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

Submission No:	41
Submitted by:	Queensland Law Society
Publication:	making the submission and your name public
Attachments:	See attachment
Submitter Comments:	

Queensland
Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
| F 07 3221 9329 | | qls.com.au

Office of the President

3 November 2023

Our ref: [BCHS:DFVCL]

Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: LASC@parliament.qld.gov.au

Dear Committee Secretary

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

Thank you for the opportunity to provide feedback on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by QLS's Criminal Law Committee and Domestic and Family Violence Committee (DFV Committee), whose members have substantial expertise in this area.

We are disappointed that the drafting of the coercive control offence was not open for at least three months of consultation prior to its introduction, as set out in recommendation 78 of the first *Hear Her Voice* report. Had such consultation taken place, some of the difficulties identified with the drafting of the offence may have been remedied.

We have real concerns with the drafting of the new coercive control offence: its terms are unnecessarily complex, too wide and breach fundamental human rights norms.

We urge the government to take the time required for further consultation. In its present form, the offence is a disservice to both complainants and accused persons, and the wider community. It will be too difficult for juries to understand. It will produce unjust outcomes.

PART 3 – AMENDMENT OF CRIMINAL CODE 1899

Clause 13 – Replacement of s 348 (meaning of consent)

The proposed new provisions in s348(1) (2) and (4) are otiose. This is already the law in Queensland. No purpose is served by rewriting these provisions.

We do not support the new s348(3) – "*a person who does not offer physical or verbal resistance to an act is not, by reason only of that fact, to be taken to consent to the act*". It should not be passed because it it artificially limits the circumstances in which consent is, in fact, given and is not good law.

Queensland law already recognises that silence or lack of resistance does not equal consent: *R v Shaw* [1996] 1 Qd R 641, where the Court of Appeal stated that "*a complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it*".

The common law also recognises, however, that, depending on the context, silence may also constitute consent. The law needs to be flexible to accommodate the wide and complex range of human communicative behaviours. For example, a long term married couple may have spontaneous sexual intercourse without any prior explicit communication because their history enables them to understand each other's non-verbal behaviours. Strictly interpreted, however, the couple falls foul of s348(3). This is an inappropriate extension of the criminal law.

One of the justifications for s348(3) appears to be to limit the application of the mistake of fact excuse (s23 of the *Code)*. That is to say, s348(3) prevents an accused person from saying that s/he honestly, reasonably but mistakenly believed that their partner's lack of resistance meant they were consenting to sex.

This will produce convictions that occasion a miscarriage of justice. Take the long-term married couple example again. Suppose that five years later they are divorced. Person A subsequently alleges that the "spontaneous sexual intercourse" was rape. Why should Person B be prevented from saying that s/he believed there was consent arising from the context of their previous long-term loving relationship where sex was often initiated on the basis of non-verbal cues and without physical resistance. Whether the elements of s23 Code are made out would then be a matter for a jury.

We also do not support s348AA(f). The criterion of "harm" is inappropriately broad. As a legal proposition, a person may, for many reasons, freely agree to do something that they would prefer not to do, or later regret doing. Neither circumstances equates to an absence of consent at the time of the act. The question of whether the consent was freely given does not mean a complete absence of conflicting or negative thoughts or consequences. To require otherwise is a fallacious standard, and an inappropriate incursion of the criminal law. We recommend that s348(f) be removed entirely.

We also note that the proscriptive approach adopted in the drafting of s348AA will increase, not decrease, the focus on the alleged complainant's evidence, and therefore reliability and credibility. This is contrary to some of the stated concerns in the Women's Justice and Safety Taskforce reports.

Clause 20 – New criminal offence of coercive control

Both the QLS Domestic Violence and Criminal Law Committees are concerned that the new coercive control offence, as currently drafted, will lead to members of the Queensland community being wrongfully charged, convicted and criminally punished. This will bring the justice system into disrepute, and negatively impact on the rule of law, including for victims of domestic violence.

