Speech By

Hon. Shannon Fentiman

MEMBER FOR WATERFORD

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

Introduction

Hon. SM FENTIMAN (Waterford—ALP) (Minister for Health, Mental Health and Ambulance Services and Minister for Women) (11.18 am): I present a bill for an act to amend the Bail Act 1980, the Criminal Code, the Domestic and Family Violence Protection Act 2012, the Domestic and Family Violence Protection Regulation 2023, the Evidence Act 1977, the Evidence Regulation 2017, the Justices Act 1886, the Penalties and Sentences Act 1992, the Recording of Evidence Regulation 2018, the Security Providers Act 1993, the Youth Justice Act 1992 and the legislation mentioned in schedule 1 for particular purposes, and to repeal the Criminal Law (Sexual Offences) Act 1978. I table the bill, the explanatory notes and a statement of compatibility with human rights on behalf of the Attorney-General. I nominate the Legal Affairs and Safety Committee to consider the bill.

Tabled paper: Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 1615.

Tabled paper: Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, explanatory notes 1616.

Tabled paper: Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, statement of compatibility with human rights 1617.

I am very pleased to introduce, in the absence of the Attorney-General, the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023. The Palaszczuk government is committed to ending all forms of domestic, family and sexual violence in Queensland. This legislation is an important milestone towards achieving this goal.

One in five women have experienced sexual violence since the age of 15. One in six women and one in 18 men have experienced physical or sexual violence by a cohabitating partner. These statistics are startling and expose the epidemic of violence against women. However, these statistics can also obscure the reality of the violence—the impact of trauma on victims, their families and the community. Countless brave victim-survivors spoke their truth, shared the horror of their experiences and exposed the reality of these forms of violence that until recently have remained concealed.

In introducing this bill today I want to, first and foremost, thank those brave and courageous victim-survivors whose stories led to the establishment of the Women's Safety and Justice Taskforce, which made these recommendations. The taskforce produced two reports titled *Hear her voice*. The taskforce said in the opening chapter of its first report, which examined coercive control—

> Her voice is too often unheard. We can't hear her voice because, as a community, we don't recognise many of the perpetrator's behaviours as abusive. She often has no bruises, no injuries that are discernible to the eye. The underlying weapon of the perpetrator in this kind of abuse is control—exerted slowly, steadily and with increasing intensity—over her free association, free movement, and free thought. Like water torture, the drip, drip, drip continues until she is disorientated, confused, and in fear of drowning. It destroys and far too often ends her life.

I want to thank the taskforce, led by the Hon. Margaret McMurdo AC, for their work and also acknowledge the taskforce secretariat, its members and all of the stakeholders and advocates who shared their experiences, many of whom have joined us in the gallery today. The brave women who shared their stories to the Women's Safety and Justice Taskforce did so with great difficulty but with great generosity. They shared their experiences so that others may avoid it. Margaret McMurdo called it recentring victims' voices. Women's voices and their experiences have been heard and are always at the centre of everything we do in this space.

Perhaps the most reluctant but most effective champions of this cause, Sue and Lloyd Clarke, who still live with the trauma of their devastating loss every day, have used their experience—their story—to educate others. They told the taskforce—

We have to admit that we did not understand coercive control, even as our family was dealing with it on a daily basis. We knew that something was wrong with the behaviour, and we certainly knew that Hannah deserved so much better from her husband. We didn't understand that this bad behaviour had a name, could be codified and should be illegal. And, of course, we didn't know where it was leading.

Coercive control is a pattern of behaviours perpetrated against a person to create fear, isolation, intimidation and humiliation. It can be hard to detect, report and protect from, particularly if we do not listen to the person experiencing it. It is an all-consuming, relentless pattern of behaviour by manipulative perpetrators who gaslight and redefine the victim's reality, and all of it can be done without any physical contact. Another woman told the taskforce—

I was a victim of domestic violence though I didn't know it until Allison Baden Clay's detective said on TV you don't have to have a black eye to be a victim.

