# Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

# Explanatory Notes

## Short title

The short title of the Bill is the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (the Bill).

## Policy objectives and the reasons for them

The objectives of the Bill are to:

1. implement the Government's response to the second tranche of reforms recommended by the Women's Safety and Justice Taskforce (the Taskforce), in Chapter 3.9 of the Taskforce's first report, *Hear her voice – Report One – Addressing coercive control and domestic and family violence in Queensland* (Report One) (**Recommendations 74-79**), building on the groundwork established by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*, including by introducing a new offence to criminalise coercive control;

2. give effect to the Government's response to a range of recommendations from the Taskforce's second report, *Hear her voice – Report Two – Women and girls' experiences across the criminal justice system* (Report Two), relating to domestic and family violence (DFV), sexual violence, publication restrictions and women and girls as accused persons and offenders (**Recommendations 7, 43-44, 56, 58-59, 76-77, 80-82, 86, 110** and **126**), including amendments to create an affirmative model of consent in Queensland;

3. progress further amendments to abolish or reform particular jury directions (re-examining **Recommendations 65** and **66** of the *Criminal Justice* report of the Royal Commission into Institutional Responses to Child Sexual Assault (Royal Commission) in light of Report Two);

4. implement the Government's response to two related DFV recommendations from the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence Report, *A Call for Change* (**Recommendations 20** and **50**); and

5. amend the *Domestic and Family Violence Protection Act 2012* (DFVP Act) to allow a court to make an order to extend a police protection notice (PPN) in exceptional circumstances.

In March 2021, the Queensland Government established the independent Taskforce to examine coercive control and review the need for a specific offence of commit domestic violence, and the experience of women across the criminal justice system.

Report One was released on 2 December 2021 and responds to the first part of the Taskforce's work examining coercive control and the need for a specific offence of commit domestic violence. Report One makes 89 recommendations for broad systemic reforms to Queensland's DFV and justice systems. The Queensland Government response to Report One, released on 10 May 2022, outlines the Government's commitment to support or support-in-principle all of the recommendations.

In Report One, the Taskforce proposed two tranches of legislative reform to prepare for and implement a new offence to criminalise coercive control: (i) the first tranche, containing immediate reforms to improve the existing legislation; and (ii) the second tranche, containing significant new initiatives, including a new standalone offence of coercive control.

On 1 August 2023, the remaining provisions of the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023* commenced, implementing the first tranche of legislative reform to strengthen Queensland's current response to coercive control. The Bill builds on this groundwork by delivering a second tranche of reform.

Report Two was released on 1 July 2022 and focuses on women's experiences in the criminal justice system as victim-survivors of sexual violence and as accused persons and offenders. Report Two includes 188 recommendations to improve women and girls' experiences of the criminal justice system. The Queensland Government response to Report Two, released on 21 November 2022, outlines the Government's commitment to support 103 recommendations in full, support 71 recommendations in principle, and note 14 recommendations.

On 10 May 2022, the Queensland Government announced, in response to **Recommendation 2** of **Report One**, the Commission of Inquiry into Queensland Police Service Responses to Domestic and Family Violence (QPS COI). On 30 May 2022, the QPS COI was established, with Her Honour Judge Deborah Richards as Commissioner.

On 14 November 2022, the QPS COI delivered its report, *A Call for Change* (the QPS COI Report), to the Queensland Government. On 21 November 2022, the Queensland Government indicated it supported the intent of all 78 recommendations in the QPS COI Report.

The Bill implements these recommendations through amendments to the *Bail Act 1980* (Bail Act); the Criminal Code; the DFVP Act; the Domestic and Family Violence Protection Regulation 2023 (DFVP Regulation); the *Evidence Act 1977* (Evidence Act); the Evidence Regulation 2017 (Evidence Regulation); the *Justices Act 1886* (Justices Act); the *Penalties and Sentences Act 1992* (PS Act); the *Police Powers and Responsibilities Act 2000* (PPR Act); the Recording of Evidence Regulation 2018 (RE Regulation); the *Security Providers Act 1993* (Security Providers Act); the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act); and the *Youth Justice Act 1992* (YJ Act). The Bill also repeals the *Criminal Law (Sexual Offences) Act 1978* (CLSO Act) and makes related consequential and transitional amendments.

## Achievement of policy objectives

The Bill will achieve the policy objectives by implementing the reforms outlined below.

## Amendment of the Bail Act and related amendments to the YJ Act

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 Taskforce observed that a refusal of bail significantly limits a woman's ability to seek legal assistance, and to make arrangements for the care of dependent children. The Taskforce recommended that, in the context of bail decisions, the effect on a person's family and dependants should be considered.

The Bill amends the Bail Act to require, when relevant, a police officer or court considering bail to have regard to the likely effect that refusal of bail would have on a person with whom the defendant is in a family relationship and for whom the defendant is the primary care giver, or 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 also requires consideration of the likely effect a condition would have on the defendant's ability to carry out the defendant's responsibilities for those persons when a court or police officer is considering imposing a bail condition. The terms 'family relationship' and 'informal care relationship' are defined by reference to the DFVP Act. The Bill mirrors these amendments in the YJ Act.

The amendments are intended to require watchhouse staff and courts to take a more holistic view of a person's life (specifically, their caregiving responsibilities) when assessing the risk in deciding whether to refuse or grant bail. The amendments are also intended to encourage the making of bail conditions which are reasonable and more easily able to be complied with, having regard to care giving responsibilities.

## Amendment of Criminal Code

<u>Failure to report offence</u>

Section 229BC of the Criminal Code establishes the offence of *'Failure to report belief of child sexual offence committed in relation to child*'. The offence applies to an adult who gains information that causes them to believe on reasonable grounds, or ought reasonably to cause them to believe, that a child sexual offence is being or has been committed against a child by another adult. The adult commits an offence if they fail, without reasonable excuse, to disclose the information to a police officer as soon as reasonably practicable. The legislation provides a non-exhaustive list of circumstances that amount to a reasonable excuse.

The Taskforce recommended a review of the reasonable excuse provisions within this offence, to consider whether the provisions should explicitly excuse providers of professional sexual assault counselling and medical care from liability. This recommendation was made to ensure the offence is not inadvertently creating an additional barrier for child victims to disclose sexual violence and obtain help, advice and support.

Consultation highlighted the counterproductive impact that the offence can have on service provision to young people in vulnerable situations. It was reported that the mandatory reporting obligations, and the associated prospect of criminal justice intervention, has led to client disengagement from services, and an erosion of trust and rapport between service providers and

young clients. Further, the offence is said to have limited the autonomy of young people in determining how their experiences are dealt with and responded to.

Existing section 229BC(4) provides the non-exhaustive list of reasonable excuses for failing to report the information. Presently, a reasonable excuse exists if an adult gains the information after the child becomes an adult (the alleged victim), and the adult reasonably believes the alleged victim does not want the information to be disclosed to a police officer.