The proposed offence provision needs to be amended with proper regard to conventions of drafting, fundamental evidentiary tenets, the need for certainty and core human rights principles. We set out the basis of this proposition below.

The proposed coercive control offence in s 334C of the Bill has four essential elements (s 334C(1)(a) – (d)), and an embedded sub-section abrogating three evidentiary precepts (s 334C(5). One of the essential elements is that the defendant intends the course of conduct to coerce or control.

The Society endorses the need for the offence of coercive control to include an element of specific intent. The inclusion of an element of intent is a manifestation of the base safeguard that a person should only be criminally liable for conduct which they intended.

However, the Society has a profound concern that, in the context of a crime of specific intent, the element of proof of a 'course of conduct', as defined, combined with the removal of the common law requirements for particularity and jury unanimity, will result in convictions that are unsafe and occasion a miscarriage of justice. In our submission, the offence provision must be re-drafted to restore the common law requirement that the Crown particularise the alleged course of conduct in every case, and to restore the requirement that the jury unanimously find the particularised, alleged course of conduct accompanied by the requisite intention order to return a conviction. To do otherwise will render the requite element of specific intent meaningless.

Presently, the term '*course of conduct*' is defined only to the extent that there must be proof of an act of domestic violence by the defendant against the complainant on more than 1 occasion. The proposed offence contains two further elements. Each element is specifically referrable to the course of conduct. First, that the defendant intends to the course of conduct to coerce or control. Second, that the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm. Against these elements, sub-section (5) is engaged. Section 334C(5)(a) abrogates the prosecution's obligation to allege particulars of any of the acts of domestic violence constituting the course of conduct. Sub-section (5)(b) abrogates the requirement that the Jury be satisfied of the particulars of any act of domestic violence alleged to constitute the course of conduct. Sub-section (5)(c) abrogates the requirement for Jury unanimity regarding the acts of domestic violence found to constitute the course of conduct.

Offence provisions involving an element of an ongoing state of affairs are not unprecedented, albeit they are few. An example is trafficking in a dangerous drug. Another is maintaining an unlawful sexual relationship with a child. However, neither crime involves an element of specific intent.

QLS knows of no crime of specific intent within the *Criminal Code (Qld)* that involved a continuous course of conduct, where the content of the course of conduct must not be particularised by the Crown nor unanimously found to exist by the Jury.

At this juncture, it is appropriate to essay why adequate particularisation is a precondition for the fair trial of an accused. In *Patel v R*[1] at [168], Heydon J (i.e. the majority of the High Court of Australia) cited and applied the principles enunciated in *Johnson v Miller* regarding the essential requirement for particularity in criminal prosecutions. This declaration of the law of particulars has guided the proper conduct of criminal prosecutions since:-

> "In *Johnson v Miller*, Evatt J said:-
>
> > "It is an essential part of the concept of justice in criminal cases that not a single piece of evidence should be admitted against a defendant unless he has a right to resist its reception upon the ground of irrelevance, whereupon the court has both the right and the duty to rule upon such an objection. These fundamental rights cannot be exercised if, through a failure or refusal to specify or particularize the offence charged, neither the court nor the defendant (nor perhaps the prosecutor) is as yet aware of the offence intended to be charged." But the importance of particulars does not lie only in relation to questions of inadmissibility for irrelevance. Particulars can also be necessary to enable the defence to make particular forensic judgments. Some concern the cross-examination of prosecution witnesses. Others concern the marshalling and deployment of its own evidence. Parts of the trial record, incidentally, suggest that the present case may, with respect, illustrate Evatt J's point that without particulars the prosecution can be as unsure of the case being run as is the court and the defendant. **A person charged with an offence is entitled to know with precision what the prosecution allege they have done. This is an elemental principle of law and human rights**." (emphasis added)

The degree of particularisation to satisfy that requirement will depend on the nature and circumstances of the offence. There is no absolute rule that one method is satisfactory in all cases. However, to remove the requirement altogether in respect of a crime of specific intent, particularly involving a course of conduct element, is unprecedented. It is opposed by the Queensland Law Society.

