Speech By

Hon. Shannon Fentiman

MEMBER FOR WATERFORD

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CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION AMENDMENT BILL; CRIMINAL CODE AND OTHER LEGISLATION (DOUBLE JEOPARDY EXCEPTION AND SUBSEQUENT APPEALS) AMENDMENT BILL

Second Reading

Hon. SM FENTIMAN (Waterford—ALP) (Minister for Health, Mental Health and Ambulance Services and Minister for Women) (12.55 pm): I move—

That the bills be now read a second time.

Following introduction, the bills were referred to the former Legal Affairs and Safety Committee for consideration, and I want to take this opportunity to thank the committee for its detailed consideration of both bills. I would also like to thank the organisations and individuals who made submissions to the committee and participated in the public hearing.

The committee made six recommendations in relation to the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill. The committee's first recommendation was that the bill be passed. I thank the committee for its support. Today I table the government's response to the committee's report. I also table an erratum to amend the human rights statement of compatibility for the bill to address a technical error.

Tabled paper: Legal Affairs and Safety Committee Report No. 63, 57th Parliament—Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, government response 290.

Tabled paper: Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, statement of compatibility with human rights: Erratum 291.

I propose to move some amendments to the bill during consideration in detail to address concerns raised during the committee process and address some technical matters. The committee made only one recommendation in relation to the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill, and that was that the bill be passed. I thank the committee for supporting the passage of the bill.

The Miles government is committed to ending all forms of domestic, family and sexual violence in Queensland, and these bills are critical milestones towards achieving this goal. I want to acknowledge the courageous victim-survivors, families and stakeholders who have advocated tirelessly for these changes and I pay my respects to the lives so needlessly lost to domestic and family violence.

For many Queenslanders, the first time they heard the term coercive control was four years ago following the murders of Hannah Clarke and her three children. I want to particularly acknowledge and thank Sue and Lloyd Clarke, whose tireless advocacy has increased community awareness of the dangers of coercive control. I also want to acknowledge the family of Allison Baden-Clay, her parents, Priscilla and Geoff, and her sister, Vanessa, who also chairs our Domestic and Family Violence

Prevention Council. Thank you to all of you for your guidance, your knowledge and expertise in developing this bill. Through unimaginable pain and loss, I have been repeatedly astounded by the incredible advocacy of victim-survivors and their families, whose lives have been torn apart as a result of domestic and family violence.

The Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill amends various pieces of legislation to strengthen domestic, family and sexual violence laws and provide additional protections for victim-survivors. In 2021 the Women's Safety and Justice Taskforce was established by the government to provide independent and expert advice about the best way to legislate against coercive control. The taskforce, led by the Hon. Margaret McMurdo AC, examined coercive control and reviewed the need for a specific offence. The taskforce heard from women and girls from diverse backgrounds about how coercive and controlling behaviour left them feeling isolated, invisible and with their sense of identity stolen. One victim-survivor described coercive control through the metaphor of being like a frog in hot water, not realising the danger until she felt trapped, weak and could see no way out. Another victim-survivor described coercive control as—

... very exhausting, debilitating, emotional, scary and abusive, but it's very hard to explain the abuse that has taken place to an outside person as it makes me sound crazy. It's very hard to live through and heal from.

The taskforce recognised that no current Queensland criminal offence captures the full range of abusive behaviours which may constitute coercive control.

The bill implements the government's response to the second stage of legislative amendments recommended by the taskforce to address coercive control. The bill creates a new offence of coercive control which carries a maximum penalty of 14 years imprisonment. The manner in which the offence is created has been directly informed by the taskforce's recommendations and findings about the experiences of victim-survivors and coercive control. I would like to take some time to address issues raised in the LNP's statement of reservation regarding the drafting of this offence.

Firstly, in relation to concerns raised around the particularisation of the offence, victim-survivors told the taskforce that it is hard to pinpoint particular stories because the coercive control and intimidation they experienced was ongoing and relentless. Importantly, the prosecution must still particularise and prove each element of the offence and a jury must still be satisfied of the essential allegation that the defendant committed the offence of coercive control. Secondly, in relation to the threshold of harm, the taskforce did not recommend that there be a requirement that the harm suffered be serious or severe.

Debate, on motion of Ms Fentiman, adjourned.