The Bill amends this reasonable excuse to apply when the adult gains the information after the child turns 16, rather than 18. The effect is that an adult, who receives information from a 16- or 17-year-old child victim will have a reasonable excuse for not reporting the matter to police, if that child has expressed a desire not to involve police. This amendment will provide greater autonomy to alleged victims aged 16 to 17 years old and brings the provision in line with the current age of sexual consent in Queensland.

The Bill also amends section 229BC(4) to include an additional reasonable excuse. This reasonable excuse will apply in circumstances where the adult gains the information during a confidential professional relationship with the child, and where the adult is a 'relevant professional'.

A 'relevant professional' is defined in the Bill, but will generally include medical practitioners, psychologists, registered nurses, midwives, social workers, and counsellors. The term 'counsellor' is defined broadly, and consistently with the sexual assault counselling privilege scheme. A person may be considered a counsellor based on the nature of their work, and their experience (without requirement for a tertiary qualification or membership of a professional body). It is anticipated this definition will capture a range of people who work in the community with young people.

This new reasonable excuse will only apply when 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. This balances policy objectives related to the desirability of maintaining professional confidentiality against the desirability of reporting sexual abuse to police where the alleged offender presents an ongoing risk.

Affirmative consent, mistake of fact and stealthing

The Bill amends the existing consent and mistake of fact framework in Chapter 32 to provide for an affirmative model of consent, implementing recommendations 43 and 44 of Report Two. As the definition of consent in chapter 32 of the Criminal Code does not apply to offences in Chapter 22, for offences where the absence of consent is an element, consent is defined for the purposes of the subsections to ensures consistency.

The Bill amends section 348, meaning of consent, to provide that consent means free and voluntary agreement. The Taskforce found that the existing definition, which requires consent to be given rather than agreed, was outdated and framed women and girls as sexual gatekeepers. They found that 'agreed' better reflected community standards regarding equality and mutual respect in sexual relationships. Moving to 'agreed' also harmonises Queensland with all other jurisdictions with the exception of Western Australia.

Additional subsections have been included in new section 348, meaning of consent, to assist legal practitioners and the community to understand affirmative consent. This includes provisions that provide consent can be withdrawn at any time, that a person who does not offer physical or verbal resistance is not, by reason only of that fact, to be taken to consent, and that a person does not consent to an act just because they consented to the same or a different act with the same or a different person.

The Bill also moves the list of circumstances where there is no consent to a new section 348AA and expands this non-exhaustive list.

The existing list in section 348(2) of the Criminal Code provides that there is no consent where a person's consent to the act is not freely and voluntarily obtained because of force, threat or intimidation, fear of bodily harm, exercise of authority, false and fraudulent misrepresentations about the nature or purpose of the act or a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

The expansion of the list of circumstances in which there was no consent was recommended by the Taskforce which found that, while most circumstances were already covered by the existing law, being more explicit in legislation would have real benefits to community education. As recommended by the Taskforce, new section 348AA has been modelled off section 61HJ of the *Crimes Act 1900 (NSW),* with some adjustments taking into account stakeholder feedback.

The circumstances of non-consent captured by new section 348AA(1) are:

(a) the person did not say or do anything to communicate consent;
(b) the person does not have the cognitive capacity to consent;
(c) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;
(d) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act;
(e) the person is unconscious or asleep;
(f) the person participates in the act because of force, a fear of force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal or property, regardless of: (i) when the force, harm or conduct giving rise to the fear occurs; or (ii) whether it is, or is a result of, a single incident or is part of an ongoing pattern. Examples of harm are provided;
(g) the person participates in the act because of coercion, blackmail or intimidation, regardless of when it occurs or whether it is a single incident or part of an ongoing pattern;
(h) the person participates in the act because the person or another person is unlawfully confined, detained or otherwise deprived or their personal liberty;
(i) the person participates in the act because the person is overborne by the abuse of a relationship of authority, trust or dependence;
(j) the person participates in the act because of a false or fraudulent representation about the nature or purpose of the act, including about whether the act is for health, hygienic or cosmetic purposes;
(k) the person participates in the act with another person because the person is mistaken about the identity of the other person or that the person is married to the other person;
(l) 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;

(m) the person participates in the act with another person because of a false or fraudulent representation by the other person about whether the other person has a serious disease and the other person transmits the serious disease to the person;
(n) the person participates in the act with another person on the basis that a condom is used for the act and the other person does any of the following things before or during the act: does not use a condom; tampers with the condom; removes the condom; or becomes aware that the condom is no longer effective but continues with the sexual act.

*Absence of communication*
First, the Bill provides there is no consent where a person did not say or do anything to communicate consent.

*Capacity*
New section 348AA(1)(b) uses the term 'cognitive capacity', as used in existing section 348(1), rather than 'capacity' as appears in section 61HJ(1)(b) of the *Crimes Act 1900 (NSW)*, with the intention that the current understanding of this term will inform interpretation of the provision.

New section 348AA(1)(c) and (d) are modelled on sections 36AA(1)(g) and (h) of the *Crimes Act 1958 (Vic).* New section 348AA(1)(d), as inserted by the Bill, is designed to specifically capture circumstances where a person may give prior consent to a sexual act but, at the time of the sexual act, no longer has capacity to withdraw consent because they are affected by alcohol or another drug. This is consistent with an affirmative model of consent which requires consent to be present at the time of the act.

New section 348AA(1)(e), which refers to the person being unconscious or asleep, is expressed in the same terms as section 61HJ(1)(d) of the *Crimes Act 1900 (NSW).*

*Force and harm*
New section 348AA(1)(f) is modelled on a combination of section 61HJ(1)(e) of the *Crimes Act 1900 (NSW)* and section 36AA(1)(b) of the *Crimes Act 1958 (Vic).* It provides examples of harm that are not limited to physical harm and include economic or financial harm, reputational harm, harm to the person's family cultural or community relationships, harm to the person's employment, domestic violence involving psychological abuse or harm to mental health and sexual harassment. It also includes a fear of harm to the person, other persons, animals or property. It can be a result of a single incident or part of an ongoing pattern. It applies regardless of when the force, harm or conduct giving rise to the fear occurs. It is therefore not necessary that the fear or harm occur immediately prior to the act, as previous fear or harm may, depending on the circumstances, remove the ability of a person to freely and voluntarily agree in the future. It is necessary to prove that the person participates in the sexual act because of the fear or harm.

*Coercion, blackmail or intimidation*
New section 348AA(1)(g) is expressed in the same terms as section 61HJ(f) of the *Crimes Act 1900 (NSW)* and similar terms to section 36AA(1)(c) of the *Crimes Act 1958 (Vic).* The terms, 'coercion, blackmail or intimidation' are not defined. It is intended that they are interpreted broadly, to cover a range of behaviours including verbal aggression, physical persistence, social pressuring and emotional manipulation, where that behaviour causes the person to submit to the sexual act.

It is intended to capture coercive controlling behaviour in a DFV context. It is intended to capture begging and nagging where it seriously affects a person's ability to freely and voluntarily agree or

decline to participate in sexual activity. However, it is not intended to capture mere nagging or begging which does not seriously affect a person's ability to freely and voluntarily agree to participate and which does not amount to coercion or intimidation.

