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

Submission No:	36
Submitted by:	Full Stop Australia
Publication:	making the submission and your name public
Attachments:	See attachment
Submitter Comments:	

Full Stop Australia

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

27 October 2023

Full Stop Australia

About Full Stop Australia

Thank you for giving Full Stop Australia (FSA) the opportunity to comment on the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023* (Qld) (Bill).

FSA is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide expert and confidential telephone, online and face-to-face counselling to people of all genders who have experienced sexual, domestic, or family violence, and specialist help for their supporters and those experiencing vicarious trauma;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate with governments, the media, and the community to prevent and put a full stop to sexual, domestic and family violence.

FSA, as a national service, draws upon the experiences of our trauma-specialist counsellors to support people impacted by sexual, domestic and family violence across jurisdictions. Our advocacy is informed by this work, as well as by the lived expertise of survivor advocates in our National Survivor Advocate Program.

About this submission

This submission was prepared by Emily Dale, Head of Advocacy. If you have any questions in relation to this submission, please do not hesitate to contact Emily Dale at [redacted].

Throughout this submission, we have used the term *sexual violence* as a broad descriptor for any unwanted acts of a sexual nature perpetrated by one or more persons against another. This term is used to emphasise the violent nature of all sexual offences and is not limited to those offences that involve physical force and/or injury. Those who are or have experienced sexual violence are referenced as *victim-survivors*, *people with lived experience* or in the case of their involvement with FSA's National Survivor Advocate program, *survivor-advocates.*

FSA's comments on the Bill

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Bail considerations Clauses 4-7	We recommend adding a new clause, specifying that these proposed considerations do not apply when the offender is applying for bail in connection with a domestic and family violence (DFV) offence, or has a history of DFV-related offences. We are concerned that without this carve-out, victim-survivors of DFV could be at increased risk. For example, a person with a history of DFV, whose bail application might even relate to a DFV-related offence, would be more likely to be granted bail if they are the primary carer to, or in an informal care relationship with, a dependent child. We understand that the purpose of these provisions is to prioritise the safety and stability of dependent children – and are supportive of that objective. However, we are concerned that, without this carve-out, the safety of victim-survivors of DFV (including children) could be at increased risk. We reiterate these comments in relation to clauses 96-97 of the Bill, which deal with bail considerations for youth offenders and are in the same terms as clauses 4-7.
Creation of a standalone criminal offence of coercive control Clauses 19-23	Full Stop Australia is generally supportive of the Bill's drafting of a coercive control offence. However, we consider the following changes would improve these provisions: • The definition of 'emotional or psychological abuse' should include reproductive coercion, as well as specific forms of abuse suffered in faith-based communities including forced marriage. • We have concerns that the defence specified in s 334C(10) sets too low a bar. "Reasonable in the context of the relationship" creates a mixed subjective/objective standard. For this defence to succeed, an accused's actions need not be objectively reasonable according to community standards, but only reasonable *in the context of the particular relationship*. We are concerned about the capacity of this defence to reinforce myths that blame victims and harmful assumptions about gender roles and stereotypes, which continue to impact policing, the justice system and broader community. This is especially concerning in relation to non-physical forms of coercive control, such as financial abuse,

