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

Submission by the Queensland Youth Policy Collective to the Legal Affairs and Safety Committee of Queensland Parliament

I. Summary

Coercive control is a particularly insidious form of domestic violence. The repeated pattern of abusive behaviour acts to destroy a victim-survivor's autonomy, self-esteem and sense of safety and, as seen in the murder of Hannah Clarke and her children in 2020, is a significant predictive factor for domestic violence homicide.[1] There has been a significant surge recently of jurisdictions across Australia, as well as internationally, criminalising, or looking into criminalising, coercive control.[2] While there is no doubt that significant action is required to address coercive control and the criminalisation of coercive control presents one avenue of doing this, the existing issues plaguing Queensland's criminal justice system raise concerns as to whether the criminalisation of coercive control will achieve its policy objectives without large-scale systematic reform to the criminal justice system.

The Queensland Youth Policy Collective ("**QYPC**") is a strong proponent of the significant action being taken to address domestic violence and believes that the introduction of a coercive control offence will play a key role in allowing for earlier intervention in domestic violence scenarios. However, the QYPC cautions against widening the offence of domestic violence to incorporate coercive control as this may disproportionately affect First Nations Women due to the frequent misidentification of victims as perpetrators.

Key conclusion:

The QYPC supports the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 ("the **Bill**"), but strongly suggests that be coupled with significant reform of the criminal justice system to combat the misidentification of victims and perpetrators and ensure QPS members understand and appropriately respond to situations of domestic violence involving First Nations People.

We support that:

- Clause 35 of the Bill to include criminal histories in other Australian States and Territories.
- Clause 53 stipulate that police liaison officers are able to serve documents on respondents.
- Clause 58 amend s 14L(1)(b) of the *Evidence Act* to grant the counsellor or counselled person standing to participate in proceedings relating to an application to seek leave to compel the production or disclosure of a protected counselling communication.
- s 299B of the Criminal Code (maintain sexual relationship with a child) be amended and replaced with 'persistent sexual abuse of a child'
- The requirement for certain legal documents to be witnessed in-person be reinstated in situations where there is a heightened risk of coercion

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[1] Victorian Aboriginal Legal Service. (2022). *Addressing Coercive Control Without Criminalisation: Avoiding Blunt Tools that Fail Victim-Survivors*. pg. 4. Retrieved from https://www.vals.org.au/wp-content/uploads/2022/01/Addressing-Coercive-Control-Without-Criminalisation-Avoiding-Blunt-Tools-that-Fail-Victim-Survivors.pdf
[2] Ibid

II. Effect of the Bill on victims being misidentified as perpetrators

As highlighted by the Women's Safety Justice Taskforce's *Hear Her Voice – Women and girls' experiences across the criminal justice system (Report two)*, the criminal justice system is rife with systematic issues in how it responds to victim-survivors of domestic violence, particularly those from First Nations, culturally and linguistically diverse and other diverse backgrounds.[3] These concerns have been amplified in the testimonies coming from the Independent Commission of Inquiry into Queensland Police Service's Responses to Domestic and Family Violence which has unveiled systematic and widespread racist and sexist behaviour within the Queensland Police Service.[4] The introduction of a coercive control criminal offence does offer an opportunity to intervene in the early stages of domestic violence, however, it does also introduce the potential of net-widening and harm to diverse, vulnerable communities.

Victim-survivors of domestic violence are frequently misidentified as perpetrators of domestic violence, whether through misinterpretation of the situation by the police responding as well as the deliberate actions of the abuser.[5] The risk of misidentification is amplified for victim-survivors who may be reluctant to talk to police, are experiencing a heightened emotional state at the time of police intervention, have a prior criminal history or suffer from mental health or addiction issues.[6] Where a victim-survivor does not fit the idea of an "ideal victim" (someone who is calm and collected, cooperative with police, can clearly articulate what has happened and has no criminal history or pre-existing issues) they can be misidentified as the preparator of domestic violence. First Nations women are significantly more likely to be misidentified as perpetrators of domestic violence, both as the result of the risk factors outlined above and not fitting into this "ideal victim" archetype as well as the result of racism and bias among police and the criminal justice system.[7] With these considerations, it is clear to see why the misidentification of victim-survivors in domestic violence incidents is concerning.