*Deprivation of liberty*
New section 348AA(1)(h) is expressed in the same terms as section 61HJ(1)(g) of the *Crimes Act 1900 (NSW)* and section 36AA(1)(d) of the *Crimes Act 1958 (Vic)* with some adaptations to adopt the terminology used in the deprivation of liberty offence (section 355 of the Criminal Code) to ensure consistent use of terminology throughout the Criminal Code.

*Abuse of a relationship of authority, trust or dependence*
New section 348AA(1)(i) is expressed in the same terms as section 61HJ(1)(h) of the *Crimes Act 1900 (NSW).* It applies to relationships of authority, trust or dependence. A relationship of authority will generally exist where a person has a right to direct or control the other person's actions. For example, in the context of guardianship or with a student and teacher. A relationship of trust goes beyond a relationship where trust may be present and extends to situations where there is a responsibility to care for and protect the other person. It may arise where there are cultural or religious relationships. A relationship of dependence includes where the person is dependent on the offender for support of some sort, whether it be financial, physical or emotional. Such relationships may arise, but are not limited to, where a complainant is a child or otherwise immature, or where a person has a disability, necessitating reliance on another person for daily living or to engage in community activities or work.

*Fraudulent representation about the nature or purpose of the act*
New section 348AA(1)(j) is modelled off section 61HJ(1)(i) of the *Crimes Act 1900 (NSW).*

*Mistaken identity*
New section 348AA(1)(k) applies where a defendant pretends to be someone they are not, such as the person's partner, and this induces the person to participate in the act. It is modelled on section 61HJ(1)(j) of the *Crimes Act 1900* (NSW) and is similar to existing section 348(2)(f) in the Criminal Code.

It is not intended that this provision would criminalise conduct based on a person's representations about their gender or sexual characteristics. It is intended to address circumstances where a person agrees to participate in sexual activity under a misapprehension as to whom they are engaging in those sexual activities with, or mistakenly believing that the other person is their spouse.

*Acts involving sex workers*
New section 348AA(1)(l) provides that a sex worker who participates in the act because of a false or fraudulent representation that they will be paid or receive some reward for the act, does not consent. Sex worker means a person who provides services to another person that involve the person participating in a sexual activity with the other person for payment or reward. The inclusion of 'receive some reward' is intended to reflect that the commercial arrangement may include compensation by some means other than money. Paid is undefined. It is not intended that partial payment would satisfy the requirement for payment, though what was agreed between the parties to the sexual act would need to be considered in each case.

*Fraudulent representation – serious disease*
New section 348AA(1)(m) provides there is no consent where a person participates in the act because of a false or fraudulent representation about whether the defendant has a serious disease and the defendant transmits the serious disease to the person.

'Serious disease' is already defined in section 1 of the Criminal Code. It is anticipated that it would capture HIV or potentially other sexually transmitted infections that fall within that definition.

This provision is designed to promote honest dialogue, to permit informed agreement and avoid deceptive conduct, where that conduct has significant health implications for a complainant. This is also consistent with an affirmative model of consent.

The provision requires actual transmission of the disease. This is intended to limit the circumstances where the provision would apply. This recognises that the treatment of many such diseases has advanced to a point where the risk of transmission of disease is almost non-existent with effective management and treatment. This policy approach also recognises that a person should only be criminally responsible for a sexual offence in circumstances where there are serious consequences such as actual infection flowing from their fraudulent conduct.

HIV and STI transmission are primarily a public health issue. However, fraudulent misrepresentations about serious sexually transmitted diseases strike at the heart of a person's right to make a free and informed decision about whether to participate in a sexual activity with another person. The provision does not mandate disclosure of disease status. Rather, the approach strikes an appropriate balance with the right to privacy. Where a person does not wish to disclose their status, they may decide not to participate in the act, rather than make misrepresentations that could have a substantial influence on a person's decision to participate in sexual activity. This adequately balances the rights of both parties while promoting affirmative consent.

The approach to criminalise fraudulent non-payment of a sex worker and transmission of a serious disease differs from the approach in section 61HJ(1)(k) of the *Crimes Act 1900* (NSW), which provides there is no consent where the person participates in the sexual activity because of fraudulent inducement. New sections 348AA(1)(l) and (m) are more specific for purposes of clarity and community education.

*Stealthing*
New section 348AA(1)(n) implements recommendation 44 of Report Two, specifically criminalising stealthing as a circumstance of non-consent. To enliven the provision, participation in the sexual act must be on the basis that a condom is used; that is, the agreement to participate in a sexual act is predicated on use of a condom. The requirement to use a condom may be explicit; it may also be inferred from the surrounding circumstances, for example, by one party putting on a condom on the other, or the person themselves putting the condom on in the presence of the other person. The provision recognises that any person involved in a sexual activity may be responsible for tampering or removing the condom, not just the wearer of the condom.

Where a circumstance of non-consent is found to exist in a particular case, proof of these circumstances will be sufficient to prove the absence of consent. This provision is complemented by the introduction of new section 103ZX of the Evidence Act which provides that a judge may direct the jury that if the jury concludes that the defendant knew or believed that one of these circumstances is present, that knowledge or belief is enough to show that the defendant did not reasonably believe the person was consenting. Importantly, this ensures that a jury can be directed appropriately and avoids a defendant, who is aware of existence of one of these circumstances, from arguing that their belief was reasonable.

*Grievous bodily harm*

New section 348AA(2) implements part (c) of recommendation 43 of Report Two and is expressed in the same terms as section 2A(3) of the *Criminal Code 1924* (Tas). It provides that where a person suffers grievous bodily harm as a result of, or in connection with, the sexual offence, this will be evidence of a lack of consent, unless the defendant proves otherwise. This creates a rebuttable presumption; the defendant may still prove, on the balance of probabilities, that the grievous bodily harm is not evidence of a lack of consent. For example, a defendant might do so, by proving that there was consent to sexual activity which included agreement to violence which might cause grievous bodily harm. A defendant might still be liable in appropriate circumstances for an offence under section 320 of the Criminal Code (Grievous bodily harm).

The Taskforce heard that there had been a substantial increase in reports of non-consensual violence occurring during otherwise 'consensual' sexual activity. This appears to be the result of increased consumption of violent pornography. If a person intends to use violence during a sexual activity – which would include choking or strangulation – this should be freely and voluntarily agreed to by the parties, as it forms an integral part of the sexual activity. This is consistent with an affirmative model of consent.

For the purposes of the provision, only grievous bodily harm is evidence of an absence of consent. This is not intended to exclude consideration of lesser injuries or non-consensual violence, more generally, when determining whether there was consent to a sexual activity.

