Domestic and Family Violence Protection (Combatting Coercive Control) and Other Legislation Amendment Bill 2022

Submission by Legal Aid Queensland

2 November 2022

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Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to provide feedback on the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (the Bill) which initiates some of the recommended reforms stemming from the Women's Safety and Justice Taskforce's (WSJT) *Hear her voice: addressing coercive control and domestic and family violence in Queensland* report. LAQ supports in principle the underlying intentions of the reforms recommended by the WSJT.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and is required to give this "legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ's services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ always seeks to offer policy input that is constructive and is based on the extensive experience of LAQ's lawyers in the day-to-day application of the law in courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

The Bill will have an impact on LAQ clients, service delivery and resources. Much of the consequential costs and increased demand on our criminal law services stemming from the Bill will be costs over and above LAQ's current financial budget and have to date not been provided for in any additional funding. If this is not addressed as part of implementation of the Bill, LAQ will need to consider reducing or ceasing some existing services to accommodate these additional costs.

We have attached a table of issues identifying the matters in the Bill of most significance to our organisation. However, it is our view clauses 59 and 60 of the Bill amending *Evidence Act 1977* Part 2, Division 6 provisions in relation to protected witnesses will have the most significant financial impact on LAQ.

The existing section 21O of Division 6 allows a court to make an order requiring the provision of legal representation through LAQ for unrepresented defendants wanting to cross examine persons determined by definition to be protected witnesses. Because of the current wording of section 21O(2) and (4), once the court rules a person to be a protected witness, LAQ has no discretion and is obliged to provide legal representation (regardless of merit or any existing LAQ means test). However, due to the current wording of section 21L limiting the application of the division to higher court matters, and our current funding arrangements funding all District and Supreme Court representation in criminal proceedings provided a client meets the LAQ means test, LAQ is only occasionally called upon to fund this representation. In a period of 1 January 2021 – 30 April 2022, LAQ recorded 33 grants of aid stemming from a section 21O order.

Expanding the category of offences to which the protected witness provisions apply to include domestic violence offences (contraventions and the broader category of offences not strictly requiring the existence of a Domestic and Family Violence Protection order), and applying the Division 6 provisions to summary proceedings for that extended category of protected witnesses (that is, to summary trials, committal hearings and some contested sentences in Magistrates Courts throughout Queensland) will require LAQ to provide an entirely new service to a large number of defendants not previously entitled to be legally aided.

To manage the delivery of our services across Queensland in accordance with government priorities as efficiently as possible within our existing budget and having regard to obligations under the *Legal Aid Queensland Act 1997*, LAQ applies funding and service guidelines and policies to each application for legal aid. This includes means testing of most of our clients, to ensure we are able to service Queensland's most financially disadvantaged and/or vulnerable members of our community who cannot afford to pay for their legal representation.

We also apply specific guidelines and merits testing to matters that proceed summarily. This ensures that the provision of legal representation is directed:

- to the most financially disadvantaged and vulnerable defendants, and
- those at a real risk of losing their liberty as a result of criminal charges and,
- in summary trials in the Magistrates Courts across the State, which are considered meritorious.

Current court data captures only current matters where defendants are self-representing. On one set of figures provided to LAQ by the Department of Justice and Attorney-General, in the 2020/2021 financial year over 1400 cases involved the listing of a summary trial for unrepresented defendants charged with a contravention and/or domestic violence offence. The period from July 2021 – March 2022 involved a similar number. Each of these situations would involve at least one protected witness if the matters proceed to trial as listed. It is expected that the proposed amendment will generate additional demand which cannot be measured or anticipated from current data.

In our experience with the Commonwealth family violence and cross-examination scheme for family law proceedings, the forecasting substantially underestimated the likely application of the scheme by courts. The Commonwealth government initially estimated costs, however actual costs have been significantly higher (driven by demand) with costs in the 2021/2022 financial year being in the order of $5 million. Our experience in this scheme shows us that with new services, without means and merit test funding criteria, there is a significant risk that previously unexpressed and unmeasured demand which cannot be predicted will cause a significant service impost and cost to LAQ.

It is noted that the commencement of the provisions relating to these amendments is on proclamation.[1] To give proper effect to the intent of Recommendation 55 of the *Hear her voice* report 1, without impacting on other services provided to financially disadvantaged and vulnerable clients, LAQ suggests that funding for at least 2000 cases (at the current scale of fees for summary trials) be provided prior to the proclaiming of this particular aspect of the reforms. The number of cases is based upon a projection for a full year given the Court statistics only covered a period of

[1] As per clause 2 of the Bill.

nine months within the 2021/2022 financial year. Furthermore, LAQ suggests a reimbursement model for any demand over and above the initial number of cases in each financial year. Administrative and overhead costs related to the implementation and on-going management of this scheme will be needed as the administrative burden of managing it will be significant and would place additional pressure upon our existing and stretched resources currently available to process grants of legal assistance.