It is also apt to address the common law principles applicable to the need for jury unanimity. This body of law has developed in the context of appeals against conviction brought on the basis of a failure to direct, or a misdirection, of the Jury. In *R v Walsh*[2] at [57] the Court distinguished between two situations. Jury unanimity is required in only one of them:-

> "To sum-up the foregoing, it seems that the cases give rise to two situations at least (and if there be tension between them, this is not the case to resolve it, for it is only the second

---

[1] *Patel v R* [2012] HCA 531; (2012) 247 CLR 531 per Heydon J at [168]; see also, *John L Pty Ltd v Attorney-General NSW* 1 [1987] HCA 42; (1987) 163 CLR 508; *Kirk v Industrial Court NSW* 2 [2010] HCA 1; (2010) 239 CLR 531; *Veysey v R* [2011] 33 VR 277; 214 A Crim R 215; [2011] VSCA 309..
[2] (2002) 131 A Crim R 299; [2002] VSCA 98.

> with which we are now concerned). The first is that exemplified by the cases concerning murder and manslaughter, where, when alternative legal bases of guilt are proposed by the Crown but depend substantially upon the same facts, there is no need for a direction on 'unanimity' about one or other or more of those bases, at least if they do not 'involve materially different issues or consequences'... The second situation is where one offence is charged, such as obtaining property by deception, but a number of discrete acts is relied upon as proof and any one of them would entitle the jury to convict. If those discrete acts go to the proof of an essential ingredient of the crime charged, then the jury cannot convict unless they are agreed upon that act which, in their opinion, does constitute that essential ingredient. In this type of case, much will depend 'upon the precise nature of the charge, the nature of the prosecution's case and the defence and what are the live issues at the conclusion of the evidence"

Under the proposed s 334C, proof of a course of conduct is an essential element of the crime. The course of conduct must merely consist of two or more acts of domestic violence. The prosecution may tender evidence of an unlimited number of acts of domestic violence. The provision allows the Jury to return a conviction on the basis that of combination of any two or more discrete acts of domestic violence are independently capable of proving the course of conduct. In such circumstances, jury unanimity regarding the constituent acts is required.

In its current form, s 334C will allow conviction of a defendant for the Indictable crime of coercive control, and make them liable to a maximum penalty of 14 years imprisonment, on the basis that 12 jurors find to exist a 'course of conduct' consisting of undefined and likely different combinations of unparticularised evidence of multiple acts of domestic violence. What each juror found the course of conduct to comprise – i.e. it's content and boundaries – will be unknown and inscrutable. This situation cannot co-exist with the need to find the existence of a specific intent at the time the course of conduct (s 334C(1)(c)).

In crimes of specific intent, it is axiomatic that the requisite *mens rea* be proved to coincide with the commission of the charged act or omission. Applying this principle to the proposed s 334C underlines the problem.

There is no precedent for how a trial Judge can or may properly direct the Jury on the issue of when the requisite intent must be found to exist in circumstances where the course of conduct it must attend is unparticularised. This will lead to an elongation of trials, imprecision in Directions and irremediable difficulties on appeal.

Finally, we note with concern that the Women's Safety and Justice Taskforce recommended that the new coercive control offence be modelled on the offence in Scotland. The Bill does not reflect this recommendation. None of the evidentiary truncations imposed by the proposed sub-section (5) are mirrored in the Scottish provision.

PART 6 – AMENDMENT OF EVIDENCE ACT 1977

Clause 59 – Insertion of new pt 6B (Evidence related to sexual offences)

QLS's Criminal Law Committee members do not support the proposed amendments to the *Evidence Act 1977* which provide that leave should not be granted unless the court is satisfied that the probative value of any evidence about a complainant's sexual activities outweighs any

distress, humiliation, embarrassment that the complainant may suffer as a result of its admission.

