

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

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## The Queensland Indigenous Family Violence Legal Service (QIFVLS) Submission to the 57<sup>th</sup> Queensland Parliament Legal Affairs and Safety Committee regarding the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (the Bill)

### Executive Summary

Queensland Indigenous Family Violence Legal Service (QIFVLS) Aboriginal Corporation ('QIFVLS') welcomes the opportunity to provide a submission regarding the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (the Bill).

As a Family Violence Prevention Legal Service provider, a member of the National Family Violence Prevention Legal Service Forum and member of the Coalition of Peak Aboriginal and Torres Strait Islander peak organisations (Coalition of Peaks), QIFVLS is dedicated to achieving the priority reforms and socio-economic targets outlined in the [National Agreement on Closing The Gap](#). In this context, QIFVLS is particularly dedicated to attaining Target 13 (reducing family violence against women and children by at least 50%, towards zero by 2031), in conjunction with the remaining targets and priority reforms.

Our experience is that family violence is an intersection point linking an Aboriginal and Torres Strait Islander person's connection to the child protection system, the youth justice system, the adult criminal justice system, housing/homelessness and the family law system. In that regard, we have long advocated that a coordinated effort is required to achieve all socio-economic targets detailed in the National Agreement on Closing the Gap. At our core, we advocate for and support any measures that will ensure the safety of our families, particularly women and children.

With roughly 85% of our clientele identifying as female, our submissions are shaped by our daily observations of our clients and the difficulties they face in navigating the abovementioned intersecting systems as victim-survivors, mothers, carers and concerned family members.

QIFVLS welcomes legislative provisions implementing the recommendations made by the Women's Safety and Justice Taskforce (the Taskforce) in its two *Hear Her Voice* reports, alongside the recommendations from *A Call for Change*.

As an Aboriginal and Torres Strait Islander Community-Controlled Organisation ('ACCO'), QIFVLS is uniquely positioned to provide feedback from the standpoint of a family violence prevention legal service which provides a holistic model of attending to our communities' legal and non-legal needs. In this regard, QIFVLS wholeheartedly welcomes legislative provisions which go towards addressing the entrenched institutional disadvantage faced by women and girls, and from our perspective Aboriginal and Torres Strait Islander women and girls, who are victim-survivors of domestic and family violence and sexual violence.

We are broadly supportive of the reforms and the approach to the legislative provisions in the Bill. In this submission, we have specifically commented on clauses and provisions in the Bill where we specifically seek to highlight our perspectives and observations.

We want our submission to underscore that in tandem with the provisions that are being legislated, the successful implementation of the recommendations and reforms arising from the *Hear Her Voice* reports and *A Call for Change* must be complemented with the Women's Safety and Justice Taskforce's advice to the Government that it actions



the 4-phase plan for implementation to successfully introduce a new criminal law offence relating to combatting coercive control. This was the basis on which QIFVLS supported the Taskforce's recommendation to criminalise coercive control. We fear that failure to implement the four-phase plan will risk unintended consequences, particularly to Aboriginal and Torres Strait Islander peoples and the flow-on effect of over-criminalisation.