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	whereby perpetrators may effectively manipulate the confidence and autonomy of a victim-survivor over time. We are especially concerned about how this defence may enliven intersecting forms of discrimination, such as ageism and ableism. For example, a defendant could allege his partner's cognitive impairment limited her ability to control her own finances, and therefore that controlling her finances was "reasonable in the context of the relationship." • To address these concerns, we recommend an objective reasonableness standard – i.e. "It is a defence for the person to prove that the course of conduct for the coercive control offence was reasonable." This steers away from individual relationship dynamics, and focuses instead on community expectations. • For the criminalisation of coercive control to meaningfully improve the safety of victim-survivors, law reform must be accompanied by robust and comprehensive trauma-informed training for justice system professionals, especially police; education to raise community awareness; and ongoing monitoring and formal evaluation of the legislation's effectiveness.
Amendments to failure to report offence Clause 9	We support the application of the reasonable excuse in s 229BC(4)(c) of the *Criminal Code Act 1899* (Criminal Code) to persons younger than 18. However, this provision should reflect that decision-making capacity differs between young people (with some people younger than 16 having capacity to decide whether to report to police), and recognise the significant and specific consequences that young people experience in reporting to police. Rather than having a hard age limit of 16 years, this reasonable excuse should apply to young persons who are assessed as having the capacity to decide whether they want their matter reported to police. Noting that victim-survivors of child sexual offences have been robbed of their autonomy, we think it is important to centre autonomy and choice as much as possible, while also protecting safety. We support the addition of the new reasonable excuse for disclosures made in the context of a confidential professional relationship, where no risk of serious harm would flow from not reporting. However, we note the list of "relevant professionals" doesn't include many key services with whom vulnerable children and young people commonly engage, and to whom a disclosure might foreseeably be made. For example, youth workers, Aboriginal youth workers, or drug and alcohol caseworkers (who aren't registered with the Australian Association of Social Workers and aren't qualified counsellors). Although these professions could be prescribed in regulations pursuant

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	to proposed clause (g) of the definition of "relevant professional," we see no reason for them not to be included in primary legislation alongside other listed professionals.
Affirmative consent and mistake of fact Clauses 13-16	We strongly support law reform to recognise affirmative consent. The following changes would strengthen affirmative consent provisions in the Bill, thereby ensuring a true affirmative consent standard is established: • We are concerned that proposed s 348(3) undermines affirmative consent. Affirmative consent requires parties to a sexual encounter to say or do something positive to communicate consent. According to this standard, lack of resistance should *never* amount to consent – it is not a positive expression of consent. On this basis, we recommend amending proposed s 348(3) to, "Lack of physical or verbal resistance to an act is not to be taken to be consent to the act." We also note the decision in *R v Makary* [2018] QCA 258, in which the Court of Appeal found that, "in some circumstances, a representation [as to consent] might also be made by remaining silent and doing nothing." In this context, the current drafting of proposed s 348(3) is susceptible to arguments that *in certain circumstances,* a person not saying or doing anything to resist was nonetheless consenting. • We strongly recommend that the mistake of fact amendment not be subject to exceptions for mental health and cognitive impairments. The rights to bodily and sexual autonomy, which the requirement to take positive steps to ascertain consent seeks to protect, are so important as to justify significantly limiting any carve-outs. We note that Tasmania and the Australian Capital Territory have adopted affirmative consent legislation, without including these carve-outs. There is precedent for passing effective affirmative consent reform without these exceptions. • Our views on each proposed exception are as follows: ○ There is no evidence that creating a mental health exception to affirmative consent is effective, necessary or appropriate. We note the potentially broad reach of this exception, given the prevalence of mental health issues in the community. We also note that such issues vary greatly in severity. Even though proposed s 348A(4)(b) states that the exception will only be available where mental illness was a "substantial cause of the person not saying or doing anything" to ascertain consent, and requires "expert evidence," this exception remains subject to abuse. This is because the seriousness of a mental health impairment generally requires self-reporting (e.g. for anxiety and