An amendment of this type leaves it open for a court to refuse an application for cross-examination across substantially probative and proper matters, going to the credit of the complainant, which are necessary to be put before the jury to ensure a fair trial, because of an inherently subjective assessment that there will be some adverse effect on the complainant.

Put another way, it requires a judge to balance two incommensurables. First, the need for all relevant evidence to be placed before the tribunal of fact to ensure a fair trial and, on the other hand, the unrelated and imponderable question of whether a fair trial will harm a complainant. The Bill and accompanying material does not explain how a Judge should determine whether a complainant will be harmed.

In our submission, the right to a fair trial is the paramount consideration and ought not to be compromised under any circumstances.

Clause 59 – Insertion of Division 3 Jury Directions related to sexual offences

We make the following general comments about the jury direction provisions in relation to sexual offences.

It is QLS's general position that the jury direction provisions should be facilitative and not directive, and remain subject to a trial judge's overall discretion to ensure a fair trial. Further, it is important that directions are linked to the matters in issue in the proceedings, otherwise there is a risk of irrelevant directions being provided to the jury. For example, subsection 103ZQ(1)(a) could be redrafted to read: '*The judge may give any 1 or more of the directions set out in subdivision 3 in the criminal proceeding, if the requested direction is relevant and it is in the interests of justice to do so'*. The use of the phrase '*in the interests of justice'* is consistent with drafting in other sections about jury directions.

Clauses 62 – 64 – Expansion of preliminary complaint evidence

Proposed s.94A *Evidence Act 1977* (Qld) expands the admissibility of preliminary complaint evidence – out of court statements made by a complaint prior to their first formal statement to Police – to also apply to prosecution for domestic violence offences (as defined in s.1 *Criminal Code*).

The rationale for the inclusion of domestic violence offences is sound, insofar as there are parallels that can often be drawn between that type of conduct and sexual offending; according to the discussion paper and Explanatory Notes to the Bill, the principal policy reason for including these types of offences within the preliminary complaint evidence scheme is that, not only does domestic violence often occur behind closed doors (and thus can be difficult to prove), but preliminary complaint evidence may contextualise the complainant's evidence, which is particularly important where the case requires a consideration of the whole relationship over time. The same can often be said for sexual offending.

This type of evidence is an exception the rule against the admissibility of hearsay evidence; its use in criminal proceedings should accordingly be limited. Presently, s.4A of the CLSO Act limits the use of that evidence to assess the complainant's credibility, and not as evidence of the truth of its contents; proposed s.94A keeps that limitation, which is supported by QLS. Likewise, the

preservation of the Court's overriding discretion to exclude that evidence if it would be unfair to the accused to admit it is also supported.

There remains some risk that the expansion proposed will increase the length, and therefore cost, of prosecutions and further the risk of mistrials due to a jury's misuse of that evidence despite directions. That risk often outweighs any genuine benefit that could be obtained from reliance on that evidence, which can be of little value to either defence or prosecution. Further risk comes from the prevalence of the use of body-worn cameras by Police, and the likelihood that disclosures made by a complainant in the course of a Police investigation (prior to the giving of a formal statement, which would fall within the definition of preliminary complaint evidence in current s.4A/proposed s.94A per *R v BDI* [2020] QCA 22 at [19]-[35]) would be relied upon as preliminary complaint evidence; as has been highlighted in the discussion paper, such evidence 'can be highly prejudicial not only to the defendant, but also the complainant. It's unstructured and often includes portions of inadmissible, irrelevant statements'. Care should be exercised when such evidence is sought to be relied on in a prosecution, and challenge expected to be made to its admission if the prejudice such evidence brings outweighs any potential benefit to the Crown case, itself something that will prolong the length/cost of any proceedings.