The introduction of a criminal offence is a much-needed reform. Arguably, at this time, Queensland does not have any other viable mechanisms to address and intervene in coercive control through the criminal justice system. However, the introduction of a new criminal offence which is inherently difficult to define and identify, combined with the current risk factors for misidentification, raises concerns about how it may have a net-widening effect.[8] As the criminal justice system currently stands, a criminal offence of coercive control without accompanying systematic change could result in more First Nations people, particularly women, being misidentified as preparators of domestic violence and

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[3] Women's Safety and Justice Taskforce (2022). *Hear her voice – Report two – Women and girls' experiences across the criminal justice system.- Volume 1.* pg. 153. Retrieved from https://www.womenstaskforce.qld.gov.au/publications

[4] Gillespie, Eden. (2022). *Queensland police misidentify domestic violence victims as attackers, inquiry told.* Retrieved from https://www.theguardian.com/australia-news/2022/jul/19/queensland-police-misidentify-domestic-violence-victims-as-attackers-inquiry-told

[5] Nancarrow, H., Thomas, K., Ringland, V., & Midini, T. (2020). *Accurately identifying the "person mist in need of protect" in domestic and family violence* law. pg. 9. Retrieved from https://anrowsdev.wpenginepowered.com/wp-content/uploads/2019/10/Nancarrow-PMINOP-RR.3.pdf

[6] Victorian Aboriginal Legal Service. (2022). *Addressing Coercive Control Without Criminalisation: Avoiding Blunt Tools that Fail Victim-Survivors*. pg 25-26. Retrieved from https://www.vals.org.au/wp-content/uploads/2022/01/Addressing-Coercive-Control-Without-Criminalisation-Avoiding-Blunt-Tools-that-Fail-Victim-Survivors.pdf

[7] Victorian Aboriginal Legal Service. (2022). *Addressing Coercive Control Without Criminalisation: Avoiding Blunt Tools that Fail Victim-Survivors*. pg 25-26. Retrieved from https://www.vals.org.au/wp-content/uploads/2022/01/Addressing-Coercive-Control-Without-Criminalisation-Avoiding-Blunt-Tools-that-Fail-Victim-Survivors.pdf

[8] Australian Women Against Violence Alliance (2021). *Criminalisation of Coercive Control: Issues Paper*. Pg. 7-8. Retrieved from https://awava.org.au/wp-content/uploads/2021/01/FINAL_-2021_-AWAVA-Issues-Paper-Criminalisation-of-Coercive-Control.pdf

being brought into the criminal justice system.[9] Being misidentified as a perpetrator can have disastrous, and in some cases deadly, consequences for First Nations women who are at heightened risk of death in custody and will have to endure the lifelong impacts that a criminal offence or a domestic violence protection order could have on their family, career prospects, mental health and life trajectory.[10]

The Queensland Youth Policy Collective wants to make clear that they are a strong proponent of the significant action being taken to address domestic violence and believes that the introduction of a coercive control offence will play a key role in allowing for earlier intervention in domestic violence scenarios. However, to introduce a new criminal offence that could contribute to the misidentification of victim-survivors whilst simultaneously acknowledging the systematic issues the criminal justice system, and particularly the Queensland Police Service, currently have in the interactions with victim-survivors of domestic violence and marginalised groups, presents a vital issue that needs to be considered and addressed prior to the implementation of a coercive control criminal offence. At the stage the criminal justice system currently is, it is borderline irresponsible and has the potential for significant untended consequences for our most vulnerable Queenslanders. Any introduction of a criminal offence of coercive control must be coupled with significant reform of the criminal justice system to address the systematic racism that pervades it.

III. Compliance with objectives of the Bill

The QYPC considers that recommendations 53-58 and 60-66 of the *Hear Her Voice* Report have been effectively adopted by the Bill, representing a critically important step towards strengthening Queensland's current response to coercive control and seeking to protect victims of domestic violence.

Table 1.0 indicates which clauses of the Bill adopt the recommendations made in the Report.

Recommendation	**Clause in Bill**
52 – Unlawful stalking and restraining orders	22, 23
53 – Definition of coercive control	31
54 – Restriction on who may cross-examine	48
55 – Protected witnesses	59, 60
56 – applications for domestic violence orders	37, 38, 39, 55
57 – Costs of proceedings instigated as a means of committing or continuing domestic and family violence	49
58 – Provision of perpetrator's criminal history at applications for Domestic Violence Orders	35
59 - Provision of perpetrator's domestic violence history for breach hearings	Unimplemented
60 – Substituted service of documents	53
63 – Removal of restriction of s 132B	68
64 – Expert evidence	64

[9] Respect Victoria (2021). *Coercive control and the primary prevention of family violence*. pg. 7-8. Retrieved from https://www.respectvictoria.vic.gov.au/sites/default/files/documents/202109/Coercive%20control%20and%20the%20primary%20prevention%20of%20family%20violence_position%20paper.pdf

[10] Gleeson, H. (2022). *Police are still misjudging domestic violence and victims are suffering the consequences*. Retrieved from https://www.abc.net.au/news/2022-03-31/police-misidentifying-domestic-violence-victims-perpetrators/100913268

65 – Jury directions	67
66 – Sentencing considerations	80

Table 1.0: Recommendations and causes in the Bill providing for their implementation.