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	mood disorders). Even the limitation in proposed s 348C(1)(c) ("so as to affect functioning in daily life *to a material extent*") does not get around this. A defendant might still falsely allege that they were "substantially" impacted, such that their functioning was affected to a "material" extent. Pursuant to proposed s 103ZZF, it seems that a defendant to proceedings could engage their own expert, with no oversight of the Court. We think this creates a significant loophole, which is entirely out of step with the objective of protecting bodily and sexual autonomy. ○ The exception for cognitive impairment is unnecessary, as such impairment could be addressed through other legal mechanisms. As noted by Rachel Burgin, Jonathan Crowe and Holli Edwards in relation to the carve-out in NSW and Victorian law, "it could be argued that this is not the most appropriate way to deal with cognitive differences in relation to a seriously harmful act such as rape."[1] Burgin, Crowe and Edwards suggest that the following alternatives exist to protect the rights of people with cognitive impairment: "There are, for example, special [legal] provisions… so that perpetrators who do not have the cognitive capacity of an adult are not tried similarly to other adults. Judges also have significant discretion when sentencing someone with a different mental capacity, so they are not punished excessively given their cognitive difference."[2] In relation to sentencing for people with cognitive impairment, we note that under Queensland law: ▪ The *Penalties and Sentences Act 1992* (Qld) requires the Court to consider a defendant's intellectual capacity in sentencing.[3] ▪ The Queensland Sentencing Advisory Council's latest Sentencing Guide specifies that the fact a defendant "suffers from a cognitive impairment or mental illness" is a mitigating factor in sentencing.[4] ▪ The Queensland Court of Appeal has decided a mental disorder may lessen a person's moral culpability and reduce the relevance of the sentencing purpose of deterrence when

[1] Burgin, R, Crowe, J and Edwards, H, "Affirmative Consent and the Mistake of Fact Excuse in Western Australian Rape Law," *University of Western Australia Law Review*, Vol 50(1):1, available at: https://www.able.uwa.edu.au/__data/assets/pdf_file/0005/3687926/7.-AFFIRMATIVE-CONSENT-AND-THE-MISTAKE-OF-FACT-EXCUSE-IN-WESTERN-AUSTRALIAN-RAPE-LAW_.pdf.
[2] Ibid.
[3] *Penalties and Sentences Act 1992* (Qld) s 9(2)(f).
[4] Queensland Sentencing Advisory Council, *Queensland Sentencing Guide*, March 2023, available at: https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0004/572161/QLD-Sentencing-Guide.pdf.

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	sentencing.[5] This decision guides all Queensland courts when considering what sentence may be appropriate for a person with a mental illness or impairment. In relation to special provisions for persons with mental or cognitive impairments, in Queensland "a criminal case can be referred to the Mental Health Court if it's believed that the person is or was of unsound mind and to determine whether they are fit for trial. In assessing whether the person was of unsound mind, the Court will consider if the person was deprived of the capacity to understand what they were doing, or to control their actions or to know that they should not do the act or make the omission."[6] The Mental Health Court can decide whether the person "was of unsound mind at the time of the offence (in which case the person is not criminally responsible for their behaviour) [or] is currently fit for trial (meaning they have the ability to understand the court proceedings so as to make a proper defence) and, if they are unfit, whether this is permanent or temporary."[7]
Improper questions Clause 56	We strongly support the inclusion of a duty on the Court to disallow improper questions being put to witnesses. The drafting of proposed s 21 of the *Evidence Act 1977* mirrors s 41 of the *Evidence Act 1995* (NSW).[8] Research conducted by Professors Julia Quilter and Luka McNamara found that, even in jurisdictions that have introduced affirmative consent laws (such as NSW), cross-examination still often runs contrary to legislation. Quilter and McNamara found that defence questioning in sexual violence proceedings often focusses on why victim-survivors "didn't just say no," picks apart victim-survivors' credibility over imperfect recall of (often trivial) events, and otherwise perpetuates damaging stereotypes.[9] Quilter and McNamara found, based on a reading of NSW and Victorian sexual offence trial transcripts, that "complainants are often cross-examined about their histories of

[5] *R v Goodger* [2009] QCA 377 [21] (Keane JA, Fraser JA and Atkinson J agreeing), citing *R v Dunn* [1994] QCA 147; *R v Neumann; ex parte A-G (Qld)* [2007] 1 Qd R 53.
[6] Queensland Sentencing Advisory Council, above n 4.
[7] Ibid.
[8] It is also in broadly the same terms as s 41 of the *Evidence Act 2008* (VIC).
[9] Quilter, J & McNamara, L (2023) 'Current and proposed sexual consent laws in Australia,' Submission to the Senate Legal and Constitutional Affairs Committee Inquiry on Current and Proposed Sexual Consent Laws (Submission 17), available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/sexualcontentlaws/Submissions. See also Quilter, J & McNamara, L (2021) *Qualitative Study of Rape Trials in the County Court of Victoria*, 2014-2019 (August).

