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Office of the President

3 November 2022

Our ref: [HS/BT:DFV/CrLC]

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

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

Dear Committee Secretary

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 (**Bill**). The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

Executive Summary/Key Points:

- QLS does not support the adoption of the term *penile intercourse* because of its discriminatory effect.
- QLS generally supports the changes to the *Domestic and Family Violence Protection Act* save for the high threshold for making cross orders.
- Generally, our Domestic and Family Violence Committee supports amendments that enact the intent of the Women's Safety and Justice Taskforce's recommendations.
- Our Criminal Law Committee has significant reservations regarding legislative changes that are unnecessary, reduce flexibility and may result in unintended consequences.
- QLS has significant concerns about the current drafting of the provisions regarding jury directions.

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

PART 3 – AMENDMENT OF *CRIMINAL CODE 1899*

Clause 9 Replacement of s 6 (Carnal knowledge)

We recommend further consideration be given to offences which use the term 'carnal knowledge'/proposed new term 'penile intercourse'. We note the Bill proposes to reinforce the act of penile penetration in relation to those offences in the Criminal Code that currently use the term

'carnal knowledge'. This includes (among others): bestiality;[1] carnal knowledge with or of children under 16;[2] and, incest.[3]

The necessity for penile penetration in these offences is out of step with every other Australian jurisdiction, all of which have replaced the suite of offences using the term 'carnal knowledge' with gender neutral language that captures a broader scope of conduct.[4] This broader scope of conduct includes penetration by: a penis; the body part of a person other than a penis; or, an object.

The Society considers the continued narrow requirement for penile penetration under certain offences in the Criminal Code to be discriminatory in two ways: first, it suggests certain offences (such as incest) can only be perpetrated by male offenders; and second, it has the potential to leave female offenders open to more serious charges (such as rape) because they are unable to be charged with offences using the term 'carnal knowledge'/'penile penetration'. For example, where an 18 year old female offender has sexual intercourse with another female under the age of 16, the female offender will not be able to have a charge of rape downgraded to a charge of carnal knowledge with (or penile penetration of) a child under 16.

Accordingly, we recommend against amending the definition of 'carnal knowledge' without also reviewing its use throughout the Criminal Code.

Clause 28 – Insertion of new pt 9, ch 106, s 757

There appears to be an error in s 757(1) where *section 359F(10)* should read *section 359F(11)*.

PART 4 – AMENDMENT OF *DOMESTIC AND FAMILY VIOLENCE PROTECTION ACT 2012*

Clause 34 – Insertion of new s 22A

New subsection 22A(2) provides the court must consider the stated list of factors in deciding which person in a relevant relationship is the person most in need of protection. QLS recommends the provision be re-drafted to ensure the courts have sufficient discretion and appropriate flexibility to consider all factors relevant to the particular circumstances of the case. At a minimum, the section should provide that courts may have regard to any other relevant factors.

Clause 38 – Amendment of s 41D (Hearing of applications – cross applications before different courts)

The proposed new subsection (3) appears to be missing the word *together* after applications.

Clause 39 – New s 41G (Deciding cross applications)

QLS is concerned that the threshold for making cross orders is too high. We acknowledge recommendation 56 of the Taskforce, which provided that "cross orders should only be made if the court is satisfied that there are exceptional circumstances where there is clear evidence that both parties are equally in need of protection in the relationship", and that the intention is to protect victims from having cross orders made against them.

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[1] *Criminal Code 1899* (Qld) s 211.
[2] *Criminal Code 1899* (Qld) s 215.
[3] *Criminal Code 1899* (Qld) s 222.
[4] *Crimes Act 1928* (Vic) s 35A 'sexual penetration'; *Crimes Act 1900* (NSW) s 61H 'sexual intercourse'; *Criminal Code Act Compilation Act 1913* (WA) s 319(1) 'sexually penetrate'; *Crimes Act 1900* (ACT) s 50(1) 'sexual intercourse'; *Criminal Code Act 1983* (NT) s 1 'sexual intercourse'; *Criminal Code Consolidation Act 1935* (SA) s 5(1) 'sexual intercourse'; *Criminal Code Act 1924* (Tas) s 2B 'sexual intercourse'.

QLS recognises that it is not uncommon for respondents to inappropriately bring cross orders as a form of systems abuse.

We also acknowledge the relationship should be viewed as a whole and that misconceptions around 'mutual violence' must be dispelled. However, our members highlight there may be cases where it remains appropriate to issue cross orders because both parties engage in domestic violence; for example, in circumstances where substance abuse by both parties or parenting disputes give rise to mutually abusive behaviour. In such instances, any disparity in behaviour could be dealt with by way of different conditions in the orders. For example, one party may receive a 'standard' order, while the other may be subject to additional conditions.

The requirement that there be exceptional circumstances may have the unintended consequence of discouraging magistrates from agreeing to resolve hearings by the making of cross orders (noting the magistrate has an over-riding discretion to consider any resolution proposed by the parties), resulting in more hearings and in some instances further strain on co-parenting relationships.