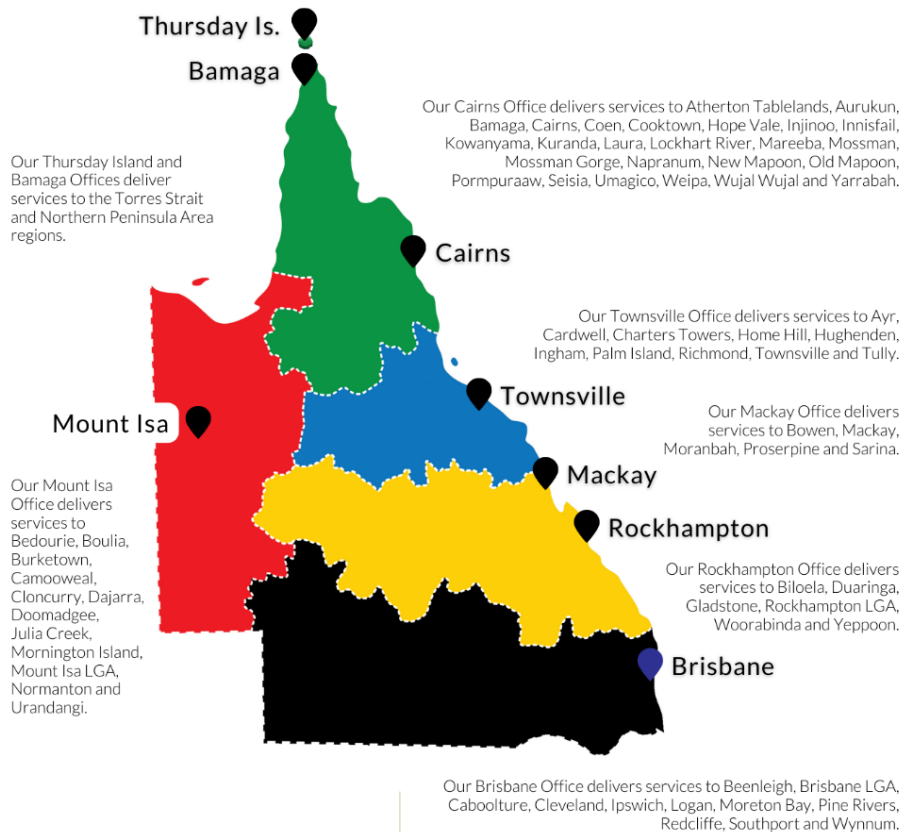
## About QIFVLS

QIFVLS is a not-for-profit legal service formed under the Family Violence Prevention Legal Services Program ('FVPLSP') through the Department of Prime Minister and Cabinet's Indigenous Advancement Strategy ('IAS'). FVPLSP fills a recognised gap in access to culturally appropriate legal services for Aboriginal and Torres Strait Islander victims of family and domestic violence and sexual assault.

QIFVLS is one of fourteen (14) Family Violence Prevention Legal Services ('FVPLSs') across Australia and one of the thirteen (13) FVPLSs that are part of the National Family Violence Prevention Legal Service ('NFVPLS') Forum. We are one of two Aboriginal and Torres Strait Islander community-controlled family violence prevention legal service providers in Queensland.

QIFVLS is exclusively dedicated to providing legal and non-legal support services to assist Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault with a breadth and scope of services which stretch to the outer islands of the Torres Strait, neighbouring Papua New Guinea. Together with its legal services, QIFVLS can be distinguished from other legal assistance providers through its advantage in providing unique, specialised, culturally safe and holistic assistance from the front-end via a wrap-around model that embraces early intervention and prevention. We advocate this model in supporting access to justice and keeping victim-survivors of family violence safe.

QIFVLS services 91 communities across Queensland including the Outer Islands of the Torres Strait, neighbouring Papua New Guinea and provides services in the areas of domestic and family violence; family law; child protection; sexual assault and Victims Assist Queensland (VAQ) applications. QIFVLS supports its clients through all stages of the legal process: from legal advice to representation throughout court proceedings. In addition, QIFVLS responds and addresses our clients' non-legal needs through our integrated non-therapeutic case management process, which is addressed through the identified role of the Case Management Officer. QIFVLS as a practice, provides a holistic service response to our clients' needs: addressing legal need and addressing non-legal needs, that have in most cases, brought our clients into contact with the justice system in the first place.



As demonstrated by the above map QIFVLS is mainly an outreach service where our teams go into rural and remote communities to meet with clients. QIFVLS services over 80+ Aboriginal and Torres Strait Islander communities throughout Queensland. Recognising that Queensland is nearly five (5) times the size of Japan; seven (7) times the size of Great Britain and two and a half (2.5) times the size of Texas<sup>1</sup>, QIFVLS has eight (8) offices in Queensland –