Allison Baden-Clay's parents, Priscilla and Geoff, and her sister, Vanessa, who is also the chair of our DV Prevention Council, are also with us today, and I want to acknowledge their ongoing advocacy. Imagine trying to leave or seek protection when you have lost most of your life skills. You have no access to money or safe communication. You have very few friends left and no-one understands that what you are describing is domestic violence. That is what we have to change.

Central to this bill is the recognition that this abuse is criminal. The bill amends the Criminal Code to establish the criminal offence of coercive control. The taskforce recognised that no current Queensland criminal offence captures the full range of abusive behaviours which may constitute coercive control. This offence will build community awareness that coercive control is abusive behaviour and will capture the full range of domestic violence behaviours which may constitute coercive control, not just physical behaviours.

The bill makes it an offence for an adult in a domestic relationship to engage in a course of conduct consisting of domestic violence occurring on more than one occasion where the person intends the course of conduct to coerce or control the other person and where the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm. The offence is a crime which carries a maximum penalty of 14 years imprisonment. As recommended by the taskforce, the offence applies only to acts of domestic violence constituting the course of conduct that were done after the commencement of this bill.

Limiting the offence to adult offenders recognises that children who commit domestic violence are often victims themselves who have experienced trauma and adopt the use of violence as a learned behaviour. The taskforce recognised that the impact of domestic and family violence on children is immense and ongoing. The bill therefore amends the Penalties and Sentences Act, which requires a court to treat domestic and family violence offending which is committed against a child or exposes a child to domestic and family violence as aggravated. Offending which is committed in contravention of a domestic violence order will also be treated as aggravated.

In response to recommendation 75 of report 1, the bill introduces the new offence of engaging in domestic violence or associated domestic violence to aid a respondent. The taskforce heard that families and friends of perpetrators are at times intimidating, berating and abusing victims on behalf of perpetrators. The taskforce also heard that some perpetrators hire private investigators to follow and monitor victims, despite there being a domestic violence order in place. The offence applies to an adult who engages in behaviour that would be domestic violence if done by the respondent against a person protected by a domestic violence order, police protection notice or release conditions. The offence carries a higher maximum penalty if benefit is derived from engaging in the behaviour.

In response to recommendation 77 of report 1, security providers convicted of the offence will be disqualified from holding a licence under the Security Providers Act.

In response to recommendation 76 of report 1, the bill amends the Domestic and Family Violence Protection Act to require the inclusion of a new standard condition in DV orders to ensure a perpetrator does not counsel or procure another person to do something that if done by the respondent would be domestic violence.

The second report of the Women's Safety and Justice Taskforce focused on sexual violence. The bill will also introduce an affirmative model of consent in Queensland and expressly reference stealthing conduct as non-consensual sexual activity. These key recommendations from the taskforce reports aim to address this under-reported form of violence. One woman told the taskforce—

> By the time I realised what had happened, I didn't have evidence and I knew the statistics. Something like 5% of rape allegations actually get prosecuted and even fewer perpetrators actually face criminal charges. I knew it would be a he said, she said scenario and I knew that it couldn't be proven.

Our laws have to reflect community attitudes. The bill amends the meaning of 'consent' in the Criminal Code to a free and voluntary agreement between the parties to a sexual activity. Also, as recommended by the taskforce, the bill provides that consent may be withdrawn at any time and that agreement to one sexual activity is not agreement to another sexual activity.

The bill also provides where a person does not offer physical or verbal resistance to an act, they are not to be taken to consent by reason of that alone. The bill also introduces a new provision which provides a non-exhaustive list of circumstances where there is no consent. These circumstances include where: the person does not say or do anything to communicate consent; the person does not have the cognitive capacity to consent; the person is so affected by alcohol or another drug as to be incapable of consenting to the act, or incapable of withdrawing consent to the act; the person is unconscious or asleep; the person participates in the act because of force, fear of force, harm of any type or a fear of harm of any type; the person participates in the act because the person is overborne by the abuse of a relationship of authority, trust or dependence; the person is a sex worker and participates in the act because of a false or fraudulent representation that the person will be paid or receive some reward for the act; and the person participates because of a false or fraudulent representation by the other person about whether they have a serious disease and that disease is transmitted to the person.

