both to determine a person is eligible and to determine a person is not eligible for the scheme.

- S 135C(1)(f) needs further consideration. As it is currently drafted, an offender would not be eligible for the diversion order scheme if 'another' police protection order or a temporary protection order (because of the definition of a 'domestic violence order' under s23 of the DFVPA) was ever previously in place. This applies even if the Court dismissed the previous applications (including if they were dismissed under s157(2)), or they were withdrawn. This seems to unreasonably restrict eligibility to the scheme and is contra to the objectives in s135B(2).

- S 135C(4) needs clarification as it contains a contradiction to s 135C(1)(f). As mentioned above, s 135C 1(f) has the effect of precluding from eligibility an offender who has had a previous domestic violence order or PPN made or issued against them - however s 135C (4) provides that a court *may* exclude a person from eligibility despite subsection (1) after having regard to their domestic violence history. According to s 135C (1)(f) this offender should already be excluded from the scheme for having any entries on a domestic violence history. Therefore, we believe the words 'domestic violence history' are not needed at 135 C (4), unless the Court is removing or varying s 135(1)(f), as this could create confusion.

- S 135K provides a court must explain to the defendant, or cause to be explained, the potential effects of a diversion order on the defendant's right to privacy - and yet there is no consideration in division 4 of aggrieved/complainant's right to privacy. We submit that s 135I (1)(d) could be amended to include a court, where reasonably practicable, must explain, or cause to be explained, to the person named as the complainant in the alleged offence, the potential effect of the diversion order on that person's right to privacy (example – potential sharing of information that may otherwise be private.)

- We submit that notification to an complainant by the police under the new s186A (a complainant be informed of the diversion order once it is made) comes too late in the process for the complainant to have the opportunity to come to court and express their wishes about the making, continuing or varying of a diversion order referred to in ss135I(2)(c) and 135M(1)(e). We believe the Court should have an obligation to notify the complainant as soon as an application is made for a diversion order and that notice of adjournments be sent also to the complainant.

Enabling domestic violence or associated domestic violence on behalf of the respondent - s179A

- We welcome the introduction of this offence. Consistent feedback from women and girls experiencing domestic violence is that other members or the respondent's family or associates of the respondent, engage in acts of domestic violence against the victim in support of the respondent.

- This is especially prevalent with victims from a culturally diverse background and in First Nations communities, although the feedback we receive is that it is a widespread issue across all communities.

- S 179A (1)(c) could be problematic and should be revised. We question how the prosecution could prove that the person committing domestic violence with the intent on aiding the respondent 'knew or ought reasonably to have known' that the other person was an aggrieved or named person on an order or PPN or release conditions. This phrase is ambiguous. We are also mindful that the non-publication provision at s 159 prohibits publication of information that identifies parties to a proceeding under DFVPA to the public (which *may* be interpreted to include a section of the public) by any form of communication. Perhaps the more appropriate wording for s 179A (1)(c) would be ***'knew or likely to have known'***.

- There are anomalies within the provisions of s 177 and 178 and the proposed s 179A with regard to when the contravention can be charged. We point out a scenario where the respondent to a domestic violence order who has not been served with the order (personally or as otherwise directed under a substituted service order) or told about the order by a police officer, but knows about the order and tells someone about the order: if the respondent commits domestic violence they cannot be charged with a contravention of the order (unless the act is a standalone offence) but the person who knows about the order and commits domestic violence (that may not be a standalone offence) with the intention of aiding the respondent can be charged and penalized up to three years imprisonment. We do not see a way to resolve this anomaly and merely wish to point it out.

Amendment of s 56 (Domestic violence order must include standard conditions)

- We welcome this amendment to include a further standard condition in plain English.

Other amendments

- We support the amendment to s 72(2)(a) to (d) related to approval of providers and intervention programs.

Amendment of the Evidence Act 1977

- We do not practice in the area of criminal law and will refrain from commenting extensively on the amendments to the Evidence Act, save for expressing our agreement to the amendments concerning improper questions, evidence concerning sexual reputation, jury directions related to sexual offences, admissibility of preliminary complaints in sexual assault and domestic violence offences, and jury directions related to lack of complaints or delay in complaints.

- We especially welcome the inclusion of the s 21 improper questions provisions to civil proceedings as provided for by s 160(2).

- Collectively, these amendments address issues we have discerned over the years listening to women and girls who have been complainants in domestic violence and sexual assault offences, about the inherent unfairness toward them in the justice system.

- The right to a fair hearing has been and should be universally understood to extend to victim-survivors who are courageous enough to report sexual assaults and domestic violence offending. These amendments address the imbalance that currently elevates the rights of offenders against the fair and dignified treatment of victims in the justice system.

Part 7A Limits on publishing information in relation to sexual offences

- We support the inclusion of the defences to s 103ZZN that pertain to a complainant adult consenting to the publication of identifying matter relating to the complainant.