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	things like alcohol or drug use, sex work, mental illness or having had children removed on welfare grounds. These are frequently gendered stereotypes and they sometimes blur into rape myths."[10] The fact that this has been identified as an ongoing problem in NSW and Victoria, which have already adopted affirmative consent laws and have existing evidence provisions that substantially mirror proposed s 21, suggests that s 21 needs to go further to protect victim-survivors of sexual violence. To this end, we recommend: • Specifying that an improper question includes a question that runs contrary to affirmative consent provisions. For example, defence counsel would not be allowed to question a witness about what they did to express non-consent, as proposed s 348AA(1)(a) in the Bill specifies that a person does not consent to an act if they did not say or do anything to communicate consent. This might seem obvious, but Quilter and McNamara's research shows that questioning that runs contrary to affirmative consent laws is still happening in jurisdictions that have adopted those laws (and also have laws on improper questioning).[11] It is therefore important that this is made explicit. • Including "distressing" in proposed subsection (2)(b).
Evidence about a complainant's sexual reputation and activities Clause 59	We support the total exclusion of evidence regarding the sexual reputation of the complainant, pursuant to proposed s 103ZG. We also support limiting the admissibility of evidence as to sexual activities of the complainant. We suggest the following amendments to the provisions in the Bill giving effect to this: • We recommend amending proposed s 103ZL, so that it simply provides that "an application for leave under section 103ZH must be heard in the absence of the jury (if any)." We do not think it is appropriate for an application for leave to admit evidence about the sexual activities of the complainant to be heard in the absence of the complainant, in any circumstances (under the current proposed drafting, this "may" occur). We understand, from conversations with the Queensland Department of Justice and Attorney General about

[10] Ibid.
[11] Ibid.

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	the Bill, that the intention of excluding the complainant is to protect the defendant's right to silence and a fair trial. It is not clear at all how a complainant being present during an application to admit evidence of the complainant's sexual activities would jeopardise the accused's right to silence or a fair trial (especially noting that the jury would not be present, which mitigates any risk of prejudice). Excluding complainants undermines their human rights. The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power enumerates some of the human rights of victims in legal proceedings, including that "victims are entitled to access the mechanisms of justice" (Article 4) and "the responsiveness of judicial and administrative processes to the needs of victims should be facilitated by informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases; [and] allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected" (Article 6).[12] Victim-survivors have a right to participate in and remain informed about legal processes that affect them. The current drafting of s 103ZL undermines this right. • We recommend removing "in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked" from s 103ZM(a). Instead, a new subsection should provide, "The court is to consider whether the age of the complainant, and the number and nature of the questions that the complainant is likely to be asked, are likely to exacerbate distress, humiliation or embarrassment to the complainant." We think this clarifies that this provision is intended to provide *additional* protection to complaints who are especially vulnerable due to their age, or the nature of questioning, but is not *only* intended to protect such complainants. We are concerned that the current drafting could disadvantage complainants who are not especially old or young, or whose complaint is unlikely to elicit especially graphic or shocking questioning.

[12] UN GA, Res 40/34, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, A/RES/40/34 (29 November 1985), available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse.