Of note is the extent to which clauses 22, 23, 35 and 53 give effect to their respective recommendations. Some issue is taken with these clauses as they are capable of being construed in such a way as falling short of an entire and fulsome adoption of the Report's recommendations. In the case of Recommendation 59, it is the view of the QYPC that it has not been implemented by the Bill.

Recommendation 52

By clause 22, the Bill amends s 359E of the Criminal Code – concerning unlawful stalking – and substantially implements Recommendation 52 of the Report. However, some concern is raised as to the circumstances in which judicial discretion remains to be exercised in relation to the period of restraining orders.

Clause 23 of the Bill implements two alternative mechanisms through which the period of a restraining order is determinable. The first mechanism prescribes that a restraining order will continue in force until a date stated by the court. The second prescribes that, if no date is stated, such restraining order will continue for five years after the day it was made.

The approach under the first mechanism is curtailed by a requirement that a court only order a restraining order continue in force for a period of less than five years if it is satisfied "that the safety of a person in relation to whom the restraining order is made is not compromised by the shorter period." This phraseology is loosely defined and a strict interpretation of the provision might see only those people named as being protected by the order be the subject of such "safety consideration". This has the obvious and detrimental consequence of people so closely related, by proximity or relationship, to such a person not having their safety considered in determining whether to make a restraining order with a period of less than five years. It is no comfort that all relevant persons requiring protection under a restraining order would ordinarily be named by the applicant or a court.[11] If there is some scope for a person's interests to be relevantly affected by the result of the "safety consideration", such should form part of that consideration.

This issue aside and in a practical sense, the Bill establishes a default position that a restraining order is to continue for five years unless otherwise ordered by a court subsequent to considerations of safety.

Recommendation 58

Clause 35 of the Bill adequately implements Recommendation 58. The QYPC suggests that it might be appropriate for the requirement that a criminal history be provided include criminal histories in other Australian States and Territories.

Recommendation 59

It is noted that the Bill does not explicitly require that a perpetrator's domestic violence history be provided to a court at breach hearings. This represents a shortcoming of the implementation of

[11] Criminal Code s 359F(6).

Recommendation 59. As a result, courts may be left without all of the information relevant to sentence or otherwise deal with an offender in breach hearings for domestic violence orders. In particular, courts may be left in a position where it is difficult to assess an offender's potential for recidivism and rehabilitation. These a necessary considerations when considering breach hearings. Without that history, the decision-maker does not have sufficient information to make a coherent decision which would maintain public safety and respect the defendant's own individual liberty.

The QYPC advises the committee to also incorporate into the bill a requirement that a perpetrator's domestic violence history be provided to a court at breach hearings.

Recommendation 60

On its face, clause 53 of the Bill implements the practical effect sought to be established from Recommendation 60. It enables documents service of documents in 'another way', an appropriately broad phraseology, by a police officer after reasonable attempts to effect service have been made and serving the document in another way is an acceptable option for service. However, a similar issue presents here as did with the implementation of Recommendation 52 by clause 52.

Clause 53 stipulates that substituted service in "another way" is to be effected as follows:

> *The court may make an order substituting another way* ***for a police officer*** *to serve the document on the respondent.*

Under potentially relevant legislation,[12] a "police officer" is not defined to include police liaison officer, throwing doubt upon whether the Report's recommendation that such liaison officers are able to serve documents on respondents is affected by the Bill. A strict reading would see police officers, where empowered by way of substituted service order, as being the sole people capable of effecting service in "another way".

Noticeably, no amendments are proposed to the *Domestic and Family Violence Protection Rules 2014* (Qld), contrary to Recommendation 60.

IV. Objective two: modernise and update sexual offence terminology in the Criminal Code in response to advocacy that the language appropriately reflects criminal conduct

Section 229B of the Criminal Code: Maintain a sexual relationship with a child should be amended and replaced with 'persistent sexual abuse of a child'

Section 299B generates confusion in Queensland

Currently there are eight definitions for sexual intercourse, the age of consent to sex, consent, and grooming between the eight state and territory jurisdictions, as well as eight different sets of

[12] *Police Powers and Responsibilities Act 2000* (Qld) Schedule 6; *Criminal Code Act 1899* (Qld); *Domestic and Family Violence Protection Act 2012* (Qld) Schedule; *Evidence Act 1977* (Qld) Schedule 3

punishments for these inconsistently worded offences. In Queensland, that offence is 'maintain a sexual relationship with a child': Criminal Code (s 299B). Similar offences involving the word 'relationship' exist in the Northern Territory and South Australia. In other states, the crime is 'persistent sexual abuse of a child'.

