Speech By

Tim Nicholls

MEMBER FOR CLAYFIELD

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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

Mr NICHOLLS (Clayfield—LNP) (2.57 pm): The LNP will not be opposing either of these bills. We will, however, be moving amendments to one part of the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill relevant only to the Penalties and Sentences Act and the Youth Justice Act, which are also being amended by the bill. I will detail our reasons for doing so a little later in my contribution.

At the outset I acknowledge, as I think the Attorney did—and I notice the Attorney, having commenced her address, was stopped after four minutes, which is most unusual—the many organisations, community groups, families of victims and victim-survivors themselves for the tireless efforts they have made to address the pervasive and intolerable instances and effects of domestic, family and sexual violence. To those here in the gallery today, or those who may be in the gallery a little later today or may be taking note of these proceedings in other places, I want to say thank you for your advocacy, strength and perseverance. We should also pause to remember all those who all too tragically have lost their lives as victims of domestic violence—we have seen that play out many times in the media, much to our disgust—and the police, of course, who have to answer and respond to these terrible calls. Perhaps this bill, when it passes, will be some small recognition of that sacrifice, of that loss of life, and that it should not go unnoticed or be in vain.

I also want to acknowledge the work of my colleagues and friends Ros Bates, the member for Mudgeeraba and shadow minister for women and a former shadow minister for domestic and family violence; and Amanda Camm, the member for Whitsunday and shadow minister for women's economic security, the prevention of domestic, family and sexual violence and child protection. The member for Whitsunday cannot be here this week. She has provided a medical certificate to the House. I know that she would want to make a contribution and, in fact, take the lead on this debate but is unable to do so. Both Ros and Amanda are committed to improving the lives of Queensland women and children who experience, all too frequently and tragically, harm at the hands of others and also, let us not forget, while they are in state care.

This coercive control and affirmative consent bill is a significant and substantial piece of amending legislation. I will be addressing my comments to that first. The bill responds to a number of reports and inquiries, most notably and recently the Women's Safety and Justice Taskforce. It amends quite significantly 10 acts and three substantial regulations—namely, the Domestic and Family Violence Protection Regulation 2023, the Evidence Regulation 2017 and the Recording of Evidence Regulation 2018. It also repeals the Criminal Law (Sexual Offences) Act 1978. Taken together, those acts and regulations are a substantial and important source of the criminal law and practice in Queensland.

These are laws that have been in operation, particularly in the case of the Criminal Code, for very many years. In the case of the definition of 'consent', the law goes back to the original drafting of the code by Sir Samuel Griffith over 100 years ago. The antecedents of that definition are there.

Therefore, this takes the law in Queensland into uncharted waters with the introduction of novel concepts in the criminal law, particularly the new offence, in new section 334C(1), of coercive control. We have had discussions about what coercive control might be. There have been reports of what constitutes coercive control. Even as late as this morning the federal Attorney-General's department was issuing materials about what constitutes coercive control. However, we have never actually had a definition or an offence of coercive control.

The bill replaces the definition of 'consent' for the purposes of chapter 32 of the Criminal Code. Chapter 32 of the Criminal Code deals with rape and sexual offences. That definition currently states that 'consent means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.' The proposed new definition states 'consent means free and voluntary agreement'. This, in effect, is said to change the view of women and girls as so-called sexual gatekeepers through the use of the word 'given' to equal and respected partners in sexual relationships through the use of the word 'agreement'. It follows findings on that matter by the Women's Safety and Justice Taskforce as outlined in its report. Many other changes relating to the law about rape and sexual offences are also being made in this legislation. Importantly, the bill expressly deals with the act of stealthing, which is a welcome addition and something that I have been commenting on for a considerable period.