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Hon. SM FENTIMAN (Waterford—ALP) (Minister for Health, Mental Health and Ambulance Services and Minister for Women) (3.27 pm), continuing: I continue my contribution to the second reading debate. Before the break I was addressing some of the issues raised in the LNP's statement of reservation. I talked about how, firstly, in relation to concerns that were raised about the particularisation of the offence—and I did want to say this again—importantly, the prosecution must still particularise and prove each element of the offence and a jury must be satisfied of the essential allegation that the defendant committed the offence of coercive control.

Secondly, in relation to the threshold of harm, the taskforce did not recommend that there be a requirement that the harm suffered be 'serious' or 'severe'. This was reinforced during consultation where stakeholders told us that in making it a requirement that the harm be 'serious' it is incongruent with the nature of coercive control where many of the behaviours may be intended to be perceived as benign or inconsequential. In fact, Lloyd Clarke eloquently articulated these complexities in an article written for the *Australian* earlier this year. In Lloyd's words—

Coercive control is about taking away the person's voice, and ultimately their identity. That's how control is truly exerted. Like water torture, it's a steady drip, drip, drip of tricks and manipulation that leaves the victim entirely at the mercy of their tormentor.

When referring to Hannah's case, Lloyd said—

None of these actions in isolation could reasonably be considered a sign of impending murder. But when they are viewed as a concerted pattern of behaviour, the warning is very clear.

I now turn to the amendments in the bill which strengthen sexual offence laws. As recommended by the taskforce, the bill amends the meaning of consent in the Criminal Code including by changing consent to mean a free and voluntary agreement between the parties to a sexual activity. As one victim-survivor told the taskforce, 'It's hard to say no anyway. They might get violent and hurt you. Half the time your body freezes up.' There will now be clearer boundaries in place for consensual sex, and these amendments better reflect community expectations of equality and mutual respect in relationships. The bill also expands the list of circumstances where there is no consent.

The statement of reservation in the committee's report, whilst acknowledging that affirmative consent amendments were broadly supported, raised the concern that the bill will criminalise spontaneous sexual intercourse between long-term partners and married couples where consent can be based on non-verbal cues. The model of affirmative consent in the bill requires that a person says or does something to ascertain consent, which can include a non-verbal cue. The bill does not prohibit the jury from considering the context of an existing relationship between the parties to the sexual activity. However, it remains essential, regardless of a person's relationship status and regardless of whether they are married or not, that there is consent to every sexual act every time. That is what this bill requires. Submissions to the taskforce made it clear we are still finding that some women may not view rape in marriage as assault, or at least the view is blurred by long-term relationships. This is really very often supported by offenders' tactics. Rape can happen between people who are married or in long-term relationships. The taskforce was alarmed at the lack of understanding about this in the community.

I note concerns about the breadth of the amendment, which provides that a person is taken to have not consented to an act if they have participated because of fear of harm of any type. The approach taken in the bill intentionally focuses on whether or not the fear of harm is why the person participated in the sexual act rather than the seriousness of that harm. That is aligned with the approach in Victoria. If the bill required the harm to be serious, that might suggest it is acceptable for somebody to participate in sexual activity because they are afraid of being harmed as long as that harm is not serious. This is not the message we want to be sending to our community about consent.

The bill introduces a new provision which provides a non-exhaustive list of circumstances where there is no consent. This includes where 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 Queensland government acknowledges the advocacy of submitters to the committee in relation to this provision and recognises the need to ensure the bill does not unintentionally criminalise or stigmatise persons with HIV.

Recommendation 3 of the committee report concerns a review of this serious disease provision and recommends that the government consider amending the bill to remove that provision pending the outcome of that review. As outlined in our government's response to the committee's report and acknowledging the concerns raised by stakeholders, especially the advocacy from Queensland Positive People and their president, Mark, who is here today, the government will review the provision relating to the transmission of a serious disease following passage of the bill and will delay the commencement of the provision pending the outcome of that review and further consultation.

The bill will also expressly reference stealthing conduct as non-consensual sexual activity. Failing to use or interfering with a condom erodes a person's right to bodily autonomy and is a form of reproductive coercion. The taskforce found that stealthing changed the nature of the sexual act for which consent was given. I want to again acknowledge the work of Chanel Contos and the many other advocates who raised awareness of this particular form of violation. I am confident these changes mean that the law will better reflect community expectations of equality and mutual respect in sexual relationships and will protect the rights of Queenslanders to choose whether and how they engage in sexual activity.