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Jury directions for sexual violence Clause 59	Timing of jury directions Proposed s 103ZQ requires jury directions to be given if there is a good reason for giving them, or if requested by a party and there is no good reason for not giving them. It also provides that a judge is "not prevented from" giving a direction before evidence is adduced, and in the judge's summing up. There is ample evidence that jury directions are most effective when first, given early in proceedings, and second, used proactively as a corrective to improper questioning. In 2004, the Victorian Law Reform Commission found that the timing of jury directions significantly impacts the jury's deliberation process, with directions delivered early being much more effective in combating misconceptions and myths about sexual assault.[13] Research by Professors Quilter and McNamara found that "for maximum effect, it is preferable if judges give 'corrective' directions (e.g. that delay in complaint does not necessarily mean fabrication) at the time this suggestion is raised – i.e. commonly during the complainant's cross-examination."[14] There is also evidence that "more needs to be done to ensure that relevant directions are given in every trial where they are warranted [and that in many cases] a direction on delay or differences in account was warranted, but was not given."[15] Pursuant to this evidence base, we recommend amending proposed s 103ZQ to specify that *all* jury directions on sexual violence and consent (i.e. all directions in proposed subdivisions 3 and 4) should be *required* to be given *at the outset of every sexual violence trial.* This should be required in addition to existing timing provisions in s 103ZQ(1). The existing requirements in subsection (1) should also apply to *all directions* in subdivisions 3 and 4 (i.e. not only subdivision 3, as is currently the case). This change would ensure that jury directions are given early in all cases, and that giving them at the outset of proceedings is not left up to the discretion of individual judges (which is currently the case under subsection (3)). Making directions mandatory at the outset of proceedings would mitigate the risk of juries building a narrative based on misconceptions at the start of a trial, which then becomes more difficult to dislodge later.

[13] Victorian Law Reform Commission (VLRC), Sex Offences: Interim Report, Report No 78 (2004) Ch 7.
[14] Quilter, J, McNamara, L & Porter, M (2022b) 'New Jury Directions for Sexual Offence Trials in NSW: The Importance of Timing', *Criminal Law Journal*, 46(3), 138-150.
[15] Quilter & McNamara (2023), above n 9.

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	Comments on specific jury directions in the Bill We strongly suggest amending the direction at proposed s 103ZT of the Bill, as the current drafting is weak, confusing and arguably undermines proposed s 348AA(1)(a) of the Bill ("a person does not consent to an act if the person does not say or do anything to communicate consent"). Both proposed s 348AA(1)(a) and proposed s 103ZT of the Bill are intended to address the 'freeze' response. Given that proposed s 348AA(1)(a) makes it clear that consent is not present if it is not positively expressed, "in circumstances where a person freezes and does not say or do anything, the judge should be directing that the element of non-consent is proven, not providing a suggestion that persons may respond in different ways."[16] As Professors Quilter and McNamara have noted about an equivalently worded provision in NSW law, "this direction does little to counteract the common cross-examination technique… where complainants were asked lines of questioning underpinned by the traditional expectation of verbalised or physical demonstrations of non-consent and which attempted to infer consent on the basis of silence."[17] A preferable jury direction would be one that clarifies, "Where a complainant has not expressed consent, consent was not present." This is consistent with proposed s 348AA(1)(a). While there is a note in proposed s 103ZT(b) referring back to s 348AA(1)(a), we do not think this does enough to address the above issue, and recommend the direction to be recast in line with an affirmative consent standard. We also recommend recasting proposed ss 103ZU(b) and 103ZV(b) of the Bill. We are concerned that referring to the complainant "not telling the truth" could unconsciously play into rape myths calling victim-survivor credibility into account. These directions should be recast to remove this risk, and reflect the latest evidence base. For example: • 103ZU: "Non-consensual sex frequently occurs in the absence of violence, physical injury, or threats thereof. A person who does not consent to sex may not be physically injured or subjected to violence, or threatened with physical injury or violence." We note that studies have found very low rates of injury during rape/sexual offences. In a 2014 study of 317 rape reports in Minnesota, only 4% of victims experienced a

[16] Ibid.
[17] Ibid.