In new section 334C, the bill introduces the new offence of coercive control. It is a new offence that strikes at the black heart of a behaviour that we see reported all too often and in too many instances of domestic abuse. It is a behaviour that we think we all know but that, in the vast range of human relationships, has until now defied legal definition and action. This bill attempts to provide that definition. In doing so, it has attempted to cast a very wide net and some have submitted that it is too wide. In particular, concerns are raised by the Law Society that the absence of particularity in the formulation of the offence or proof of each alleged act in the chain of acts in the offence will lead to unfairness and uncertainty.

In her short contribution, the Attorney-General referred to the LNP's statement of reservation and the raising of the issue of particularity about the offence, which is the need to specify each individual offence, each time the offence occurred and the elements of each offence. It is not just the LNP raising this issue. It is also a very real concern of the Queensland Law Society. The society's president, Ms Fogerty, made a presentation to the committee in which she raised those concerns and spoke to them.

In my view, the Law Society's submissions and those of its president and its CEO, should be considered very carefully. Let us remember: members of the Law Society, and particularly those who are members of their Criminal Law Committee and Domestic and Family Violence Committee, practice in this area of the law every day of the week. They are in the courts. They are dealing with these issues. When they raise concerns, they ought to be taken on board. These are concerns not just of the LNP; they are genuine concerns held by very many people in the legal profession, at Legal Aid Queensland and the Queensland Council for Civil Liberties. The lack of particularisation is understandable because coercive control is a new offence and it is difficult to put one's finger on any one event and to record any one time that it occurred. Often and understandably, there is a chain of events that leads to coercive control and that together amount to that offence. However, it must be taken carefully.

The element of intent in relation to each of those offences is another issue because intent traditionally establishes criminal liability in Queensland. Under the code in Queensland, it is not an offence in a general sense unless there is an intention to cause the offence. To remove that is a major change. It is important to note that the taskforce recommendation was that the offence be modelled on what was introduced in Scotland, which Professor Evan Stark referred to as 'a new gold standard' for criminalising coercive control. The Scottish model still partially maintains intent in the offence of coercive control so to depart from the model is risky and, as I said, that has been raised before. Warnings and critiques must be closely monitored. We cannot have prosecutions fail due to poor or sloppy drafting. Where issues arise or may arise in the future, we must be vigilant to act on them to minimise adverse and unforeseen outcomes.

The key to the rollout of this new offence will be education and training, both for the wider community and the frontline officers and police officers involved. That was made clear in the taskforce report time and time again. In my discussions with the Hon. Margaret McMurdo, former president of the Court of Appeal, she personally indicated the necessity for a large, substantial and speedy investment

in resourcing, training and education. She pointed to the Scottish model, where there were two years between the passage of the legislation and the introduction and prosecution of the offences as well as vast amounts of money involved in training people.

While we would like to be optimistic about this being rolled out effectively, our experience of the track record of this government when it comes to funding the entirety of the action against domestic and family violence makes us doubt their abilities to do so. I call on the minister to take the opportunity, in responding to this debate, to identify the funding the government will be putting on the table for the necessary preparation and training because during the committee process the department was asked, on a number of occasions, to outline what funding would be available and the department was unable to do so.

In volume 2 of the first report, the taskforce stated—

Queensland must implement systemic reforms before a new standalone offence criminalising coercive control commences. The offence should be introduced and passed, then time allowed so that all parts of the system are clearly aware of the elements of the offence and its implications.

The report went on to state—

... no new offence to criminalise domestic and family violence including coercive control be implemented until service system responses are improved.

This government has given us no reason to trust that that is occurring. The taskforce also stated—

The effective implementation of a new coercive control offence will be largely dependent on the willingness of the Queensland government to whole-heartedly embrace this reform and resource it appropriately. This will not be a cheap endeavour in the short-term. But the investment in doing this right is not only a moral obligation, but a financially sound one.

Again, I ask the minister: what resourcing is being put into this reform to ensure that this change will be effective?

With the introduction of the new offence, new definitions are required including for 'domestic violence' in new section 334B. A new concept of 'economic abuse' is defined as well as 'emotional or psychological abuse'. These are now found in proposed new section 334A of the code. The bill empowers a court to issue a restraining order whether a person is found guilty or not guilty or the prosecution ends in another way, perhaps in a nolle prosequi where the Crown does not proceed.