The offence of maintaining a sexual relationship with a child under 16 was originally inserted by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) and commenced on 3 July 1989. Until amendments in 2020, the offence of maintaining a sexual relationship with a child applied to different conduct, and attracted different penalties, over the years since its introduction. The offence differed in its application between 3 July 1989 and 1 July 1997; between 1 July 1997 and 1 May 2003; and after 1 May 2003. The present form of the offence is substantially the same as the form in which it was inserted by the *Sexual Offences (Protection of Children) Amendment Act 2003*. By amendments in 2020, the application of the offence of maintaining a sexual relationship with a child in s 229B Criminal Code has been significantly modified in respect of offences that occurred prior to 1 May 2003.

The recent case of *R v BDF* [2022] QCA 61 dealt with whether an unlawful sexual relationship can be maintained where the defendant is not the principal offender in respect of the unlawful acts. The Criminal Bench Book summarises this case in its directions about s 299B as follows:

> In that case, the Court of Appeal considered whether an unlawful sexual relationship can be maintained where the defendant was not the principal offender in respect of the unlawful sexual acts. The issue arose in the context that the appellant was the mother of the complainant. The appellant was the principal offender in respect of only one of the unlawful sexual acts. In respect of the other acts the appellant was a party to acts committed by a male offender. The Court of Appeal held by majority (Mullins JA, Mazza AJA; McMurdo JA dissenting) at [47] "that an unlawful sexual relationship can be maintained by an adult, even if the unlawful sexual acts on which the offence of maintaining is based includes the unlawful sexual act or acts of other persons for which the liability of the adult arises from the application of paragraphs (b), (c) or (d) of s 7(1) of the Code, as the deeming effect of s 7(1) of the Code results in the unlawful sexual act or acts of the other person being that of the adult for the purposes of s 229B of the Code.

Amending the offence to replace 'relationship' to 'persistent sexual abuse' would provide clarity to the community as to whether persistent sexual abuse in which a child is procured with someone can be an offence with the gravity of s 229B.

The phrase 'relationship with a child' re-victimises child sexual abuse survivors and feeds rape-myths

The Tame Foundation, founded by former Australian of the Year, Grace Tame, is campaigning for states to amend their laws, so that in states such as Queensland s 299B would be amended to 'persistent sexual abuse of a child'. Ms Tame has stated that "having a clearer name gives power back to the victim-survivors."

Ms Tame spoke of the further victimisation she experienced following local news reporters describing her abuse as a relationship. Ms Tame's abuser was convicted of "maintaining a sexual relationship with a child" by a Tasmanian court. In other Australian jurisdictions he would have faced charges of "persistent sexual abuse of a child". In her speech at the National Press Club, Former Australian of the Year, Grace Tame, pointed out the importance of language in the charging of abusers. She spoke of 'maintaining a sexual relationship with a child', used in Queensland, and the charge of 'persistent sexual abuse of a child', used in some states. Ms Tame said: "The former charge implies consent, while the

latter reflects the gravity and the truth of an unlawful, criminal act committed against an innocent child victim”.

This is important to combat rape myths and not re-victimicise the child sexual abuse survivor by in any way implying that their abuse was in some way their fault. As Ms Tame states: “"Piece by piece we must correct the narrative and take control away from abusers who have for so long sought solace in our systems and institutions that shield them from the full extent of what they have done."

Section 299B Criminal Code should be amended and replaced with ‘persistent sexual abuse of a child’

The Australian Capital Territory has recently amended the *Crimes Act*, passed on August 3, to change the language in the offence of a “Sexual relationship with child or young person under special care”. The crime is now referred to as “Persistent sexual abuse of child or young person under special care”. The ACT Attorney-General, Shane Rattenbury, stated that: “When presented with victim-survivors’ [perspectives] … we have a responsibility to act, which is why we have brought forward this reform at the first opportunity.” We call on Queensland to respond to these calls with an amendment to the Criminal Code.

In Queensland, the amendment would be as follows:

> 229B ~~Maintaining a sexual relationship with a child~~ Persistent sexual abuse of a child
>
> (1) Any adult who ~~maintains an unlawful sexual relationship~~ persistently sexually abuses a child under the age of 16 years commits a crime.
>
> *Penalty—*
>
> Maximum penalty—life imprisonment.
>
> (2) ~~An unlawful sexual relationship is a relationship~~ Persistent sexual abuse involves more than 1 unlawful sexual act over any period.