- (1) a service delivery office in addition to its Head Office located in Cairns, responsible for servicing Cape York communities, Cooktown; Atherton Tablelands, Innisfail, and Yarrabah (and communities in between);
- (2) a service delivery office in Bamaga responsible for servicing Cape York communities as far north as Bamaga and Umagico;
- (3) a service delivery office on Thursday Island responsible for servicing communities stretching to the Outer Islands of the Torres Strait, neighbouring Papua New Guinea;
- (4) a service delivery office in Townsville responsible for servicing Townsville, Palm Island, Charters Towers, Richmond and Hughenden (and communities in between);
- (5) a service delivery office in Mackay responsible for servicing Mackay and Sarina (and communities in between);
- (6) a service delivery office in Rockhampton responsible for servicing Rockhampton, Woorabinda, Mt Morgan, Biloela (and communities in between);
- (7) a service delivery office in Mount Isa responsible for servicing Mount Isa, the Gulf of Carpentaria communities, as far south as Bedourie and across to Julia Creek (and communities in between);
- (8) a service delivery office in Brisbane responsible for servicing the Brisbane local government area.

<sup>1</sup> <https://www.qld.gov.au/about/about-queensland/statistics-facts/facts>



## Family violence as the cornerstone

It may be startling for some to learn that 3 in 5 First Nations women have experienced physical or sexual violence<sup>2</sup>. This speaks to the crisis we witness as a family violence prevention legal service daily across our offices in Queensland.

This sadly informs QIFVLS' experience that family violence is the cornerstone or intersection, that links an Aboriginal and Torres Strait Islander person's connection to the child protection system, the youth justice system, adult criminal justice system, housing and/or homelessness, health and the family law system.

As a further example, Queensland Government data reveals that at least 60% of all Aboriginal and Torres Strait Islander children in youth detention have experienced or been impacted by domestic and family violence<sup>3</sup>. When considering the wellbeing of children, it should be noted that family violence was identified by the Australian Institute of Health and Welfare (AIHW) as the primary driver of children being placed into the child protection system with 88% of First Nations children in care having experienced family violence<sup>4</sup>.

We find that these 'connectors' are further compounded or exacerbated for those living in regional, rural, and remote parts of Australia, where there are restrictions on the availability of actual on the ground services to assist a victim-survivor escaping a violent relationship<sup>5</sup> (i.e., domestic violence support services and shelters; actual police presence within a community).

In contrast to siloed government responses which have long been the standard practice, QIFVLS advocates for uniform, holistic and consistent strategies that will improve responses in the family violence, housing, policing and criminal justice, corrective services and child protection system. This approach aligns with achieving reductions in the Justice targets (Targets 10, 11, 12 and 13) of the National Agreement on Closing the Gap as well as meeting the overarching objectives of the 4 priority reform areas. It is an approach which also complements the Taskforce's recommendation to government of the requirement to seriously implement the four-phase plan so as to avoid unintended consequences, particularly for Aboriginal and Torres Strait Islander peoples and communities of these much-needed reforms.

## Education and awareness for the community

Together with our comments on the Bill, we wish to outline concerns we have noticed regarding education and awareness for the general community about the proposed reforms to criminalising coercive control. From what we see and hear on the ground, a great deal more is needed in education, training and awareness, in order to prepare the sector and the general community for the new legislative reforms.

We note that the Taskforce was clear in its advice to the Government that to criminalise coercive control without improving service and justice system responses coupled with a whole scale education and awareness campaign, would lead to an unacceptable risk of unintended consequences, which would cause more harm, particularly to Aboriginal and Torres Strait Islander peoples.

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<sup>2</sup> AHRC (2020), *Wiyi Yani U Thangani Report*,

[https://humanrights.gov.au/sites/default/files/document/publication/ahrc\\_wiyi\\_yani\\_u\\_thangani\\_report\\_2020.pdf](https://humanrights.gov.au/sites/default/files/document/publication/ahrc_wiyi_yani_u_thangani_report_2020.pdf), page 44

<sup>3</sup> <https://www.cyjma.qld.gov.au/resources/dcsyw/youth-justice/reform/youth-justice-report.pdf>

<sup>4</sup> Australian Institute of Health and Welfare (2019), *Family, domestic and sexual violence in Australia: continuing the national story*, <https://www.aihw.gov.au/getmedia/b0037b2d-a651-4abf-9f7b-00a85e3de528/aihw-fdv3-FDSV-in-Australia-2019.pdf.aspx?inline=true>

<sup>5</sup> Australian Institute of Health and Welfare (2016-17), *Alcohol and other drug use in regional; and remote Australia: consumption, harms, and access to treatment 2016-17*. Cat.no. HSE 212. Canberra.