The provision also provides that where a person participates in the act on the basis that a condom will be used and the other person does not use a condom, tampers with the condom, removes the condom or continues with the act after becoming aware that the condom is ineffective, this will be a circumstance where there was no consent. This recognises the crime sometimes referred to as stealthing. I want to acknowledge the work of Chanel Contos and others who have raised awareness on this particular form of violation. Failing to use, or interfering with, a condom strikes at the heart of a person's right to bodily autonomy and their right to choose whether and how to participate in a sexual activity.

The taskforce heard that women and girls are increasingly subjected to non-consensual violence during sexual activity. The bill provides a rebuttable presumption that where a person suffers grievous bodily harm as a result of, or in connection with, the sexual offence, this is evidence of a lack of consent. I am proud to say that this amendment goes further than any other jurisdiction when it comes to consent laws.

Importantly, the bill amends section 348A of the Criminal Code, which provides for operation of mistake of fact in relation to consent. A defendant will not be able to rely on their mistaken belief that a complainant was consenting as being reasonable if they did not, at the time or immediately before an act, say or do something to find out whether the complainant was consenting. This additional requirement—to say or do something to check another person is consenting—will not apply where a defendant had a cognitive impairment or mental health impairment which was a substantial cause of the defendant not saying or doing something. The onus of proving the matters relevant to the safeguard provision rest on the accused on the balance of probabilities.

The prosecution still bears the onus of proving an absence of a mistaken belief in consent beyond reasonable doubt where the defence is raised. The taskforce found this safeguard was critical if Queensland adopted an affirmative model of consent. This is similar to safeguard provisions that have been adopted in New South Wales and Victoria. This ensures that people with a relevant impairment that substantially affects their ability to communicate are not unfairly disadvantaged by a requirement to say or do something to ascertain consent.

The affirmative consent provisions will apply to children as well as adults. This recognises that anyone engaging in sexual activity, including young people, are required to be proactive and ensure their partner is consenting to a sexual activity. However, children—even those without an impairment who would not be captured by the safeguard provision—are still developing physically, emotionally and relationally. Children are potentially more likely to misread verbal and non-verbal communication, can

be inexperienced or might enter sexual encounters with a certain naivety. Respectful relationship education—consent education—is absolutely critical, particularly for young people, particularly vulnerable young people, who may not be engaged in formal education because laws on their own are not enough to end sexual violence.

The taskforce found that sexual offence laws are often misunderstood, and rape myths and stereotypes, including narratives of implied consent, still feature very heavily in trials. The bill amends the Evidence Act to introduce jury directions for sexual offence trials and strengthen the provision pertaining to improper questions. The taskforce heard from victim-survivors of sexual violence who said they were traumatised by the offence and then re-traumatised by the justice system. One victim told the taskforce—

All the current justice system does is retraumatise rape victims. Being constantly asked for more details of an event you've tried to forget and bury is brutal. And you go through all these administrative hoops and it takes months and months of your time. All you get at the end of it is nothing. No justice.

The taskforce also heard from service providers who gave many examples of cases where victim-survivors of sexual assault were traumatised by brutal and apparently irrelevant cross-examination. The taskforce also heard that women are still self-blaming due to rape myths and that rape myths continue to influence criminal justice processes, including trials. The bill amends the Evidence Act to make it mandatory for a court to disallow an improper question put to a witness or inform the witness that the improper question need not be answered. This applies whether or not an objection is raised. The bill will also expand the matters the court must take into account when deciding whether a question is improper and better align Queensland to the position that exists in other jurisdictions.

The bill inserts jury directions related to sexual offences which address common misconceptions about sexual violence, including that victims will make a complaint at the first reasonable opportunity, or that people contribute to their own victimisation by what they wear, by being intoxicated or by flirting with a defendant. The new directions will apply to trials for sexual offences whether conducted in front of a jury or by a judge alone. In response to recommendations 58 and 59 of report 2, the bill amends and moves into the Evidence Act provisions relating to prohibitions and restrictions on evidence about a complainant's sexual reputation and sexual activities. The new Evidence Act provisions modernise language and make other amendments, including to strengthen and clarify certain provisions.