Amendments to the Evidence Act impose duties on the court about the types of questions that can be put to a witness. The public, including media, are now to be excluded automatically from trials where a complainant gives evidence. There is no public interest test. The only test is if an applicant's presence would serve the proper interest of the applicant and would not be prejudicial to the interests of the complainant. This legislation fetters judicial discretion. That discretion is being fettered in regard to the directions judges may give to juries when considering evidence, including evidence as to the time when a complainant made the complaint or, indeed, the absence of a complaint. There are now prohibited directions that a judge in a criminal proceeding may not make. This includes the so-called Markuleski direction as follows—

A *Markuleski* direction addresses the risk of unfairness that the accused will be denied the chance of acquittal on all counts, if given the state of the evidence, such a result ought reasonably to follow if the jury were to reject as unreliable any part of the complainant's evidence. Where an acquittal on one count would appear to require an acquittal on another (as, e.g., where the acquittal necessarily reflects adversely on the reliability of a complainant whose evidence is central to the other count), the jury should be told so.

This is expressly provided for in the current sentencing benchbook for the Supreme and District courts. The benchbook continues—

Particularly in sexual cases, it will often be crucial to tell the jury that any doubt with respect to the complainant's evidence in connection with one count should be considered when assessing … overall credibility and, therefore, when deciding whether … evidence is reliable in relation to other counts. A *Markuleski* direction is not always necessary. It is important to note that it is considered by the courts as addressing the risk of unfairness against an accused of the chance of an acquittal.

The bill goes on to make changes to the Penalties and Sentences Act. It is to be amended to include in the sentencing guidelines provisions about taking into account for Aboriginal and Torres Strait Islander offenders the 'effective systemic disadvantage and intergenerational trauma on the offender'. We will be taking issue on this change as we believe it substantially impedes on the foundational principle of individual justice in our criminal justice system.

As I have shown, this bill is far-reaching in its effect and substantial in its consequences. In this respect, while for some it will never be implemented quickly enough, it is a very real concern that the drafting was not open for consultation for three months as recommended by the taskforce. While the LNP committee members raised this, it was also, as I have pointed out in respect of other concerns,

raised by others including the Queensland Law Society. Quite simply, no excuses provided can cover the fact that the recommendation was not followed and that proper consultation, including the draft bill being made available for a period of three months for such a significant piece of legislation, was limited at best. The danger, of course, is that the legislation is incomplete or just plain wrong and we find ourselves back here having to make amendments to get it right. We already see amendments circulated by the minister this morning. Having to do that does not serve the interests of anyone.

I could do no better than to repeat the well-drafted words of paragraph 3 of the LNP members' statement of reservation. It refers to the recommendations and goes on to say—

In doing so there is concern uncertainty will replace certainty and long established principles that underpin our criminal justice system will be weakened or in some cases abandoned. If this is the case then there must be a clear and obvious benefit in doing so. If this benefit cannot be established the real risk is that change will worsen an already unacceptable situation for both complainants and respondents and lead to delay, expense and uncertainty. Thorough and proper consideration is therefore essential. Regrettably this has not occurred to the extent necessary for such a significant piece of legislation.

As I indicated, this bill changes very substantially the law about rape. I want to deal with this very contested area. Rape is a terrible crime. It is abhorrent to all right-minded members of society. Offenders must be severely punished. Society, and women in particular, as most often but not exclusively the victims of this crime, must be protected. Almost three years ago to the day this House debated changes to the law of rape. In doing so, we relied to a large extent on the recommendations of the Queensland Law Reform Commission review of the offence. It pays to remember that the commission conducted a thorough and comprehensive review. It balanced the right to a fair trial, including the presumption of innocence of the accused and the need for the prosecutor to prove each element of an offence, with the fundamental right of complainants to liberty and safety and individual rights of bodily integrity and human dignity.