*Mistake of fact - intoxication*

In accordance with the Taskforce's recommendation, the Bill amends section 348A to provide that voluntary intoxication is not considered when deciding whether a defendant had a reasonable but mistaken belief as to consent. Under the existing law, intoxication is not relevant to whether a belief is reasonable but can be considered when deciding whether the belief was honestly held. The Taskforce concluded the law would benefit from greater clarity in this area. *Mistake of fact – reasonableness of belief and safeguard provision*

New section 348(3) provides a defendant's belief that another person consented to an act is not reasonable if the defendant did not immediately before or at the time of the act, say or do something to ascertain whether the other person consented to the act.

Pursuant to new section 348(4) (the affirmative consent safeguard provision), this additional requirement to say or do something to ascertain consent, will not apply where a defendant had a cognitive or mental health impairment at the time of the sexual act, and the impairment was a substantial cause of the defendant not saying or doing anything. The defendant will be required to prove the impairment was a substantial cause of them not saying or doing anything, on the balance of probabilities.

The Taskforce recognised this 'safeguard' was critical if Queensland adopted an affirmative consent model and that people with impairments affecting their ability to communicate could be unfairly disadvantaged by a requirement to take steps to ascertain consent. The Taskforce recognised that *'people with cognitive impairments, mental health impairments and those with other impairments that impact on their ability to communicate could be unfairly disadvantaged by the introduction of a requirement to show that they took reasonable steps to ascertain consent'*.[1]

The affirmative consent safeguard provision in the Bill is consistent with those adopted in NSW and Victoria which recently progressed affirmative consent amendments.

Proof of a relevant impairment that was a substantial cause of the defendant not saying or doing something does not automatically mean that an accused has proven a mistaken belief about consent. Rather, if the impairment is established and the affirmative consent safeguard provision applies, whether the belief was reasonable will be assessed under the existing mistake of fact defence.

The defendant bears the legal burden of proving the cognitive or mental health impairment and that it was a substantial cause of the defendant not saying or doing anything. That is appropriate as it is a matter peculiarly within the knowledge of the defendant. It must also include evidence given by a person qualified to give expert evidence. The prosecution still bears the onus of proving beyond reasonable doubt that the defendant did not have an honest or reasonable but mistaken belief in consent.

The terms cognitive and mental health impairment are defined in new sections 348B and 348C. They capture impairments that are already known to the law (under the insanity defence in the Criminal Code and the *Mental Health Act 2016*, albeit by adopting more specific definitions). The definitions, modelled on the definitions in the *Crimes Act 1900* (NSW), require the impairment to be such as to affect functioning in daily life to a material extent.

In the absence of a cognitive or mental health impairment as provided for in the affirmative consent safeguard provision, the requirement to say or do something to ascertain consent immediately before or at the time of the act in new section 348(3), will apply to children as well as adults.

Jury directions – corroboration

Consistent with recommendation 65 of the Royal Commission, the Bill amends the Criminal Code to prohibit the judge from using phrases such as 'dangerous or unsafe to convict' or 'scrutinise with great care' when directing the jury in relation to the uncorroborated evidence of a witness. The judge is not prevented from making a comment on the evidence in the trial that it is appropriate to make in the interests of justice.

Criminal offence of coercive control

The Bill implements recommendation 78 of Report One by amending the Criminal Code to establish the criminal offence of coercive control in new Chapter 29A. Naming the offence 'Coercive control' is intended to serve an educative purpose, by putting a name to the pattern of behaviour which is familiar to many people.

[1] Women's Safety and Justice Taskforce, *Hear her voice – Report Two – Women and girls' experiences across the criminal justice system* (July 2022) vol 1, 215.

As recognised in the *National Principles to Address Coercive Control*,[2] perpetrators of coercive control exert power and dominance over their victims using patterns of abusive behaviours over time that create fear and deny liberty and autonomy. Whether the abusive behaviours used are physical or non-physical or a combination of both, coercive control is serious and has serious impacts for the victim. Perpetrator behaviours can be subtle and insidious, and individually targeted and tailored to the individual victim, making the manipulative and coercive nature of the behaviour only visible to the perpetrator and victim, and further isolating for the victim.

Locating the offence in the Criminal Code with Queensland's most serious criminal offences, including other serious offences which commonly occur in a domestic setting, including murder, torture, and choking, suffocation or strangulation in a domestic setting, recognises the seriousness of this conduct.

The Bill limits the application of the offence to persons in a *domestic relationship*, which is defined at section 1 of the Criminal Code as a *relevant relationship* under the DFVP Act. This definition encompasses past and present intimate partner relationships, wider family relationships and informal care relationships, as set out in the DFVP Act.

Consistent with the Taskforce recommendation, the Bill adopts definitions of *domestic violence*, *economic abuse*, *emotional or psychological abuse*, and related terms broadly consistent with those contained in the DFVP Act. The Bill modifies and, where appropriate, expands upon, those definitions to ensure they are appropriate in the context of the criminal offence and to better reflect the nature of breadth of coercive control behaviours. Unlike the definitions under the DFVP Act, the definitions for the offence do not include reference to 'a pattern of behaviour', as the offence already captures the patterned nature of coercive control through the requirement to establish a course of conduct.

The offence of coercive control (new section 334C) applies only to adults. The offence criminalises conduct of an adult where:

- the person is in a domestic relationship with another person;
- the person engages in a course of conduct against the other person that consists of domestic violence occurring on more than 1 occasion;
- the person intends the course of conduct to coerce or control the other person; and
- the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm (with 'harm' defined in the Bill to mean any detrimental effect on the person's physical, emotional, financial, psychological or mental wellbeing, whether temporary or permanent).

The offence applies only to acts of domestic violence constituting the course of conduct under section 334C that were done after the commencement.

The prosecution is not required to prove that the person intended each act of domestic violence that constitutes the course of conduct, when considered in isolation, to coerce or control the other person.

[2] The National Principles to Address Coercive Control in Family and Domestic Violence are available at: https://www.ag.gov.au/families-and-marriage/publications/national-principles-address-coercive-control-family-and-domestic-violence.

As recommended by the Taskforce, the Bill provides that it is a defence if a defendant proves that their course of conduct was reasonable in the context of the relationship as a whole. It is not a defence that any single or each individual act of domestic violence forming part of the course of conduct considered in isolation was reasonable in the context of the relationship.

The offence is a crime which carries a maximum penalty of 14 years imprisonment. The offence is therefore an indictable offence that cannot, unless otherwise expressly stated, be prosecuted except on indictment (per section 3(3) of the Criminal Code). In recognition of the fact that there will be some circumstances where summary prosecution is appropriate, the Bill also amends section 552A of the Criminal Code to provide that a charge of the offence must be dealt with summarily at the election of the prosecution, on a plea of guilty. The offence may be charged together with one or more other offences alleged to have been committed during the course of conduct, although sentences of imprisonment imposed for offences so charged cannot be cumulative.

The Bill provides that it is it is immaterial whether the domestic violence that constituted the course of conduct against the other person was carried out in relation to another person or the property of another person. This is intended to ensure that behaviour which seeks to coerce or control a victim by impacting or threatening a child, family member or other person or their property is within the scope of the offence.