The bill also amends section 348A of the Criminal Code which provides for the operation of mistake of fact in relation to consent. A defendant will now 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. These amendments are far better aligned with modern community expectations. Narratives of implied consent will no longer be acceptable and the voices and experiences of victim-survivors will matter.

The committee's report made a number of recommendations which are addressed in detail in the government response. The government has always recognised the need for comprehensive review and evaluation of the reforms in the bill to ensure amendments are operating as intended and has committed to legislating to provide a statutory review to occur as soon as practicable five years after the last of the relevant amendments from both taskforce reports commence.

Recommendation 6 of the committee report arises out of concerns about the publishing of identifying information about deceased First Nation complainants. Acknowledging these concerns, I will move an amendment during consideration in detail of the bill to provide that a court may have regard to any cultural considerations relevant to the applicant or complainant when making a complainant privacy order.

I want to assure stakeholders that we are aware of the importance of delayed commencement for key reforms in the bill to support necessary implementation activities. In response to the member for Clayfield's suggestion that I put on the table how many resources the government is committing to

implementing these important initiatives, I can advise the House that the government has now committed well over half a billion dollars to implement the recommendations of the taskforce reports as well as the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence. Work is already underway to implement the foundational elements identified by the taskforce to support the operation of these amendments. We are ensuring that we are strengthening the service system, undertaking community awareness-raising and education activities, and supporting the training of frontline staff.

Turning now to the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill, this bill establishes mechanisms to correct possible erroneous outcomes and maintain the balance in our criminal justice system. In December 2022 the Commission of Inquiry into Forensic DNA Testing in Queensland was established to ensure transparency and public confidence in relation to testing and analysis of DNA and the criminal justice system more broadly. The uncovering of the breakdowns at the Queensland forensic laboratory were due to the ongoing resilience and advocacy of Ms Vicki Blackburn along with scientific experts who pursued truth and transparency. I particularly want to acknowledge Dr Kirsty Wright. I want to thank both Vicki and Dr Wright for all they have done to bring these issues to light.

The inquiry observed that failings at Queensland Health Forensic and Scientific Services raised the alarming likelihood that not only have many offenders not been charged because of deficiencies in the management of the lab but also some offenders have been acquitted wrongly. In light of these matters it was identified that Queensland has the most restrictive exception to double jeopardy of any Australian jurisdiction. The bill makes important amendments to ensure an acquitted person can be retried for serious offences such as manslaughter, attempted murder and rape if there is fresh and compelling evidence. The bill also clarifies that evidence is not precluded from being fresh solely because an expert witness failed to exercise reasonable diligence. Fresh evidence could include new forensic evidence.

I acknowledge that some stakeholders raised concerns that the expansion of the exception challenges some fundamental principles of our criminal justice system. However, I agree with Lord Justice Auld's comments in his 2001 review of the United Kingdom's criminal courts. He said—

If there is compelling evidence ... that an acquitted person is after all guilty of a serious offence, then, subject to stringent safeguards ... what basis in logic or justice can there be for preventing proof of that criminality? And what of the public confidence in a system that allows it to happen?

A rational legal system ought to be adjusted to permit new and conclusive evidence, such as DNA evidence, to be taken into account. This should be done with the proper safeguards in place and only applied to acquittals for offences that sufficiently damage the integrity of the system. The criminal justice system is dependent on the participation of victims and members of the public, and therefore it is vital that it evolves so that it remains transparent, accountable and relevant.

The bill also includes a framework for subsequent appeals against conviction if there is fresh and compelling or new evidence. Whilst wrongful convictions are rare, the criminal justice system is not infallible and there is a risk that an innocent person may be convicted. The subsequent right of appeal in the bill provides a transparent and impartial mechanism to correct a miscarriage of justice if a wrongful conviction has occurred. Again, this is critical to ensuring public confidence in the administration of criminal justice in Queensland.

Today is a significant milestone for Queensland's criminal justice system. These reforms are central to improving our responses to domestic, family and sexual violence and ensuring possible erroneous outcomes can be corrected and balanced in the criminal justice system. I once again want to acknowledge those who participated in the committee process and the work of the Women's Safety and Justice Taskforce. Finally, to the victim-survivors and their families and friends who have shared their stories and experiences in the hope that others will not have to go through what they have, we hear you and we thank you. I commend the bill to the House.