## Amendments to the Criminal Code

### **Amendments to failure to report offence, s229BC – Clause 9 (Recommendation 7, *Hear Her Voice – Report Two*)**

While supportive of this amendment, we believe that a review of the Bill may consider extending the definition of a ‘relevant professional’. This would take into account regional and remote communities where a victim-survivor is supported by an Aboriginal and Torres Strait Islander health practitioner or support worker, including situations where such a support person does not have formal tertiary qualifications.

We note that the Health Practitioner Regulation National Law (Queensland) recognise Aboriginal and Torres Strait Islander health practitioners as health practitioners<sup>6</sup>. In the same way that the Bill explicitly references psychologists, nurses, midwives and medical practitioners as relevant professionals, we suggest the Bill also explicitly reference Aboriginal and Torres Strait Islander health practitioners as relevant professionals.

### **Affirmative consent, mistake of fact and stealthing – Clauses 13 to 16 (Recommendation 43, *Hear Her Voice – Report Two*)**

We support the proposed legislative implementation approach to the reforms concerning affirmative consent, mistake of fact and stealthing. We are mindful though of the views expressed by advocates from the Rape and Sexual Assault Research and Advocacy (RASARA) and the Queensland Sexual Assault Network (QSAN) to the effect that provisions around affirmative consent are not adequately affirmative in their drafting.

### **Criminal offence of coercive control – Clause 20 (Recommendation 78, *Hear Her Voice - Report One*)**

We support the proposed approach to legislating for coercive control notwithstanding our concerns that the provision may be used by perpetrators.

#### **Understanding ‘intent’**

We have concerns about misidentification of female victim-survivors, borne out of our experiences providing assistance. We note that legislating for ‘intent’ is designed to elevate the threshold for the new offence and may reduce the risk of misidentification of victim-survivors as perpetrators of domestic and family violence.

As this is a new offence, the 5-year statutory review will be vitally important in establishing a baseline for future enhancement and clarification so that justice for victim-survivors of coercive control is acknowledged and realised in the legislation.

#### **The requirement for ‘harm’**

We note the inclusion of ‘intent’ and ‘harm’ brings the proposed new section 334C closer to the Scottish provision.

We feel it important to caution against creating a distinction that acts of physical violence were more serious in nature compared to acts of non-physical violence. This would be an unhelpful distinction, given that an act of domestic and family violence, whether it is purely non-physical or not is still an act of domestic violence.

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<sup>6</sup> Health Practitioner Regulation National Law (Queensland), section 5 Definitions





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

### **Duration and extension of police protection notices – Clause 30 (Recommendation 20, *A Call for Change* report)**

We support the provision regarding the duration of police protection notices (PPNs) and further add that we support the provisions allowing for the extension of PPNs for not more than 5 business days.

### **Courts to consider appropriate period for protection order – Clause 27 (Recommendation 50, *A Call for Change* report)**

We understand the policy intent in clarifying that a court has the discretion to make orders of less than five years duration where the circumstances allow it. We understand that background discussion surrounding this provision touches on a balancing line between the disproportionate impacts on Aboriginal and Torres Strait Islander respondents/defendants and the shameful overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

As a family violence prevention legal service, we are unapologetic about advocating for the rights of women and children to lead a life of safety, free from violence.

We would suggest a carve-out in section 97 of the DFVPA, outlining examples where it may be sufficient for the court to exercise its discretion to make an order for a period less than 5 years. Although that would be our first preference, we would also support section 37 of the DFVPA being amended to refer to matters that the court needs to consider pursuant to section 97.