PART 4 – AMENDMENT OF DOMESTIC AND FAMILY VIOLENCE AVERMENTS

Clause 30 proposes to amend s113 of the DFVP Act to provide that police protection notices (**PPNs**) can be extended beyond the first court date in exceptional circumstances for up to five business days. While QLS appreciates that *exceptional circumstances* is defined narrowly, we are of the view that PPNs should not continue after the first court date.

PPNs are made by police through a less robust process than orders made by a court. This increases the risk of misidentification of victims and perpetrators and therefore the wrong person being subject to the PPN. The magistrate should be required to decide whether to issue a temporary protection order.

Clause 35 - De-identified transcripts of proceedings for media – s161A DFVP Act

QLS is concerned that the views of the parties or named persons, who may be identifiable from the de-identified transcript are not accounted for in Clause 35. This concern extends to the possibility that children who are subject to proceedings in the Federal Circuit and Family Court of Australia (and therefore subject to the confidentiality provisions of the Family Law Act) may be identifiable.

QLS contends that the aggrieved and respondent should be given the opportunity, on a voluntary and not mandatory basis, to oppose an application and have their objections heard by a judicial officer.

Clause 40 – Diversion scheme orders – insertion of new Pt 4A DFVP Act

QLS is generally supportive of a diversion scheme for accused persons charged with contravening a domestic violence order or police protection notice. Early intervention and education is key in curbing the continuation of domestic violence and a diversion scheme has the potential to prevent further breaches, particularly "technical" breaches or repeated breaches where the alleged offender argues that they did not understand the terms of the order.

However, we have a number of concerns regarding the scheme, particularly the duration of the process and number of court appearances required. There are also a number of aspects of the scheme that are difficult to assess in the absence of information that will be contained in the regulations.

Eligibility

We are concerned that some of the eligibility criteria in proposed s 135C(1) are too restrictive - the diversion scheme should tend to expand rather than limit availability if the aim is to intervene at an early stage and enhance community safety.

Specifically, we submit that proposed paragraph (f) is inappropriate. While we recognise that such limitation was a recommendation of the Women's Safety and Justice Taskforce, we think that it is too restrictive. We submit that this paragraph is too restrictive and accused persons who have been the subject of an order that they have complied with should not be deemed ineligible for the scheme. Non-compliance with earlier orders is of course a different matter and is appropriately dealt with in paragraphs (g) and (h). We submit that it would be reasonable to remove (1)(f), given that the court would still have the discretion to decide under s 135C(4) that a defendant is not eligible for diversion, based on their domestic violence history.

There may also be scope to further relax the eligibility criteria in paragraph (b) through broadening the court's discretion in proposed s 135C(2). Often, older contraventions upon which respondents have not been challenged or sanctioned are reported at the same time as recent contraventions, meaning that the temporal connection between separate offences may not be strong but the defendant may still be an appropriate candidate for early intervention. We recommend the drafting of proposed s 135C(2)(b) should be reconsidered in this regard.

It is unclear whether accused persons, who are in custody for another offence, will be eligible for the scheme or whether the types of program contemplated by the scheme (about which there is no detail) would be suitable for offenders in custody. We note that proposed paragraph (e) requires that the accused has been granted bail for the alleged offence (ie the contravention offence for which they may be diverted) but this ignores the cohort of defendants alleged to have contravened domestic violence orders from custody (eg a respondent to a domestic violence order who is serving a custodial sentence for a non-domestic violence offence who contacts the aggrieved from prison). We are unable to comment on whether prisoners should be eligible for diversion without understanding what types of programs are contemplated.

Duration of process

QLS supports the current drafting of Clause 40 insofar as it does not require the accused to enter a plea of guilty. QLS notes that this may result in a protracted diversion process that will require close monitoring and may require further refinement.

Early intervention and education should occur as close in time to the offending as possible. Relatively quick finalisation of matters also makes participation in the scheme more attractive to defendants.