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	physical injury, and only 11% sustained anogenital injuries requiring medical intervention.[18] And in a 2016 survey of 400 cases of rape reported to the central UK police force, most victims (79%) sustained no physical injuries during the attack.[19] • 103ZV: "Trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about a sexual offence, but others may not. Many victims respond to trauma in a calm and controlled manner as a coping mechanism." This reframing would recognise a strong evidence base showing the commonness of a "controlled response" as a coping mechanism to trauma, with many victims recounting evidence of sexual violence appearing "numbed" and like their emotions are under control.[20] We also suggest strengthening the drafting of the direction at proposed s 103ZW, to specify that the circumstances described in subsections (a) to (e) *have nothing to do with* whether a complainant consented, and *should be disregarded* in consideration of whether consent was present. We recommend removing proposed ss 103ZY(2)(a)(iv) and (b). The issue of imperfect recall being a common response to trauma is already sufficiently dealt with by subclauses (i)-(iii). The reference to "untruthful accounts" is inappropriate and potentially dangerous, as it seems to us to inadvertently reference harmful myths that people lie about being sexually assaulted. There is consistent evidence about the extreme rarity of false accounts,[21] yet it continues to be used to question the credibility of victim-survivors. We suggest removing "of itself" from proposed s 103ZZ(2)(a). We are concerned that this might unconsciously undermine the credibility of victim-survivors. There is a significant evidence base around all the reasons someone

[18] Carr, M., Thomas, A. J., Atwood, D., Muhar, A., Jarvis, K., & Wewerka, S. S. (2014). Debunking three rape myths. *Journal of Forensic Nursing*, 10(4), 217–225.
[19] Waterhouse, G. F., Reynolds, A., & Egan, V. (2016). Myths and legends: The reality of rape offences reported to a UK police force. *The European Journal of Psychology Applied to Legal Context*, 8(1), 1–10.
[20] Petrak, J., & Hedge, B. (Eds.). (2003). *The trauma of sexual assault: Treatment, prevention and practice*. West Sussex: John Wiley & Sons. See also Klippenstine, M. A., & Schuller, R. (2012). Perceptions of sexual assault: Expectancies regarding the emotional response of a rape victim over time. *Psychology, Crime & Law*, 18(1), 79–94.
[21] Meta-analysis of seven studies in Western countries estimate 5% of rape allegations are false. See Ferguson, C. E., & Malouff, J. M. (2016). Assessing police classifications of sexual assault reports: A meta-analysis of false reporting rates. *Archives of Sexual Behavior*, 45(5), 1185–1193.

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	might not choose to come forward with an allegation of sexual violence, and about the rarity of false allegations. Yet, myths about false allegations remain prevalent. We are concerned that caveating this direction might have the effect of reinforcing such myths. For the same reasons, we recommend removing proposed subclause (2)(c). Even without such a direction, the defence will likely make such arguments. The purpose of the jury directions in the Bill should be to correct the historic and structural bias against victims in criminal trials for sexual violence. We note this direction (if given) would have the opposite effect.
Expert evidence panel for sexual offence proceedings Clause 59	For the reasons set out above in our comments on affirmative consent and mistake of fact provisions (clauses 13-16), we oppose the Bill's inclusion of mental health and cognitive impairment exceptions to affirmative consent. We therefore do not consider this expert evidence panel to be necessary. However, if such a panel is established by the Bill, we have the following comments. While the Bill allows for a panellist to be removed ("if the chief executive decides a person included on the panel is no longer suitable to give relevant evidence"), it does not set out a process for handling complaints about panellists, or reviewing panellists' decisions. We think the Bill should: • Establish a process for handling complaints about panelists – for example, time periods in which investigations must take place, requirement for escalation, and how outcomes must be notified; and • Specify that decisions of the panel must be reviewable, and set out a process for review. In this regard, we note the well-documented issues with "independent experts" in family law proceedings, as detailed in the recent broadcast on ABC's Background Briefing ("False Witness").[22] We are concerned to avoid a similar situation where consequential decisions are not subject to review or complaints mechanisms.

[22] Davoren, Heidi, "False Witness," *Background Briefing*, ABC, 19 June 2023, available at: https://www.abc.net.au/news/2023-06-19/family-court-report-writer-recording-expert-witness-ahpra/102185414.