In addition to managing commencement in line with the full funding of these reforms, similar to the other recent amendments to the *Evidence Act 1977* (relating to the use of body worn camera footage as evidence-in-chief in certain proceedings and the intermediaries scheme), the reforms could be stepped out initially by way of a pilot in a suitable jurisdiction. This would give all stakeholders the opportunity to develop appropriate processes and responses to the reform and to better gauge or forecast the prospective cost of the expansion of the scheme. Even with a pilot approach, LAQ would require adequate funding to ensure that budgets for existing services are not adversely impacted. Should a pilot approach be contemplated, this would require the inclusion of a legislative framework to support such a pilot into the Bill.

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Attachment 1

Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022		
Clauses	**Technical/Legal Feedback on Relevant Clauses**	**Feedback on Operational Impacts**
Amendments to the Criminal Code		
Updating Sexual Offence terminology (Clauses 7-17)	**LAQ supports the inclusion of the reference to "mouth" in the definition of penile intercourse as set out below:** Section 6— *omit, insert*— **6 Meaning of *engage* in *penile intercourse*** (1) ***Penile intercourse*** is the penetration, to any extent, of the vagina, vulva ~~or~~ anus, ***or mouth*** of a person by the penis of another person. (2) A person ***engages*** in penile intercourse with another person if— a) the person penetrates the vagina, vulva, ~~or~~ anus ***or mouth*** of another person with the person's penis; or b) the person's vagina, vulva ~~or~~ anus ***or mouth*** is penetrated by the penis of another person.	
Amendments to the Unlawful Stalking provisions - Recommendation 52 **(Clauses 18-25)**		In our experience, clarification or expansion of definitions within offences results in an increase in charges and therefore matters before the courts. Consequently, this will result in an increase in demand for grants of aid for these types of offences and consequential cost implications for LAQ. The additional circumstance of aggravation increasing penalty to 7 years will remove some offences currently dealt with within the Magistrates Court (through 552B) into the District Court. This will see

		a further cost implication for LAQ with additional District Court grants of aid. Changes to the restraining order parameters may see greater litigation on the issuing of such orders. Longer orders with greater penalties will also lead to greater breach/contravention proceedings. Clause 23 and insertion of ss.359F(6B) will increase the complexity of restraining order proceedings (particularly in cases where no DFVPO). These separate civil proceedings may not be covered by current grants of aid could be heard separately to the sentence proceeding.
Amendments to the DFVPA		
Principles for administering the DFVPA, amendment of section 4 **(Clause 30)**	LAQ supports the amendment as it assists with the identification of the person in most need of protection and that domestic and family violence is a pattern of behaviour.	
Broadening/expanding definition of "domestic violence" **Recommendation 53** **(Clauses 31 - 33)**	LAQ supports these amendments but notes it could see increase in complexity of considerations for the court at first instance in the DV applications.	Similar to the commentary above regarding amendments to unlawful stalking, broadening, clarifying and expanding the definition in our experience is likely to see an increase in orders made with an increase in conditions. This will have the flow on effect of increasing contraventions and therefore increasing criminal proceedings. (additional Magistrates Court events; potential increase in demand for grants of aid for summary matters; more matters before the BWC footage pilots)
Person most in need of protection, insertion of new s.22A **(Clause 34)**	LAQ is supportive of the insertion of s22A which provides guidance on how to identify the person in most need of protection.	LAQ is concerned about how this evidence might be gathered and presented at first instance, especially with clients that are culturally and linguistically diverse, or clients that have recently experienced trauma.
Access to Respondent's criminal	LAQ is supportive of new s36A and 90A so that the Court must be given	