The bill creates a new part in the Evidence Act concerning limits on publishing information in relation to sexual offences. The new provisions maintain the prohibition on publishing material that identifies, or is likely to lead to the identification of, a complainant for a sexual offence. However, the amendments will allow an adult complainant for a sexual offence, who wants to tell their own story, to self-publish or provide others with written consent to publish, provided it does not or would not identify another complainant. Importantly, a child complainant can also self-publish and can consent to publication with a supporting statement. Sharing these stories can promote important public discussions about the nature of sexual violence, help improve community understanding and challenge common myths and misconceptions. The bill amends the Evidence Act and Recording of Evidence Regulation to allow researchers to access transcripts of sexual offences at reduced or no cost.

I would like to briefly touch on some of the other amendments in this bill. In response to recommendation 86 of report 2, the bill amends the Domestic and Family Violence Protection Act to allow media to access transcripts for, and publish information on, applications for domestic violence orders provided that such publishing does not identify, and could not lead to the identification of, victim-survivors or their children. Other amendments to the Domestic and Family Violence Protection Act are in response to recommendations 20 and 50 of the commission of inquiry to enable a court to extend a police protection notice in exceptional circumstances. In response to recommendation 76 of report 2, the bill amends the Evidence Act to make preliminary complaint evidence admissible for domestic violence offences. The taskforce thought admission of this evidence for domestic violence offences may better contextualise the complainant's evidence, which is particularly important where the case involves coercive and controlling behaviour.

The bill expands the reasonable excuses under the existing failure to report offence in section 229BC of the Criminal Code. The new reasonable excuse applies where a relevant professional, as defined in the bill, gains information during a confidential professional relationship with the child and where the relevant professional reasonably believes there is no real risk of serious harm to the child or any other child in not reporting the information. The bill otherwise amends an existing excuse that applies where the adult gains the information after the alleged victim becomes an adult, which the bill changes from 16 to 18 years of age, and the adult reasonably believes the alleged victim does not want the information to be disclosed to a police officer.

The taskforce found that women are proportionally more likely to be refused bail and held in custody than men and, because of their circumstances and vulnerabilities, may be disproportionately impacted by existing bail laws and processes. The bill amends the Bail Act to require a police officer or court considering bail to have regard to the effect that a bail condition or refusal of bail would have on the defendant's ability to carry out their responsibilities for: a family member for whom they are the primary caregiver; a person with whom the defendant is in an informal care relationship; or, if the defendant is pregnant, the child of the pregnancy.

The bill makes amendments to the Penalties and Sentences Act which are intended to ensure a sentencing court takes a much more holistic approach when considering a defendant's personal circumstances, including their history of being abused or victimised. The bill also provides that when a court is sentencing an Aboriginal and Torres Strait Islander person the court must have regard to any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender. The bail and sentencing amendments are mirrored in the Youth Justice Act to ensure the changes also apply to children.

This bill is the embodiment of a shift of our understanding of domestic, family and sexual violence. This bill recentres victims' voices and puts women's voices at the heart of our criminal justice system. For too long, victims have been let down by a system that does not understand or acknowledge the pain inflicted upon them by perpetrators who face no consequences. This bill will begin to change that.

I again acknowledge the contributions of the countless victim-survivors who have shared their stories. This bill and the legacy it will create belong to them. They have contributed to making the Queensland of tomorrow a safer, more just state than it was yesterday. I commend the bill to the House.

First Reading

Hon. SM FENTIMAN (Waterford—ALP) (Minister for Health, Mental Health and Ambulance Services and Minister for Women) (11.41 am): I move—

That the bill be now read a first time.

Question put—That the bill be now read a first time.

Motion agreed to.

Bill read a first time.

Referral to Legal Affairs and Safety Committee

Madam DEPUTY SPEAKER (Ms Bush): In accordance with standing order 131, the bill is now referred to the Legal Affairs and Safety Committee.