

1 November 2022

Committee Secretary  
Legal Affairs and Safety Committee  
PARLIAMENT HOUSE QLD 4000

By email: [lasq@parliament.qld.gov.au](mailto:lasq@parliament.qld.gov.au)

Dear Mrs O'Sullivan,

RE: Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022

Thank you for the opportunity to provide feedback on the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022. Women's Legal Service Queensland (WLSQ) appreciates the opportunity to provide feedback on these important proposed changes.

WLSQ proactively advocates for cultural and legislative change to end violence towards women, and to represent the voices of those who identify as women in Queensland who experience domestic and family violence.

WLSQ supports the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022, ('the Bill') and its stated policy objectives.

More detailed information in relation to the specific amendments is provided below.

#### Non-taskforce first report related amendments

WLSQ welcomes the proposed update in sexual offence terminology in relation to existing phrases used in the Criminal Code. WLSQ sees this replacement as being in keeping with community understanding of sexual behaviour, and notes the outdated assumptions, prejudices and ideas embedded in phrases like "carnal knowledge", and "maintaining a sexual relationship with a child".

WLSQ supports the explicit expansion of the standing provision of a counselled person in section 14L of the Evidence Act.

#### Amendments to the Criminal Code

##### Unlawful Stalking

WLSQ commends the incorporation of forms of stalking which include current forms of surveillance and technological advances.

##### S359A and B

WLSQ supports the intention to modernise and broaden the definition of 'Unlawful Stalking' to "Unlawful stalking, intimidation, harassment or abuse", however, is concerned about the potential unintended consequences of an amendment to the title of the offence.

There is a risk that if the title 'Unlawful Stalking' is amended to include "intimidation, harassment or abuse", that courts, the Queensland Police Service, and prosecuting authorities might infer that direct intimidation, harassment or abuse are the target behaviours of the offence and read down the seriousness of the other examples of behaviour such as loitering, watching, and contacting a person.

To mitigate this risk, WLSQ suggests either leaving the term "unlawful stalking" as it is in the heading and title of the section, and including the words "intimidation, harassment or abuse", in section 359B (c), or explicitly including a sub-section which clarifies that the heading is not intended to limit the operation of the section (in a similar, but not identical, way to the proposed clause 229B (9A) in the Bill).

### S359B (a)

WLSQ would support further changes to the elements of the offence of unlawful stalking. The proposed amendments do not alter the first element of the offence, being "... conduct (a) **intentionally directed** at a person (the stalked person)".

As explored in the cases of *Mc Nicol*<sup>1</sup>, and *Gibson*<sup>2</sup>, the first element of unlawful stalking can be difficult to prove. It is likely that this difficulty will increase where the offensive conduct relates to the broad publication of material (s359B(c)(iva)).

To address this issue, WLSQ proposes that the first element of 'Unlawful Stalking', be amended to words that have the following effect:

"... conduct (a) intentionally directed at, or that is likely to cause, offence to, or harassment or intimidation of, a person (the stalked person)"

The phrase "likely to cause" already appears in the criminal code in relation to a number of offences, most relevantly in the offence of Threatening Violence (s75).

### S349B (c)

WLSQ recommends that the list of acts which fall into the category of unlawful stalking should include "harassment or pressure for ongoing sexual contact", or similar, to capture behaviour where an accused harasses or coerces a victim in relation to ongoing sex or sexual contact.

WLSQ is aware of circumstances where perpetrators keep intimate images and threaten to publish these if sexual contact is not continued, or where a perpetrator pesters the victim for sex and threatens to hurt themselves if sex is withheld. While the consent laws are technically structured to only include consent which is freely and voluntarily given, the practical experience of our clients is that perpetrators are rarely charged with sexual offences in these situations. As such, there is an opportunity to give greater effect to the broader legislative intent by explicitly including this behaviour in unlawful stalking and providing a clear message to victims and perpetrators that manipulating someone for ongoing sexual contact is a form of stalking, intimidation, harassment, or abuse.

## Domestic Violence history

WLSQ is conceptually supportive of providing the court with a full picture of a respondent's criminal and domestic violence history to help decide whether an order is needed and to assist in best tailoring the conditions to keep the victim safe. We are

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<sup>1</sup> *McNicol v QPS* [2015] QDC 39 at 18 to 25

<sup>2</sup> *Gibson v Golding* [2011] QDC 271

concerned about the potential consequences of this change for those women who are misidentified as respondents in domestic and family violence matters.

WLSQ is aware of many women, including First Nations women and CALD women, who are misidentified as respondents and, often because of their acute vulnerability, consent without admissions to orders. There is a risk that the use of this history might compound their misidentification in the absence of other reference material. To mitigate this risk, WLSQ proposes that the disclosure provision be broadened, and that specific material be included in the Magistrates Court Benchbook.

### Disclosure provision

As drafted in the proposed Bill, s590(AH)(4) is limited to orders made against a person. WLSQ proposes that the scope be broadened to orders made against a person or “naming the person as an aggrieved”. This change would provide broader context for the court, as, in many, but not all, cases, misidentified respondents will also be named as an aggrieved party. WLSQ notes that the drafters contemplated the need for the disclosure of other orders, specifically including the following observation:

“The defence might for example, seek the disclosure of or seek to rely upon orders where the accused person is the aggrieved.”<sup>3</sup>

While this avenue would exist, it is largely reliant on a defendant being legally represented. It is unlikely that an unrepresented defendant would have the skills and knowledge necessary to seek such an order. Given this context, and the likely impact being on those already disadvantaged and vulnerable, it is preferable to enshrine the obligation for disclosure in the legislation. This obligation will likely prove less onerous post the implementation of the Bill and the resultant reduction in cross-applications and orders.