history, insertion of new s.36A, s.90A and s.160A **(Clauses 35, 44 and 51)**	the respondent's criminal history and domestic violence history. LAQ has concerns as to at what point in the proceedings this becomes an exhibit so that all parties can view the material. However, s.160A provides clarity on the process and may resolve these issues.	
When court may make Protection Order, amendment to s.37, s.43 and s.45 **(Clauses 36, 41 - 42)**	LAQ is supportive of amendment of s37; s43; s45; to include the consideration of the respondent's criminal history and domestic violence history when deciding to make a final or temporary protection order or vary a protection order.	
Hearings of applications and cross applications before the same court, amendment of s.41C, s.41D, insertion of new s.41G **(Clauses 37-39)**	LAQ is supportive of amendment to s41C; s41D and s41G as the amendments ensure the applications are heard before the same court to ensure appropriate consideration of the facts to evaluate the person in most need of protection in cross-applications.	
Clauses 45-49	LAQ supports these amendments.	
Reopening particular proceedings, insertion of s.157A and s.157B **(Clause 50)**	LAQ is supportive of the insertion of s157A; reopening of a proceeding to provide the respondent natural justice if the respondent was served by substituted service and is not reasonably aware of the order and was not present at court when the order was made. This division places the onus on the respondent to prove they have not been provided natural justice before the court may reopen the proceedings. LAQ supports that the proceedings will only be reopened with the leave of the court to prevent systems abuse. In relation to the new s.157B, LAQ recommends caution to be exercised when stay of a TPO or DVPO as it may compromise the Aggrieved's safety. The Respondent should be required to establish that they would be harmed or prejudiced in some	LAQ holds concern that there is nothing to preserve the welfare of the Aggrieved in accordance with the objects and principles of the legislation. These provisions are silent on whether the aggrieved will be informed of the Stay and how this will impact on the safety of the person in most need of protection. It is unclear as to whether this remedy is available in relation to both TPO's or DVO's or both. LAQ recommends an explanation be included with examples in relation to the new sections.

	significant way if the stay is not ordered, which consideration should prevail. The paramount consideration should always be the safety of the Aggrieved.	
Service and substituted service, amendment of s.184, insertion of new 184A – Recommendation 60 (Clauses 52 and 53)	LAQ supports the amendment of s184 and the insertion of s184A to provide a mechanism for substituted service however it should be noted that Police struggle with the existing service requirements.	Substituted Service may add a further complexity to the process and an increased opportunity for error and delay in proceedings which provides uncertainty for the applicant/ aggrieved. LAQ holds concerns regarding the police may be reluctant to proceed with a contravention of the protection order if the Respondent has been served in a substituted manner.
Amendments to the *Evidence Act 1977*		
Protected Counselling Communications, amendment to s.14L **(Clauses 58 and 69)**	Amendment to s14L standing of counsellor and counselled persons, provide clarity about the role of the counselled person when an application is made to access their protected counselling communications. These amendments allow counselled persons to participate and advocate for the protection over their counselling communication in criminal law and domestic violence proceedings. They are in line with the evidence and recommendations that acknowledge the importance of protecting these counselling communications and limiting the harm to victims and alleged victims of sexual assault offences.	
Expansion of XXN of Protected Witnesses **Recommendation 54 and 55** **(Clauses 59 and 60)**	Clause 60 amendments to s.21M by inserting s (3) is unclear and potentially confusing. May be preferable to simply say what is meant to be affected rather than create another term within the legalisation related to domestic violence. It is not clear what is intended by the new s21(3)(b).	Please refer to main body of our submission regarding significant operational issues associated with these amendments.

Admissibility of Evidence of Domestic Violence **Recommendation 63 and 64 (Clauses 63-70)**	Clause 64 – 103CA (d), (e) and particularly (f) are imprecise. S (f) is particularly convoluted. Lack of precision could lead to the admission of highly prejudicial evidence that could lead to the discharging of juries and retrials (both through aborted trials and successful appeals). It is important to be linked to the matters in issue in the proceedings otherwise there is a risk of admission of irrelevant, prejudicial evidence.	LAQ currently recognises through existing grants of aid expertise provided by psychiatrists, psychologists, social workers, neuropsychologist and other medical specialists. Consideration would need to be given to additional expert categories of grants of aid in light of this amendment and potentially the funding of those not previously funded. This is likely to have additional cost implications to LAQ.
Amendments to the *Penalties and Sentences Act 1992*		
Impact of domestic violence on offender and when it should be mitigating factor in sentencing **Recommendation 66 (clause 80)**	It is anticipated these amendments to section 9 of the PSA will lead to delays in proceedings and additional court dates to enable a court to be satisfied of the factors set out in clause 80, in particular those set out in (gb)(ii).	LAQ anticipates the establishment of these factors, in particular those outlined in the new ss(10B) at times will require evidence, including an opinion from an expert in order to be able to satisfy a court of the "effect of the domestic violence" and the commission of the offence being "the extent to which the commission of the offence is attributable". This will not only lengthen the time for sentence proceedings, but also increase costs to LAQ to fund reports to substantiate such claims. It is highly unlikely a sentencing court would place any weight on unsubstantiated claims of such attribution.


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