The offence requires that the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm. The Taskforce recommended that there should not be a requirement to prove actual harm to a victim, noting that this would place a burden on victims and may give rise to difficulties in prosecuting. The Bill therefore provides that the offence applies regardless of whether the course of conduct actually caused harm to the other person or, whether the other person was aware of unauthorised or unreasonable surveillance or economic abuse at the time of the course of conduct.

The Bill allows a court hearing a charge of coercive control to make a restraining order against the defendant, whether the person is found guilty or not guilty or the prosecution ends in another way, similarly to the existing restraining order provisions in relation to the offence of stalking, intimidation, harassment or abuse in section 359F. The Bill also provides that upon an indictment charging a person with the crime of coercive control the person may alternatively be convicted of the crime of unlawful stalking, intimidation, harassment or abuse if that offence is established by the evidence.

The Bill includes related and consequential amendments, including:

- amending section 21AC of the Evidence Act to include coercive control as an ‘offence involving violence’, to ensure that Division 4A (Evidence of affected children) applies to the new coercive control offence;
- amending Schedule 1 of the PS Act to include the offence of coercive control as a serious violent offence (SVO) for the purposes of the SVO scheme;
- amending Schedules 2 and 4 of the WWC Act to include the coercive control offence as a disqualifying offence if the offence was committed against a children or exposed a child to domestic violence and as a serious offence in all other circumstances; and
- amending the Security Providers Act to include the offence of coercive control as a disqualifying offence for a security providers licence, consistent with the policy objectives of the Security Providers Act, which include protecting the community by ensuring high standards of integrity and probity in the private security industry.

New aggravating factors and domestic violence averments

The Taskforce heard that the impact of DFV on children is immense and ongoing. The Taskforce considered that offending which exposes a child to DFV or that contravenes a court order, is particularly serious and should be reflected on an offender's criminal history and in sentencing. It was the intention of the Taskforce that courts be able to place extra weight on offending that exposes a child to domestic violence.

The Bill gives effect to this intention by amending section 9 of the PS Act to require a court to treat the following circumstances as aggravating when sentencing an offender for a domestic violence offence:

- if an adult offender is convicted of a domestic violence offence committed against a child;
- if an offender is convicted of a domestic violence offence and a child was exposed to the domestic violence during the commission of the offence; and
- if an offender is convicted of a domestic violence offence that was also a contravention of an order or release conditions under the DFVP Act, or of an injunction.

The Bill also amends section 12A of the PS Act, which relates to the information to be recorded on an offender's criminal history when convicted of a domestic violence offence. Section 12A of the PS Act already provides for convictions to be recorded as a 'domestic violence offence'. The effect of the amendment to section 12A is that an offenders' criminal history must now also reflect when they are convicted of a domestic violence offence committed against a child, or a domestic violence offence that exposed a child to domestic violence. These amendments are intended to enable future courts, police, prosecutors, and corrective services officers to easily identify patterns of behaviour against the same or different victims.

The Bill also includes related amendments to sections 564(3A) & 572(1A) of the Criminal Code, and sections 47(9) and 48(2) of the Justices Act. These amendments will allow indictments and complaints to state (or be amended to state) that an offence is a domestic violence offence committed against a child, or that exposed a child to domestic violence. These provisions operate in conjunction with the amendment to section 12A of the PS Act.

**Amendment of *Domestic and Family Violence Protection Act 2012* and Domestic and Family Violence Protection Regulation 2023**

Requirement for court to consider making a temporary protection order

The Bill amends the DFVP Act to insert a new provision (new section 47B) which requires a court adjourning a hearing for an application for a protection order (which includes a PPN) at the first mention to consider whether a temporary protection order should be made.

This amendment gives effect to the underlying purpose of recommendation 20 of the QPS COI Report, which is to ensure the ongoing protection of DFV victims.

While recommendation 20 was to repeal section 113(3)(c) of the DFVP Act so that a PPN would not end if the court adjourned an application for a PPN and did not make a temporary protection order, stakeholder feedback has identified possible adverse consequences of such an amendment, including that a respondent who may have been misidentified as the perpetrator would remain

subject to a PPN even where a court has determined that a Temporary Protection Order (TPO) should not be made.

The amendments instead reiterate and emphasise the existing power of the court to make TPOs by requiring consideration as to whether a TPO should be made on the first return date of an application.

Extension of PPNs in exceptional circumstances

The Bill amends section 113 of the DFVP Act to allow a court, *in exceptional circumstances*, and without appearances by the parties to the application, to adjourn an application for a protection order (meaning a PPN, by virtue of section 113(4)), and make an order to extend a PPN for the earlier of not more than 5 business days or until the next anticipated sitting date of the court. A PPN may only be extended once under this provision.

A court so adjourning an application for a protection order must take reasonable steps to notify the parties of any extension to the PPN. The particular circumstances will influence what steps are reasonable in notifying the parties. In particular, it is acknowledged that exceptional circumstances may make it unfeasible for an adjournment notice to be produced by the court and served on the defendant. A failure to serve this notice would not, however, invalidate or otherwise affect a domestic violence order (DVO) (due to operation of existing section 187(6) of the DFVP Act).

As an alternative, it is anticipated that the court may, for example, notify the parties of an extension to a PPN extension by a general announcement published on the relevant daily law list and court website.

Exceptional circumstances is defined as unforeseen circumstances that cause the operation of the court to be significantly reduced and listed examples include natural disaster, severe weather event, and major public health event.

The purpose of the provision is to ensure the protection provided by a PPN does not lapse where exceptional circumstances significantly reduce a court's operational capacity, such that there is no capacity to print and serve a TPO. The need for this provision has been identified in the context of recent events, including the COVID-19 emergency and the 2022 southern Queensland floods.

Court to consider appropriate period for protection order

The Bill amends section 37 of the DFVP Act to provide that a court which decides to make a protection order must consider the appropriate period for which the order is to continue in force.

This amendment gives effect to the purpose of recommendation 50 of the QPS COI Report, which was to clarify the court's discretion to make orders of less than 5 years' duration where circumstances require it. This recommendation was made in response to the QPS COI's findings that protection orders that are not tailored to the individual needs of each relationship can become counterproductive and are more likely to lead to an offence of contravention of a protection order, and that a five year order may not always be appropriate.

The amendments are not intended to depart from or override the current statutory presumption that a protection order be in place for five years unless the court is satisfied there are reasons for making an order for a lesser duration. The amendments clarify the existing ability for the court to decide

the period for which a protection order is to continue in force, having regard to the matters listed in section 97 of the DFVP Act.

Media may apply for transcript of DFV applications

Currently, applications for DVOs are civil proceedings which occur in closed court and cannot be reported on publicly. The Taskforce found that open justice is an important principle to maintain the integrity of, and public confidence in, the criminal justice system. However, the Taskforce noted that the safety, protection and wellbeing of victim-survivors was paramount. The Taskforce considered, and rejected, changing the current closed court status of applications for DVOs. However, the Taskforce found there would be benefit in media being able to access and publicly report on applications for DVOs provided that such reporting did not identify, and could not lead to the identification of, victim-survivors or their children. The Taskforce recommended this amendment be progressed with a revised Domestic and Family Violence Media Guide (DFV Media Guide) (recommendation 6 of Report Two).