### **Court-based perpetrator diversion scheme – Clause 40 (Recommendation 74, *Hear Her Voice - Report One*)**

We support the proposed amendments legislating for a new court-based perpetrator diversion scheme.

#### **The approved program provider's cultural competency**

We are interested in the process of approvals for the providers of the diversion programs under the proposed new section 135T of the DFVPA. Our non-negotiable will be that approved program providers dealing with Aboriginal and Torres Strait Islander defendants, if not from an Aboriginal and Torres Strait Islander Community Controlled Organisation (ACCO) or other First Nations stakeholder group, at the very least should demonstrate a high level of cultural competency.

#### **Broadening scheme eligibility to cover up to two contraventions**

Under the proposed new section 135C(2), we observe that the Bill provides for broadened eligibility in exceptional circumstances where the perpetrator presents with more than one contravention of a DVO. QIFVLS would support such a broadening.

#### **Acknowledging responsibility and resulting immunity provisions**

Whilst the Bill does not require the defendant to plead guilty, we support the requirement that a defendant will be required to acknowledge to the court responsibility for their conduct to be eligible for the scheme. This is consistent with requiring a defendant to take accountability for their actions and address the underlying concerning behaviours.





We also highlight the possibility that not formally pleading guilty may provide opportunities for greater numbers of defendants to seek access to the scheme. Additionally, defendants who have been misidentified as perpetrators may also be spared the prospect of further criminalisation.

We further note that the Bill incorporates immunity provisions that were not contemplated by the Taskforce. They cover acknowledgment of responsibility to the Court (proposed new section 135D) and potential admissions made during a suitability assessment (Proposed new section 135H). We would be supportive of measures that are put in place whereby a defendant can take accountability for their actions in an attempt to address those underlying concerning behaviours.

We acknowledge this may lay the groundwork for defendants to be open, fully engaged with the scheme and provide full and frank disclosure.

## **Introduce a new facilitation offence to stop a person facilitating domestic abuse on behalf of a perpetrator – Clause 46 (Recommendation 75, *Hear Her Voice - Report One*)**

We support the proposed new section 179A. We highlight the importance of having a safeguard provision to account for unforeseen circumstances such as an elderly parent/relative (who themselves is a victim of family violence at the hands of an adult perpetrator) unwittingly influenced or coerced into facilitating domestic abuse on behalf of the perpetrator.

We acknowledge that the provision includes an intent requirement together with the proposed section 179A(4) placing an evidential burden on the defendant in relation to showing a reasonable excuse for section 179A(1).

## **Require a court making a Domestic Violence Order to impose an additional standard condition that the perpetrator must not counsel or procure someone else to engage in behaviour that if engaged in by the perpetrator would be domestic violence – Clause 48 (Recommendation 76, *Hear Her Voice - Report One*)**

We support the proposed amendment to section 56 of the DFVPA. We suggest that the wording in the new standard condition on the protection order should place an emphasis on plain English and more simplified drafting so that a respondent and the aggrieved can more easily understand the condition.

Subject to the provisions of any order or police protection notice in place, we also agree that section 60 of the DFVPA be amended to clarify that the new standard condition does not prohibit someone/respondent from asking a lawyer to contact the aggrieved or from asking another person, including a lawyer, to contact or locate the aggrieved for a purpose authorised under the Act. This would provide clarity.

## **Amendments to the Evidence Act 1977**

### **Jury directions for sexual violence – Clause 59 (Recommendation 77, *Hear Her Voice – Report Two*)**

We support the proposed provisions providing for jury directions to be given that would address misconceptions about sexual violence with additional points below.

#### **Directions regarding Aboriginal and Torres Strait Islander women and children**



We would like to submit that consideration is given to further enhancing the legislation by including additional provisions that specifically address community misconceptions about sexual violence experienced by Aboriginal and Torres Strait Islander women and children.

Australia's history since European colonisation has been marked by, among other things, sexual violence towards Aboriginal and Torres Strait Islander women and children perpetrated by men of all backgrounds. We suggest that consideration be given to including such jury directions especially in cases where the complainant identifies as Aboriginal and/or Torres Strait Islander.