In appropriate cases, cross orders can also be helpful in minimising abuse where they prevent each party from initiating contact or responding to the other. Similarly, while we acknowledge the Taskforce took a deliberately gendered approach to its investigation of cross applications, the proposed threshold for making cross orders may not account for relationships where that gendered analysis is not applicable (for example, in gay or lesbian relationships).

Clause 49 – Amendment of s 157 (Costs)

QLS notes the amendment to s 157(2) and supports the intent of the amendment to discourage systems abuse.

QLS submits that it would also be appropriate to consider amending s 157 to enable aggrieveds to apply for costs against respondents in certain limited circumstances.

PART 5 – AMENDMENT OF *EVIDENCE ACT 1977*

Clause 64 Insertion of new pt 6A, div 1A

The Domestic and Family Violence Committee is supportive of amendments that enact recommendations 63 and 64 of the Taskforce's first report. The importance of admitting relevant evidence of domestic violence that increases juries' and judicial officers' understanding of domestic violence is recognised and discussed in the Taskforce's report and the Domestic and Family Violence Committee considers this will be particularly important where coercive control is an issue in the proceedings. [5]

<u>103CA What may constitute evidence of domestic violence</u>

The QLS Criminal Law Committee is concerned that the drafting of this section is too broad, and lacks clarity and certainty. This lack of precision may lead to the admission of highly prejudicial (but not highly relevant) evidence that could result in the discharge of juries and retrials. Evidence must be relevant and linked to matters in issue in the proceedings, otherwise there is a risk of admission of irrelevant and prejudicial evidence. Accordingly, we recommend that proposed subsections 103CA(1)(d)-(f) be significantly redrafted for clarity and certainty.

<u>103CB Evidence of Domestic violence</u>

[5] See discussion on page 696 of *Hear her voice – Report one*.

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The Criminal Law Committee considers the drafting of this section to be too broad.

Currently, s 132B of the Evidence Act allows for relevant evidence of the history of the domestic relationship between a defendant and complainant to be admitted in criminal proceedings. The operation of s 132B is limited to offences in chapters 28 to 30 of the Criminal Code. The sole test of admissibility of relationship evidence under s 132B is relevance to the issues at trial.[6] The evidence is not subject to the common law test for admissibility for propensity evidence.[7] As such, evidence of domestic violence between the defendant and complainant (in relation to an offence in chapters 28 to 30 of the Criminal Code) is already admissible where it is relevant to a fact in issue.

Further, it was explained in *R v PAB*[8] that s 132B does not place limits on the admissibility of particular evidence in proceedings for other offences that fall outside Chapters 28 to 30 of the Criminal Code. The current law permits the reception of evidence of domestic violence in a relationship where it is relevant to a fact in issue and the admissibility of such evidence is determined on a case by case basis, which allows flexibility and enables the law to develop with, and take into account, community standards.[9] In submissions to the Women's Safety and Justice Taskforce (**Taskforce**), legal stakeholders, including QLS, Legal Aid Queensland and the Bar Association of Queensland (**BAQ**), highlighted that evidence around the nature of a relationship is already admissible in Queensland.[10]

Nonetheless, cl 64 of the Bill proposes to insert a new s 103CB into the Evidence Act, to remove the restriction that such evidence can apply only to offences in chapters 28 to 30 of the Criminal Code. This is consistent with the Taskforce's recommendation 63 of its first report, *Hear her voice – Report one – Addressing coercive control and domestic and family violence in Queensland.*[11]

However, new s103CB also makes evidence of domestic violence admissible whether that evidence relates to the defendant, the person against whom the offence was committed, or another person connected with the proceeding. The Explanatory Notes do not provide any justification or rationale for the expansion of evidence of domestic violence beyond that occurring between the defendant and the person against whom the offence was committed. Nor was this recommended by the Taskforce.

The Criminal Law Committee considers this expansion too broad. Proposed s 103CB opens the possibility of arguments about potential prejudice and probative value of evidence. For example, the prosecution may lead evidence regarding a history of harassing phone calls against a family member

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[6] *Roach v The Queen* (2011) 242 CLR 610, 622.
[7] *Pfennig v The Queen* (1995) 182 CLR 461.
[8] [2008] 1 Qd R 184, 189 [28] (Keane JA; McMurdo P and Muir J agreeing) citing Forbes, *Evidence Law in Queensland* (5th ed, 2004) [132B.2]: Harris, 'Evidence in Queensland – Recent Legislative Changes' (1998) 18 *Queensland Lawyer* 196, 198. Specifically, Keane JA stated:

> It cannot be suggested, however, that section 132B impliedly excludes the admissibility of evidence of the history of the relationship in proceedings for offences defined under chapters of the Criminal Code other than Chapter 28 to Chapter 30. That is because section 132B of the *Evidence Act 1977* does not add 'anything to the common law, which recognises that evidence of a relevant and specific "relationship" between an alleged offender and a complainant is not caught by the rule against "character" or propensity evidence.'