The Bill implements recommendation 86 of Report Two by amending the DFVP Act and DFVP Regulation.

The Bill amends section 159 of the DFVP Act to allow accredited media entities to publish information if the information does not identify and is not likely to lead to the identification of a person as a party or witness to a proceeding under the DFVP Act or a child.

The Bill also amends section 160 and inserts new section 161A in the DFVP Act, to allow a judicial officer to authorise that an accredited media entity receive a copy of a transcript of a proceeding for an application for a DVO.

In deciding whether to give the authorisation the judicial officer must consider the principles in section 4 of the DFVP Act which includes that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount. The accredited media entity must provide an undertaking to comply with the DFV Media Guide, as in force at the time that the authorisation is given and the judicial officer must be satisfied that it is in the public interest to give the authorisation. It will remain an offence under section 159 of the DFVP Act to publish information that identifies, or could lead to the identification of, a party to the proceeding, a witness or a child.

The Taskforce also recommended clarification that the existing prohibition on publication does not extend to criminal proceedings under the DFVP Act, including proceedings for contravention of a DVO, whether or not the publication of those proceedings would identify a party (other than a child) to a DVO. To give effect to this aspect of the Taskforce recommendation, the Bill amends the DFVP Regulation.

Under the existing DFVP Regulation, publication of information is permitted where that information is in the public domain or is information in which the community has a legitimate interest (which applies where an aggrieved or respondent has died). Information is in the public domain if a DVO was made during the proceeding and either the aggrieved or respondent is later convicted of an offence under another Act that was factually related to the DVO. Because the existing provision provides for ‘an offence under another Act’ the offences in Part 7 of the DFVP Act (including contravention of a DVO) are not captured. The Bill amends the DFVP Regulation

to provide that offences under the DFVP Act committed subsequent to the making of a DVO, are also captured within information in the public domain.

In keeping with the Taskforce recommendation, the Bill also amends the DFVP Regulation to provide that publication is not permitted (of information that is either in the public domain or in which the community has a legitimate interest) where that would identify a child.

Court-based perpetrator diversion scheme

The Taskforce identified a clear policy need to create a path for diversion for DFV offenders before the criminal justice system is fully engaged. The Taskforce's intention was that a perpetrator could be diverted before their offending escalates and provided with support and strategies to help them change their behaviour in relationships.

In response to recommendation 74 of Report One, and to give effect to the intentions of the Taskforce, the Bill amends the DFVP Act to establish a court-based domestic violence diversion scheme (diversion scheme) for adult defendants. The Bill provides that the purposes of making a diversion order under the scheme are to intervene at an early stage to promote ongoing behavioural change, hold the defendant accountable for acts of domestic violence for which the defendant has accepted responsibility, facilitate rehabilitation to eliminate domestic violence from the defendant's behaviour and the community generally, and to reduce the risk of harm to, and increase the safety of, victims.

Providers and programs for the diversion scheme will be approved by the chief executive (Department of Justice and Attorney-General), and the Bill makes clear that the scheme applies only if there is an approved provider who can provide an approved diversion program or counselling for the defendant under the scheme. This is intended to allow the roll-out of the scheme to be limited operationally to specific locations where providers have been approved.

The scheme is intended to apply to a limited cohort of defendants who are appearing before a Magistrates Court charged for the first time for an offence of contravening a DVO or PPN.

The Bill outlines eligibility criteria for the scheme, including that a defendant is eligible only if they have accepted responsibility for the alleged facts constituting the alleged offences and indicated a willingness to participate in an approved diversion program and be assessed for suitability. The defendant's acceptance is not taken to be a plea to the charge for the offence and is not admissible in evidence against the defendant.

The Bill allows the court to find a defendant is eligible for the diversion scheme if charged with more than one contravention offence, provided the charges are for offences of the same character, or offences committed in the prosecution of a single purpose, and there is a strong factual and temporal connection between the offences. The Bill provides that the court must be satisfied that the facts constituting the alleged offence (or offences) are not otherwise charged as an indictable offence. The Bill also provides the court with discretion to decide the defendant does not meet the eligibility criteria for the scheme, having regard to the seriousness of the behaviour constituting the alleged offence or the defendant's criminal history.

If a defendant is eligible and the court is considering making a diversion order, the court must order the defendant to undergo a suitability assessment with an approved provider within 14 days or a longer period allowed by the court. The approved provider must assess the defendant's suitability for the diversion program or counselling against a list of non-exhaustive features, including how the defendant's participation in the scheme could affect the victim's safety or wellbeing, and prepare a suitability assessment report.

In deciding whether is appropriate or desirable to make a diversion order in relation to a defendant, the court must consider the suitability assessment report, as well as the principles mentioned in section 4 of the DFVP Act, and any other relevant matter, including any expressed wishes of the person named as the aggrieved in the DVO or PPN. The Bill is explicit in providing that the court must not make a diversion order unless satisfied it would not pose an unacceptable risk to the safety, protection, and wellbeing of an aggrieved or named person, a person who is in a relevant relationship with the defendant, or a person employed or engaged by the approved provider.

Mechanisms are in place to enable the variation or revocation of a diversion order. In the event the court revokes a diversion order, the defendant must enter a plea to the charge of the alleged offence.

The Bill includes immunity provisions which relate to the acceptance of responsibility to the court and potential admissions made during a suitability assessment. The Bill provides that these statements cannot be used in evidence against the defendant and a police officer must also not use any information derived from either of those statements for a proceeding for an offence. These provisions are intended to encourage participation and engagement in the scheme and in the suitability assessment process. A person can still be prosecuted if evidence exists other than the statement or evidence that is derived from the statement.

An approved provider's initial obligations under the scheme are to conduct a suitability assessment and to provide a suitability assessment report to the court within 14 days of that assessment. If the defendant fails to report for a suitability assessment, an approved provider is obliged to advise the registrar of the court within 2 business days. An approved provider is also required to report any contraventions of a diversion order within 7 days.

If an approved provider is satisfied the defendant has completed an approved diversion program or counselling with the approved provider, the approved provider must give the defendant, the registrar of the court and the police commissioner a notice of completion within 14 days of the defendant completing the program or counselling.

The Bill provides that when the notice of completion is received by the court, the diversion order and the plea for the alleged offence ends and the defendant is not required to enter a plea. The charge is taken to be dismissed by the court and the defendant is taken to be discharged and is not liable to be further prosecuted for the alleged offence.

Importantly, an approved provider has an ongoing obligation while carrying out a suitability assessment, or whilst providing the program or counselling to assess whether the defendant's behaviour may a pose a risk to the safety, protection or wellbeing of the aggrieved or named person in the DVO or PPN; and to assist in providing services to the aggrieved or a named person in the DVO or PPN.