This could take the form of considering cultural considerations marked by:

- a victim-survivor's sense of obligation to their community;
- the fear of payback from the respondent/perpetrator's family; and
- ostracism from their community.

### **Hearing an application under the proposed new section 103ZL**

We observe that the proposed section 103ZL is drafted such that the defendant may request that the complainant be absent when their application for leave of the court to cross-examine on the complainant's sexual history is heard. Viewing the matter from the standpoint of the rights of the victim-survivor, there may be circumstances where the complainant wishes to remain present for the application.

We note that the Government in its response to *Hear Her Voice – Report Two*, supported recommendations 64 and 65 which sought consideration for funded legal representation for victim-survivors of sexual violence during the criminal justice process, including trial proceedings.

*64. The Department of Justice and Attorney-General, when evaluating the proposed victim advocate model (recommendation 9), consider whether there is a need for funded legal representation for victim-survivors of sexual violence during criminal justice processes.*

*65. The Queensland Government, when reviewing the legislative changes implemented in response to this report (recommendation 186), consider whether there is a need to extend the right of victim-survivors to be represented during trial proceedings beyond matters related to protected counselling communications.*

We believe that the presence of a dedicated legal representative may have the capacity to assist in such a situation – whether it is in giving immediate legal advice about the nature of the application and/or seeking leave to remain present in court while the complainant is excused. Depending on the progress that is made with implementing recommendations 64 and 65 above, we are flagging this as a consideration for future legislative provisions on this issue.

### **Proposed new s103ZZH Sexual offence expert evidence panel – Clause 59 (Recommendation 80, *Hear Her Voice – Report Two*)**

We wish to highlight that in relation to these provisions, a premium should be placed on the cultural capability and competence of those appointed to the expert panel. Furthermore, as an organisation that services over 90 communities throughout Queensland, we are mindful that resourcing and identifying an expert who will accept the legal aid funding to provide their services will be a significant factor. This is particularly so given that Townsville will be one of the two pilot locations alongside Brisbane. We are concerned about availability of experts and how that may affect any delays/ access to justice.



## **Expand the admission of preliminary complaint evidence to all domestic violence offences – Clause 62**

### ***(Recommendation 76, Hear Her Voice - Report Two)***

We support the proposed new section 94A of the *Evidence Act* as it expands the admission of preliminary complaint evidence to all domestic violence offences.

## **Limits on publishing information - Proposed s103ZZN – Clause 69**

### ***(Recommendation 82, Hear Her Voice – Report Two)***

We note that the proposed new section 103ZZN of the *Evidence Act* will provide that the prohibition on identifying a complainant will not apply if the complainant is deceased. We have concerns about this provision from the standpoint of cultural protocol in Aboriginal and Torres Strait Islander communities around the naming of a deceased person. In that regard, we support the proposal for complainant privacy orders in the Bill.

## **Release of transcript for research purposes – Clause 72 (Recommendation 82, Hear Her Voice – Report Two)**

In supporting this provision we would like to raise what we see as possible privacy issues under the proposed section 134AA(2) of the *Evidence Act*, regarding the ability of an approved person to contact parties, particularly vulnerable parties from marginalised communities and in whom English is not their first language, for the purpose of accessing transcripts for research purposes. Would there be consideration given to the legislation or a prescribed regulation outlining a procedure whereby the court or a legal representative or cultural support worker from a community-controlled organisation contact the relevant parties as a first point of call?

## **Amendments to the *Penalties and Sentences Act 1992***

### **Sentencing considerations – Clause 83**

#### ***(Recommendation 126, Hear Her Voice – Report Two)***

We are pleased that the proposed section 9(12) of the PSA will adopt the definition of ‘family relationship’ as provided for in section 19 of the DFVPA.

## **Conclusion**

We take this opportunity to thank the Committee for considering our submission regarding the Bill. We are keenly interested in the progress of the Bill as it progresses through the legislative and parliamentary process. We trust that the Committee appreciates our viewpoint as both an Aboriginal and Torres Strait Islander Community Controlled Organisation and Family Violence Prevention Legal Service.