[9] See Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 163-167 [6.210]-[6.225].
[10] Women's Safety and Justice Taskforce, *Hear her voice – Report one – Addressing coercive control and domestic and family violence in Queensland* (Report, 2 December 2022) vol 2, 266-8.
[11] Women's Safety and Justice Taskforce, *Hear her voice – Report one – Addressing coercive control and domestic and family violence in Queensland* (Report, 2 December 2022) vol 1, xx.

in a sexual violence case involving a spouse. Accordingly, the Criminal Law Committee recommends this clause be re-drafted to narrow its intent, and that it be restricted to evidence of domestic violence between the defendant and the person against whom the offence was committed. As discussed above, this would not prevent other evidence being received by the courts where it is relevant to a fact in issue in a proceeding.

103CC Expert evidence of domestic violence

Clause 64 of the Bill also introduces a new s 103CC which provides that expert evidence about domestic violence is admissible in criminal proceedings. Given expert evidence that is relevant and admissible at trial is already routinely admitted, our Criminal Law Committee questions whether new s 103CC is necessary.

103CD Ultimate issue and common knowledge rules abrogated

Clause 64 introduces new s 103CD, which abrogates two common law rules of evidence; namely, that opinion evidence is inadmissible if it (a) answers the ultimate issue for the finder of fact's determination, or (b) relates to a matter of common knowledge.

However, the Criminal Law Committee maintains its previous positions that all evidence should be subject to the usual rules of admissibility. Differing rules of admissibility for different types of evidence is problematic. Expert evidence of this type may have the effect of prolonging proceedings, including by adding an additional layer of expense, complexity/technicality and likely pre-trial litigation. The duration and subject matter for the jury of trials will also be extended. There is also a real risk of creating a trial within a trial regarding conflicting expert opinion.

The BAQ has also identified that where an exemption allows a party to adduce expert evidence which is not otherwise relevant and/or admissible, it may have the unintended consequence of diminishing the probative value of ordinarily admitted expert evidence.[12] The Criminal Law Committee considers the reception of such evidence may distract the jury from its primary task, particularly in circumstances where much of the content is now within the realm of common sense. This position mirrors that of the QLRC, which has previously recommended against a provision authorising the receipt of expert evidence that does not meet the requirements for admissibility at common law.[13] Accordingly, the Criminal Law Committee recommends new s 103CD be deleted to ensure all expert evidence is subject to the same common law rules of admissibility.

Clause 67 Insertion of new pt 6A, div 3

Although jury directions about domestic violence have been embraced by law reform commissions and inquiries around Australia and implemented in some jurisdictions, there is significant debate about the efficiency of jury directions to really address jury members' understandings about domestic and family violence and to dismantle strongly entrenched myths and community views.[14]

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[12] Bar Association of Queensland, Submission to Women's Safety and Justice Taskforce, Discussion Paper 3 (14 April 2022).
[13] Queensland Law Reform Commission, *Review of consent laws and the excuse of mistake of fact* (Report No 78, June 2020) 222 [8.77].
[14] Chantelle M Baguley, Blake M. McKimmie, and Barbara M. Masser, 'Re-Evaluating How to Measure Jurors' Comprehension and Application of Jury Instructions' (2020) 26 *Psychology Crime & Law* 53; Virginia Bell, 'Jury Directions: The Struggle for Simplicity and Clarity' (2019) 14 (2) *The Judicial Review: Selected Conference Papers: Journal of the Judicial Commission of New South Wales*; Louise Ellison and Vanessa E. Munro, "Telling Tales": Exploring Narratives of Life and Law within the (Mock) Jury Room' (2015) 35 (2) *Legal Studies* 201.

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This aside, we make the following comments about the jury directions provisions.

103T Request for direction to jury about domestic violence

The wording of subsection 103T(3), in particular the phrase 'unless there are good reasons for not doing so' is unclear and should be re-drafted. These 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 103T(3) could be redrafted to read: 'The judge may give the jury the requested direction if it is relevant and 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 (for example, new s 103V(2)).

103U Request for direction to jury about self-defence in response to domestic violence

Similarly, subsection 103U(3) should be re-drafted for clarity to ensure the provision is facilitate and not directive, and provides the trial judge with sufficient discretion to ensure a fair trial.

103Z Content of general direction about domestic violence.

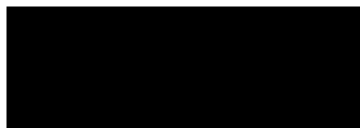
QLS recommends that new s 103Z(1) be amended, for consistency, as follows: 'The judge in a criminal proceeding who is directing the jury about domestic violence generally may, if relevant and in the interests of justice to do so, inform the jury that domestic violence – '.

103ZA Direction about self-defence in response to domestic violence

QLS recommends that new s 103ZA(1) be amended, for consistency, as follows: 'If the judge in a criminal proceeding is directing the jury about self-defence in response to domestic violence, the judge may, if relevant and in the interests of justice to do so, inform the jury that - '. These amendments should also be carried through to new ss 103ZB and 103ZC.

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 [redacted]

Yours faithfully



Kara Thomson
President