The Bill also makes related amendments to the DFVP Act to:

- amend section 184 to require that a diversion order is served on a defendant, if the defendant was not present in court when the order was made;
- require that the police commissioner inform a complainant of the making of the diversion order if the complainant was not present in court when the order was made;
- update the suitability assessment criteria for the existing intervention order scheme (Part 3, Division 6 of the DFVP Act) to align with the list of considerations for the diversion scheme; and
- provide that a copy of the approved providers list for the scheme should be given to the police commissioner as well as the Chief Magistrate.

Criminal offence of engaging in domestic violence to aid respondent

During consultation the Taskforce heard that friends and family of perpetrators can pressure victims to have contact with perpetrators and sometimes intimidate, berate and abuse victims on behalf of perpetrators, including when a DVO is in place. The Taskforce also heard that some perpetrators hire private investigators to follow and monitor victims despite a DVO being in effect, and some private investigators advertise in a way which suggests they will undertake surveillance work for a person because that person is unable to do it themselves without breaching a DVO.

Recommendation 75, Report One was for the introduction of a new 'facilitation' offence to stop a person facilitating domestic abuse on behalf of a perpetrator against a person named as an aggrieved in a DVO, with a circumstance of aggravation if it is for reward.

The Bill amends the DFVP Act to inserts a new offence of 'Engaging in domestic violence or associated domestic violence to aid respondent' (new section 179A). The offence applies to an adult who, without reasonable excuse, engages in behaviour against a person who is an aggrieved or named person in a DVO, PPN or release conditions, if that behaviour would constitute domestic violence if it were done by the respondent to that DVO, PPN or release conditions. The offence applies where the person engages in that behaviour with the intent of aiding the respondent, and the person knew, or ought reasonably to have known that the other person was the aggrieved or a named person.

As recommended by the Taskforce, the maximum penalty for the offence is 120 penalty units or 3 years' imprisonment, but if a benefit is derived from engaging in the behaviour the offence is aggravated and attracts a penalty of 240 penalty units or 5 years' imprisonment. This is intended to reflect the seriousness of circumstances where a perpetrator may hire third parties, including private investigators, to locate and monitor an aggrieved.

The purpose of these amendments is to reduce abuse by persons who engage in domestic violence behaviour with intent to aid a respondent to a protection order.

The Bill also makes related amendments to the Security Providers Act to include the new offence of 'Engaging in domestic violence or associated domestic violence to aid respondent' (new section 179A) as a disqualifying offence for security providers. This amendment to the Security Providers Act achieves the policy objective of implementing recommendation 77 of Report One, which is to include a conviction for the new facilitation offence in the DFVP Act (recommendation 75) as a 'disqualifying offence' for a private investigators licence. While recommendation 77 specifically referred to private investigators, in keeping with the approach taken under the Security Providers

Act with respect to disqualifying offences, the amendment will apply to all categories of licence under the Security Providers Act.

Additional standard condition on protection orders and PPNs

Report One, recommendation 76, recommended that courts making a DVO impose a new standard condition that the perpetrator not counsel or procure someone else to engage in behaviour that if engaged in by the perpetrator would be domestic violence. The Taskforce recommended this amendment in order to actively dissuade perpetrators from encouraging third parties to commit acts of domestic violence on their behalf. This condition is intended to ensure that respondents are aware that it is inappropriate to counsel or procure someone else to engage in behaviour that if done by the respondent would constitute a contravention of a DVO, PPN or release conditions.

The Bill amends section 56 of the DFVP Act to require the inclusion of a new standard condition in DVOs that a respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that, if done by the respondent, would be associated domestic violence against the aggrieved, a named person or a child. The Bill also insert a condition, for an order that includes a named person who is a child, that the respondent must not or 'organise, encourage, ask, tell, force or engage another person to do something that exposes the child to domestic violence'.

The Bill intentionally adopts plain language to ensure the condition can be readily understood by a respondent, noting that comprehension of order conditions is a key factor influencing compliance. The condition is intended to encompass behaviour that would be caught by a requirement not to 'counsel or procure'.

The purposes of these amendments are:

- to educate respondents that counselling or procuring another person to assist them in abuse of a person protected by a DVO will result in a contravention of the order;
- to reduce the incidence of respondents counselling or procuring others to abuse the aggrieved and protected persons; and
- to reduce the incidence of abuse of aggrieved and protected persons by extended family, friends and private investigators.

**Amendment of *Evidence Act 1977*, Evidence Regulation 2017 and Recording of Evidence Regulation 2018**

Improper questions

The Taskforce 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 noted that judicial officers may not always be relied on to intervene, and that the prosecution may refrain from objecting to inappropriate questioning for tactical reasons or due to inexperience.

The Bill amends the Evidence Act to impose a duty on the court to disallow an improper question put to a witness in any proceeding, or inform the witness that the improper question need not be answered. This duty applies whether or not an objection is raised to a particular question. The Bill will also expand, but not limit, the matters the court must take into account when deciding whether a question is improper. The Bill also provides a non-exhaustive list of what an improper question is, including a question that is misleading or confusing, unduly harassing, intimidating, offensive,

humiliating or repetitive, put in a belittling, insulting or inappropriate manner or tone or that has no basis other than a stereotype.

The Bill also provides that a question is not an improper question merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness or requires them to discuss a subject they consider to be private or distasteful. If the court fails to disallow an improper question, or to inform the witness that it need not be answered, this will not affect the admissibility of any answer given by the witness in response to the question.

Exclusion of public and evidence about complainant's sexual reputation and sexual activities

The Bill repeals the CLSO Act. The Taskforce recommended that sections 4 and 5 of the CLSO Act be removed into a dedicated part in the Evidence Act dealing with proceedings for sexual offences (recommendation 59 of Report Two).

Section 5 of the CLSO Act currently requires the court to exclude members of the public with the exceptions of particular categories of persons, from the courtroom while a complainant of a sexual offence is giving evidence.

The Taskforce recommended that this provision be amended to clarify that the court should be closed when the complainant is giving evidence, whether during a pre-recording of evidence in court or remotely; during the playing of the pre-recorded evidence at trial or on appeal; and whilst the complainant is giving evidence in person in court (recommendation 58 of Report Two). The Taskforce said that this clarification was intended to ensure that the recommendations of Report Two do not change the position that the victim-survivors evidence, regardless of its form, is heard at the trial in closed court.

The Bill inserts new Part 6B Division containing new section 103ZE into the Evidence Act which applies in relation to a criminal proceeding that relates wholly or in part to a charge for a sexual offence. New section 103ZE provides that the court is to be closed with the exception of the same categories of person as under the existing law.

In keeping with the recommendation of the Taskforce, new 103ZE clarifies that the requirement to exclude the public applies when a complainant is giving evidence, regardless of the way in the which the complainant gives that evidence. Examples are provided including that the complainant might give evidence remotely via audio-visual link or by pre-recording. The Bill also requires a judge to direct the jury regarding the closure of the court, to the effect that they should not draw any inferences as to the defendant's guilt, the probative value of the evidence is not increased or decreased, and the evidence is not to be given any greater or lesser weight.