The commission examined transcripts of trials of rape and sexual assault cases up to 2018 in 135 trials. It analysed the Queensland Court of Appeal decisions in rape and sexual assault cases between 2000 and 2019 and reviewed transcripts of a further 76 trials in which consent or mistake of fact was raised. It consulted widely with all those groups and organisations representing people with an interest and received many submissions. After having undertaken this quite lengthy and detailed task, the commission resolved that the existing law did not require extensive changes. The commission said—

Detailed examination of the existing law in this area does not generally reveal significant issues for reform to the definition of consent or the excuse of mistake of fact, as it applies to rape and sexual assault. The Commission does not recommend wholesale changes to those provisions.

It went on to say—

One of the key strengths of the criminal law in Queensland is its combined certainty and flexibility. The Criminal Code sets out the general rules and the core elements of each offence and any excuses or defences. Their interpretation is permitted to develop on a case by case basis, having regard to the factual circumstances of each case and prevailing community attitudes and standards. The jury system is also a significant part of this process.

It went on to say—

The law regarding consent needs to be clear, for judges and juries as well as for the wider community. As a general aim, it is also desirable for the laws in Queensland to be reasonably consistent with those in other jurisdictions, taking into account fundamental differences between the common law and code jurisdictions—

so the differences among Queensland, New South Wales and Victoria. Further—

Reforms should also, where possible, be informed by available empirical evidence.

It went on to say—

… the Commission sees merit in amendments that aid in providing clarity to the existing provisions.

In March 2021 this House amended the Criminal Code to provide that clarity, taking on board those reforms. While there are fair reasons advanced for the change being contemplated by this bill to the law of consent and rape in Queensland, we must take care that in trying to create a better and safer environment for victim-survivors we do not inadvertently make things worse. That is my fear with this legislation and that is why I believe that a review within a reasonable time, say, three years from its proclamation, is necessary.

It can be easily foreseen in a new area of law in such a contested area between prosecutors and defendants that there will be a significant number of appeals to at least the Court of Appeal and subsequently to the High Court in this area. There will be considerable interest in the meanings of words

such as ‘free’, ‘voluntary’ and ‘agreement’ in the context of this amended section. Delays and appeals serve no-one’s interests. Back in 2021, with regard to the suggestions of change to the rape laws and the definition of consent I said—

… we remain open to the consideration of further legislative changes that, as I said in my opening remarks, are strongly supported by the evidence and that deliver a better system and outcomes than that which it seeks to replace.

That is still our position. We will be supporting these laws, but I must say that the evidence that this will result in a better system is thin on the ground. There is a great deal of hope—and we all hope—that it does lead to better outcomes, but we must remain vigilant and we must review the laws to ensure they are giving the better outcomes we hope for for all those who seek to call upon them. Ultimately, there is still much to commend the statement by the Law Reform Commission on page 14 of its report—

… there are limits to what the criminal law is practically and properly able to achieve in terms of changing social practices. Sexual offences occur within a broad social context and raise complex issues that go beyond the criminal law on consent. Legislative amendment is only one means of addressing these issues.

That goes back to the position I had in relation to the money being made available for education and training.

The criminal law has its limits. As a society we must all do more to ensure safe, rich and fulfilling lives for all of us. We need to engender more respect for each other, not less. But these are not tasks of the criminal justice system alone; they are tasks for all of us.

I would also like to thank the victim-survivors who came forward to share their experiences and have input into this bill. It is through them bravely retelling and reliving their experiences that we can get the change needed to make a safer Queensland. As one person presenting to the committee stated—

It is not just about getting a DVO; it is about being believed, being taken seriously and getting the abuse to stop.

Our hope is that action taken in this bill will make a difference to those people.

I want to turn now to the proposal to change the Penalties and Sentences Act and, in particular, to insert provisions in sentencing guidelines referring to ‘systemic disadvantage and intergenerational trauma’ if the offender is an Aboriginal or Torres Strait Islander. I table my proposed amendments.