As drafted, where the court is satisfied at the first court date that the defendant meets the eligibility criteria set out in proposed s 135C, the scheme provides for the court to make an order and grant an adjournment of at least 14 days for a suitability assessment to occur (s 135E(3)),

after which the approved provider reports back to the court within 14 days or a longer period allowed by the court (s 135G(2)). That is, it is approaching at least one month before the defendant's suitability is determined.

Once suitability is determined, the court may make an order for the diversion program to be completed within a period of not more than 1 year (s 135I(5), with the court empowered to adjourn the matter for not more than 1 year – s 135J. The order may also be extended - s 135L).

All things going well, the diversion order ends when a notice of completion is given to the registrar of the court, though it is unclear whether a further mention is required at this stage (s 135N).

This can be contrasted with the drug diversion scheme where the accused's suitability is assessed before or, on the morning of, the first mention, a plea of guilty is entered and the defendant is placed on a good behaviour bond conditioned on a recognisance and completion of an approved program within a certain amount of time. Only if the bond is breached or program not completed does the matter return to court for the defendant to be resentenced. This is a lot simpler than keeping the matter 'on the books' while suitability is assessed and the program is undertaken.

While we appreciate the significant differences between drug offences and domestic violence, we are concerned that the additional court appearances and long timeframe will make the diversion scheme unattractive and therefore result in fewer defendants receiving necessary intervention and education.

Types of programs and resourcing

It is difficult to comprehensively comment on the diversion scheme (including the duration of the process) without additional information about the types of programs that are contemplated. If the intention is to approve existing men's behaviour change programs, significant attention must be given to the level of resourcing required to ensure that such programs are available, particularly in rural, regional and remote areas. Such programs are long (eg 27 weeks) and generally only have defined intake points, meaning that it can take several months before a program can be commenced.

Other comments

If the scheme is enacted in its current form, we recommend that the scheme be reviewed after an initial period of operation of 12 or 24 months.

Clause 46 – Facilitation offence - Insertion of new s 179A

QLS is concerned that the drafting of proposed s 179A(1)(b) is not sufficiently clear. The drafting requires that the domestic violence behavior engaged in by the person (set out in proposed s 179A(1)(a)) is engaged win with the intent of aiding the respondent to the order, notice or conditions.

There is no specificity regarding what the person is aiding the respondent to do – does it relate only to aiding the respondent to commit further domestic violence or to aiding them in legal proceedings or otherwise. The broad wording may criminalise conduct that is not intended to be captured. For example, a person who is an occupier of premises may provide CCTV footage

of an incident between the respondent and aggrieved to the respondent for the purpose of defending proceedings against them, where the respondent is themselves prohibited from recording the aggrieved.

We suggest that paragraph (b) should be clarified as follows:

> *the domestic violence behavior is engaged in with the intent of aiding the respondent to the order, notice or conditions* *to commit or continue to commit domestic violence against the aggrieved or named person*

Clause 49 – Amendment of s 60 DFVP Act

Clause 49 amends s 60 to provide that the standard conditions on a domestic violence order introduced by clause 48 do not prohibit a respondent from, in proposed 60(1A)(b) asking another person, including a lawyer, to contact or locate the aggrieved or a named person for a purpose authorized under an Act.

While we recognized that this drafting follows existing s 60(1)(b), we are concerned that *another person* is too broad and may extend to friends or relatives of the respondent contacting or locating an aggrieved (under the guise of trying to arrange mediation, for example) where this is not intended. We recommend that consideration be given to specifically listing the categories of person a respondent may ask to contact an aggrieved or named person or by adding categories of persons as part of an inclusive list that gives a clearer indication of the categories of person contemplated. For example proposed s 60(1A)(b) could read:

> *another person, including a lawyer, counsellor, mediator, family dispute resolution practitioner or parenting coordinator, to contact or locate the aggrieved or a named person for a purpose authorized under an act.*

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on (07) [redacted].

Yours faithfully

Chloé Kopilović
President