We call on Queensland Parliament to amend s 299B of the Criminal Code to ‘persistent sexual abuse of a child’ as was recently done in the Australian Capital Territory.

V. Objective three: address stakeholder concerns regarding the operation of the sexual assault counselling privilege (SACP) framework in relation to the standing of counsellors and victims and alleged victims of sexual assault offences (‘counselled persons’)

The Sexual Assault Counselling Privilege (“**SACP**”) framework was introduced by the *Victims of Crime Assistance and Other Legislation Amendment Act 2017* (Qld). The SACP framework limits the disclosure and use of confidential communications between a victim of sexual assault (a “counselled person”) and a counsellor during a proceeding under the *Domestic and Family Violence Protection Act 2012* (Qld) (‘*Domestic Violence Act*’).

Under sub-div 3 of the *Evidence Act 1977* (Qld) (“the ***Evidence Act***”), a party to a proceeding relating to a domestic violence order can seek leave to compel the production or disclosure of a protected counselling communication. However, neither the counsellor nor the counselled person currently have standing to participate in the proceedings relating to the application for leave.

The counsellor and counselled person are uniquely positioned to inform the Court about the physical, emotional and psychological harm the counselled person is likely to suffer if the Court were to admit the communication into evidence. Granting them standing in these proceedings would enhance the Court's ability to effectively decide, under s 14H of the *Evidence Act*, whether the public interest in admitting the communication substantially outweighs the public interest in preserving the confidentiality of the communication and protecting the counselled person from harm.

Therefore, the QYPC welcomes the proposed amendment to s 14L(1)(b) of the *Evidence Act* to also give the counsellor or counselled person standing in these circumstances.

VI. Objective six: amend the *Oaths Act 1867* to address issues that have arisen in the implementation of the *Justice and Other Legislation Amendment Act 2021*

The *Justice and Other Legislation Amendment Act 2021* (Qld) amended the *Oaths Act 1867* (Qld) ("the ***Oaths Act***") to allow affidavits, statutory declarations and most oaths to be witnessed over audio-visual link by a "special witness" (such as an Australian legal practitioner). The purpose of these changes was to give permanent effect to the temporary allowances introduced in response to the COVID-19 pandemic when it was not possible or desirable, due to social distancing requirements, for such documents to be witnessed in person.

As young adults who have grown up in an increasingly technological world, we welcome the Government's desire to embrace technology as a means of making the performance of routine legal tasks more efficient and accessible. However, we also recognise the risks that remote witnessing of electronic documents pose in the context of domestic violence.

The amendments introduced to the *Oaths Act* create a dangerous avenue for perpetrators of coercive control to isolate their victims from the special witness, making it easier to pressure the victim into swearing or affirming a false statement. Despite the advances of modern technology, the special witness will ultimately only be able to see what is in the camera's field of view. While this may be sufficient to verify the identity of the deponent, it does little to ensure they are swearing their oath or making their affirmation free from undue pressure or influence from a perpetrator standing off-camera.

Therefore, we propose that the requirement for certain legal documents to be witnessed in-person be reinstated in situations where there is a heightened risk of coercion. This may include:

- where the document being signed/sworn/affirmed relates to a domestic violence proceeding;
- where the deponent is named in a domestic violence or other protection order; or
- in any other circumstance where the special witness has a reasonable suspicion that the deponent is at risk of coercion.

VII. Conclusion

The Queensland Youth Policy Collective is a group of young people who have gathered together to inform policy discussions with our youth perspective. We thank the Committee for inviting us to speak at the Public Hearing on 7 November 2022 and we are grateful for the two day extension of time for us to prepare this submission. However, we would like to state that the short turnaround time of this consultation period does not encourage meaningful engagement from the community and will likely have reduced the ability of Queensland Parliament to consult with community on this important issue.

To summarise our recommendations, the QYPC supports the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 ("the **Bill**"), but strongly suggests the that be coupled with significant reform of the criminal justice system to combat the misidentification of victims and perpetrators and ensure QPS members understand and appropriately respond to situations of domestic violence involving First Nations People. With respect to the Oaths Act, we propose that the requirement for certain legal documents to be witnessed in-person be reinstated where there is a heightened risk of coercion. We further recommend that the recommendations for the Hear Her Voice report be adopted and support those which have been adopted. We welcome the proposed amendment to s 14L(1)(b) of the *Evidence Act* to also give the counsellor or counselled person standing in certain circumstances. Finally, we recommend that s 299B of the Criminal Code be amended and replaced with 'persistent sexual abuse of a child'.