### Magistrates Court Benchbook

In addition to broadening the disclosure provision, the Magistrates Court Benchbook ought to be updated to include content similar to the proposed Jury Directions in s103Z, and further, information about the misidentification of respondents, the gendered nature of domestic and family violence, and the dangers of relying on the existence of an order by consent alone in future determinations.

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

In relation to the proposed amendment of ‘behaviour’ at section 8 of the Domestic and Family Violence Protection Act 2021 (“DFVP Act”), to include “, or a pattern of behaviour,” WLSQ is concerned that triers of fact and prosecutors will continue to focus on incident-based violence, albeit a number of incidents – as opposed to the dynamics of the relationship and the power imbalance.

WLSQ notes that the objective of the Domestic and Family Violence Protection Act was always to focus on abuse which created or exploited a power imbalance:

*“... a person being subjected to an ongoing pattern of abusive behaviour by an intimate partner or family member. This behaviour is **motivated by a desire to***

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<sup>3</sup> Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022, Explanatory Notes page 5

*dominate, control and oppress and to cause fear. Although any act of aggression in a relationship is unacceptable, domestic violence refers to this particular type of abuse. It is this type of abuse that is the focus of the bill*<sup>4</sup>. (Emphasis added)

To effectively reflect the original intentions of the government and the DFVP Act, WLSQ recommends that section 8 (1A) of the DFVP Act, be amended as follows:

- (1A) Behaviour, or pattern of behaviour, mentioned in subsection (1) --
- (a) may occur over a period of time; and
  - (b) may be more than 1 act, or a series of acts, that when considered cumulatively is abusive, threatening, coercive or causes fear in a way mentioned in that subsection; and
  - (c) is to be considered in the context of the relationship between the first person and the second person as a whole, **with particular reference to power, control and dependency**

This addition reflects the themes of s103Z and is likely to create a greater focus on the pattern and consequences of abuse rather than isolated incidents.

## Cross Applications

WLSQ is very supportive of the amendment to reduce the ability for perpetrators to use the DFVP Act as a means of continuing to control and intimidate victims. Of critical importance is the inclusion of the legislative guidance for magistrates included in the new proposed s22A.

## Service

WLSQ supports the amendment to provide for substituted service and is encouraged at the prospect that fewer respondents will be able to avoid service. We note that the current drafting still requires the service to be undertaken by a police officer. Given the volume of orders made and challenges associated with service, WLSQ suggests the broadening of parties able to effect service, for example a 'police liaison officer' who is trained to affect service on a party.

## Amendments to the Evidence Act

### Expert evidence

While WLSQ is supportive of the ability for courts to receive expert evidence in relation to domestic violence, we note the need to ensure that this evidence is limited to the areas set out in s103CC (2)(a) and (b) and not expanded to allow evidence either from unqualified witnesses or in relation to other topics, such as the bringing of complaints, relationship evidence generally, or community attitudes. This concern arises from the broader public engagement on the issue. See, for example, the expert evidence referred to in the submission to the Women's Safety and Justice Taskforce made by the Australian Brotherhood of Fathers<sup>5</sup>. The permissibility of expert evidence in relation to domestic violence ought to be considered with express reference to the main objects of the Act as set out in section 3 and with a primary focus on ensuring that the justice

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<sup>4</sup> Hansard (6 September 2011, pp. 2775-2778)

<sup>5</sup> Available at [vsyt-submission-australian-brotherhood-of-fathers.pdf \(womenstaskforce.qld.gov.au\)](https://www.womenstaskforce.qld.gov.au/attachment_data/attachment_data/file/123456/vsyt-submission-australian-brotherhood-of-fathers.pdf)

system not be used to further perpetrate abuse or diminish or deny the experience of victims.

### Jury Directions

WLSQ is supportive of the proposed insertions for jury directions in relation to domestic violence and the impact of domestic violence. WLSQ would welcome the inclusion of similar provisions in relation to sexual offences, including the availability of expert evidence and jury directions about the realities of the nature and effect of sexual violence on a person and the range of responses to this kind of offending.

### Amendments to the Penalties and Sentences Act

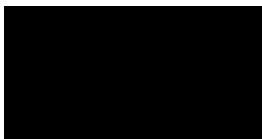
As discussed above in relation to the Domestic and Family Violence Protection Act changes, WLSQ is supportive of the amendment to require the provision domestic violence history in a relevant proceeding. We repeat here our view that this history ought to include details of orders where the accused was an aggrieved.

In relation to the proposed insertion of section 9 (2) (gb), while WLSQ is supportive of the inclusion of the context, our view is that it ought to appear in a different part of the section. Our view is that the current drafting does not appropriately reflect the seriousness of domestic violence and the appropriate weight to be given to it. An alternative would be to include the three sub paragraphs under sub section 9 (d) as follows:

- (d) the extent to which the offender is to blame for the offence; including but not limited to:
  - (i) whether the offender is a victim of domestic violence;
  - (ii) whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender;
  - (iii) whether the offender is, in fact, a perpetrator of domestic violence who is falsely claiming to be a victim of domestic violence and the person in a domestic relationship who is most in need of protection from the other person in the relationship; and

This Bill represents a significant step forward in protecting the rights and freedoms of victims of violence. WLSQ eagerly awaits the report of the committee. If there are any questions regarding the contents of this letter, please do not hesitate to contact us.

Yours faithfully,



Nadia Bromley

CEO, Women's Legal Service Qld