- However, whilst we support the provisions that allow for adult complainants to self-publish or agree to publication, we have real concerns about the provisions that allow a child to agree to publication. Despite the safeguards in the proposed provisions, our extensive dealings with child victims have led us to believe a child is highly unlikely to understand what it means to be identified as a victim of a sexual offence or the potential consequences of losing anonymity.

- With great respect to the cohort of persons defined as a 'relevant person' under s 103ZZS(3), unless someone has had the experience of being identified as a child victim of a sexual offence, they cannot possibly provide meaningful advice or counsel a child contemplating publishing or allowing publication of their sexual assault story, let alone be sure the child understands what publication will mean to them. Once the story has been published and is known, anonymity is lost and cannot be recovered. The potential consequences for the child are extremely serious in an environment where social media is used to troll and harass people (children are no exception), and where child victims will have to engage in the community with other children who may not have the maturity to understand what has actually occurred or treat the child with respect. We draw your attention to the treatment of Grace Tane by certain members of the public, after publication of the details of the offending against her. She was blamed for the offending even though she was a child at the time.

- Whilst we do not believe a child should commit an offence for publishing their story, we believe there should not be an exception for a publisher who publishes with a child's consent.

Amendments of Penalties and Sentences Act 1992

- We acknowledge the pressing need to address the overrepresentation of First Nations people in detention and the high rates of deaths in custody. We fully support efforts to address these issues, however we are troubled by the inclusion of 'race' in the proposed s 9(2)(fa) of the PSA. We have concerns that this will lead to perverse outcomes where different considerations apply to offenders according to their race - essentially setting two (or more) standards of 'justice.' For instance, we are concerns that including 'race' would lead to the elevation of the rights of First Nations men who commit domestic violence, at the expense of the rights of First Nations women and children to live free of violence. This would see First Nations victim-survivors receiving a less 'just' outcome at the hands of First Nations offenders, than victims of non-Indigenous offenders, based on considerations of 'race.'

- We support the intention behind the inclusion of s 9(2)(fb)(i), however we hold concerns of unintended consequences brought about by offenders or their families removing children without the consent of the real primary caregiver, in order to access a consideration under these sections.

- We support the inclusion of s 9(2)(gb) to consider the offenders' history of being abused or victimised.

- As we have stated above, we recognise the issues with overrepresentation of First Nations peoples in custody and understand the intent behind ss 9(2)(oa) and 9(2)(p)(ii). Looking though a victim-focused lens, however, we wish to raise some concerns about the inclusion of these sections.

- We are concerned that expanding the sentencing guidelines to broadly include 'systemic disadvantage' and 'intergenerational trauma on the 'offender', signals the wrong message to victim-survivors. Essentially, this could be seen as an elevation of the rights of First Nations men who commit domestic violence, at the expense of the rights of First Nations women and children to live free of violence. We argue that victims-survivors of domestic violence would themselves suffer 'systemic disadvantage' by the inclusion of these considerations in the sentencing guidelines. Furthermore, victim-survivors experience trauma from the impact of domestic violence that may compound any intergenerational trauma they experience. It would be unjust to elevate the offender's trauma over their victim's trauma.

- Section 9(2)(p) already has scope to include any relevant cultural considerations (including systemic disadvantage and intergenerational trauma) submitted by a representative of the community justice group in the offender's community. We believe local justice groups should be preserved as the source of reliable information about cultural issues that are specific to the offender and the offender's community.

- We support the inclusion of the new aggravating factor at s 9 (10C) of the PSA when an adult offender commits an offence against a child.

- We support the inclusion of the new aggravating factors at s 9 (10(D) however we believe that s 10D(b)(ii) should *specifically* mention (maybe by way of example) an order of a court made under the *Family Law Act 1975,* including an injunction made by that court.

Amendments of Youth Justice Act 1992

- As per our submission regarding the PSA, we support the intention behind the inclusion of ss 48AA(4)(b)(x)(A); 52A(2)(d)(i); and 150(1)(eb)(i), but we hold concerns of unintended consequences brought about by child offenders or their families removing children without the consent of the real primary caregiver, in order to access a consideration under these sections.

- As per our submission regarding the PSA, we are troubled by the inclusion of 'race' in the proposed s 150(1)(ea) of the PSA.

- We support the inclusion of s 150(1)(ga)(iii) to consider the offenders' history of being abused or victimised.

- Looking at these sections, again through a feminist lens, we hold concerns that ss 150(1)(ha) and 150(1)(i)(ii) could elevate the rights of First Nations boys who use violence, over the rights of First Nations girls to live without violence. As per the PSA, s 150(1)(i) contains the scope to include any

relevant cultural considerations submitted by a representative of the community justice group in the child offender's community.