Tabled paper: Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023, amendments to be moved by Mr Tim Nicholls MP, accompanying explanatory notes and statement of compatibility with human rights 293.

The LNP does not support this change. We do so because it offends against the principle of individual justice in this country. An individual is tried for each individual offence. A verdict is rendered on each charge. A sentence is delivered based on the individual aspects of each case, the nature of the offence, the impact on the victim and the circumstances of the offender. Ours is not generally a ‘set and forget’ formulaic system of justice. Our courts deliver individual justice relevant to the facts of each case.

When it comes to sentencing—and, in particular, sentencing guidelines for Aboriginal and Torres Strait Islanders—the High Court has had its say on this type of approach. In Bugmy v The Queen in 2013 the High Court decisively dismissed the proposition that a sentencing court should take judicial notice of the systemic background of deprivation of Aboriginal offenders. It regarded such a proposition as ‘antithetical to individualised justice’. It said—

There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.

In fact, the High Court raised the spectre that such a provision similar to the one we are discussing might be discriminatory because it might be thought to contravene the principle of individualised justice by establishing a sentencing consideration based purely on race.

In Munda v Western Australia in 2013, a case decided at the same time as Bugmy, the High Court found it to be ‘contrary to principle to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities’. The High Court observed—

To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal*—

another case—

> to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

I will discuss that more in consideration in detail.

I want to turn quickly now to the position in relation to the Criminal Code and Other Legislation (Double Jeopardy Exception and Subsequent Appeals) Amendment Bill. Let us be under no misapprehension here. This bill is here entirely because this government, the now Miles and formerly Palaszczuk government, comprehensively failed Queenslanders when it came to the operations and functions of the DNA lab. Utter failure—that is the only way to describe what occurred with DNA testing at Forensic Services Queensland. When it came to the operation and functions of the DNA lab, Labor is the guilty party. No other words cover it. Two inquiries, hundreds of hours, hundreds of millions of dollars, untold angst and waste—all because the health minister at the time, the now Attorney-General, failed to take notice of what has happening under her very nose. Now, as a result, a cherished and longstanding principle of law has to be overturned because quite simply this government could not get its act together.

From the beginning, the LNP have stood by the victims and scientists and called for the issues in this lab to be thoroughly investigated and addressed. I first raised this matter in a speech in this place in December 2022. We have asked questions of this House. We remember the now Attorney-General who as health minister said that it was all just a beat-up, that it was being done for political purposes. Two inquiries later, over 11,000 cases under review and delay after delay after delay for current cases—for people who are simply seeking a death certificate following a plane accident so they can administer the probate of a will of their dearly beloved—and Queenslanders are still paying the price.

The now health minister stayed quiet while this was occurring. The then attorney-general and minister for justice, despite this matter being one of the greatest failings of the justice system, stayed quiet. We asked questions at the beginning of 2021. 'Shandee's Story', the *Australian* podcast series, kept going. The then minister for health in February 2022 said, 'There has been no evidence of systemic failings.' On 29 March, in answer to another question from the opposition, the then minister for health confirmed there would be a review, noting—

> We should not in any way taint their reputation. There are allegations being made. I think it is important that we ensure public confidence. That is why I am referring this on.

It missed the point all along that this is not just about confidence. It is not just about the public thinking there are no issues. It is about the victims and justice for the victims. We have spent, as I say, hundreds of thousands of dollars. We have had two inquiries. At the moment we are still waiting for the outcome of the reviews into all of these cases. There is a special unit in the Director of Public Prosecutions. There is a special unit in the police department. Forensic Services Queensland cannot do the work that they should be doing. They are sending it interstate and overseas because of the delays. Over 103,000 samples potentially need to be retested, with 37,000 cases. There have been delays and costs. Justice delayed is justice denied. This is an abject failure. We will be supporting this bill because we support justice for victims, but we will never let this Labor government forget their failures when it comes to testing at the DNA lab.