Currently section 4 of the CLSO Act applies to any examination of witnesses or trial in respect of a sexual offence. Section 4 of the CLSO Act prohibits evidence and questions relating to the general reputation of the complainant with respect to chastity. It also prohibits cross-examination or evidence of the complainant's sexual activities without the leave of the court. The application for leave of the court must be made in the absence of the jury and if the defendant so requests in the absence of the complainant.

The court shall not grant the leave unless satisfied that the evidence sought to be elicited or led has substantial relevance to the facts in issue or is a proper matter for cross-examination as to credit. It is not to be regarded as having substantial relevance to the facts in issue only because of any

inference it might raise about general disposition. Evidence of an act or event that is substantially contemporaneous with any offence with which a defendant is charged or that is part of a sequence of acts or events in which such an offence was committed is to be regarded as having substantial relevance to the facts in issue. Evidence relating to or tending to establish the fact that the complainant has engaged in sexual activity with a person is not a proper matter for cross-examination as to credit unless, because of special circumstances, the court considers the evidence would be likely to materially impair confidence in the reliability of the complainant's evidence.

The Taskforce heard that the operation of this section had resulted in 'perverse applications', and that it should be strengthened to be consistent with comparable provisions in other Australian jurisdictions. The Taskforce recommended that it be amended to reflect that leave should not be granted unless the court is satisfied that the probative value of any evidence about a complainant's sexual activities outweighs any distress, humiliation, embarrassment or other prejudice that the complainant may suffer as a result of its admission (recommendation 58 of Report Two).

To implement this aspect of the Taskforce recommendation, the Bill inserts new Part 6B, Division 2 into the Evidence Act which applies to a criminal proceeding that relates, wholly or in part, to a charge for a sexual offence. The language in this new division has been modernised to reflect contemporary community attitudes to sexual offences and make the law in Queensland more consistent with legislation in other jurisdictions.

New section 103ZG provides that the court must not allow any question as to, or admit any evidence of, the sexual reputation of the complainant. This maintains the existing prohibition on questions or evidence of this nature but modernises the terminology to 'sexual reputation'.

New section 103ZH provides a complainant must not be cross-examined and the court must not admit any evidence, as to the sexual activities, whether consensual or non-consensual, of the complainant (other than those to which the charge relates), without the leave of the court. This maintains the existing requirement for the leave of the court to ask questions or admit evidence of the complainant's sexual activities but clarifies that the prohibition does not extend to sexual activities which relate to the charge and that the requirement applies whether the activities were consensual or non-consensual.

New section 103ZI and 103ZJ, require that applications for leave to cross-examine or admit evidence regarding the complainant's sexual activities be filed in advance of the proceeding unless the court waives these requirements in the interests of justice. New section 103ZK provides that the application must be in writing and must address certain matters. These are new provisions that are intended to increase consistency in applications. They are also aimed at the prosecution and defence considering and indicating at a time earlier than the trial, whether they intend to ask these kinds of questions and whether there are proper reasons for doing so.

New section 103ZL provides similar to the existing law, that the application must be heard in the absence of the jury and may be heard in the absence of the complainant.

New section 103ZM provides that when determining an application for leave to cross-examine or admit evidence regarding the complainant's sexual activities the court must not grant leave unless it is satisfied that the evidence has substantial probative value or is a proper matter for cross-examination as to credit and that it is in the interests of justice to allow the cross-examination or admit the evidence having regard to a number of matters.

In keeping with the Taskforce recommendation, one of the matters to which the court must have regard is whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or admission of the evidence in view of the age of the complainant and the number and nature of the questions the complainant is likely to be asked. The court must also have regard to the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility, the need to respect the complainant's personal dignity and privacy, the right of the defendant to fully answer and defend the charge and any other relevant matter.

New section 103ZN provides in keeping with the existing law, that evidence of the complainant's sexual activities is not to be regarded as having substantial probative value by virtue of any inferences it may raise as to general disposition and as being a proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely to be materially impair confidence in the reliability of the evidence of the complainant.

Jury directions – sexual offences

The Taskforce found that despite improved understanding of violence against women, some in the community still hold concerning views and attitudes that enable common misconceptions about sexual violence ('rape myths') and harmful beliefs about women and violence to perpetuate. The Taskforce heard that these rape myths continue to influence criminal justice processes, including trials.

Consistent with the Taskforce's recommendation (recommendation 77 of Report Two), the Bill introduces jury directions for sexual offences, in similar terms to the directions contained in the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) and recommendation 78 of the Victorian Law Reform Commission report, *Improving the Justice System Response to Sexual Offences.*

The Bill inserts new Part 6B, Division 3 into the Evidence Act.

New section 103ZO provides that the division applies in relation to a criminal proceeding that is a trial by jury or by a judge sitting alone and that relates wholly or partly to a charge of a sexual offence. It provides that for a trial by a judge sitting alone, the reasoning of the court must, to the extent the court thinks fit, be consistent with how a jury would be directed.

New Part 6B, Division 3, subdivision 3 provides for a number of directions about the circumstances in which non-consensual sexual activity occurs, responses to non-consensual sexual activity, lack of physical injury violence or threats, responses to giving evidence, the behaviour and appearance of the complainant.

New Part 6B, Division 3, subdivision 4 provides for a number of directions about differences in the complainant's account, lack of complaint or delay in making complaint and evidence of post-offence relationship.

New section 103ZP provides that the judge may request an indication from the parties as to whether it is likely that evidence will be adduced in the trial that would require the giving of a direction under subdivision 3 or 4. The judge does not have to form a view at that time as to whether the direction should be given and the prosecution, defence counsel or defendant can later request or make submissions about a direction about which the judge was not informed.

To ensure greater consistency with these new provisions, the Bill also inserts new section 103SA into Part 6A, Division 3 of the Evidence Act which deals with jury directions for domestic violence. New section 103SA provides, consistent with the approach for jury direction for sexual offences under new section 103ZP, that a judge may request an indication from parties on whether it is likely that evidence will be adduced in a trial that would require a direction about domestic violence.

New section 103ZQ provides that the judge must give any 1 or more of the directions set out in Part 6B, Division 3, Subdivision 3 (a) if there is good reason or (b) if requested to do so by a party to the proceeding unless there is a good reason not to give the direction.

New section 103ZA also provides that in respect of both direction given in relation to consent and mistake of fact as well as any other direction, that the direction must be given at the earliest time in the criminal proceeding that the judge determines is appropriate. However, the judge is not prevented from giving the directions at any time including before any evidence is adduced or in the summing up. The judge may repeat the direction at any time and is not required to use any particular form of words in giving the direction. New section 103ZR provides that the division does not limit the matters the court may direct the jury about including evidence given by an expert witness.

New Part 6B, Division 3, subdivision 5 prohibits the judge from giving certain directions in relation evidence of complainants who delay in making a complaint (or who do not make a complaint).

These jury directions are intended to ensure better directions are given to jurors in criminal trials and reduce the extent to which rape myths influence their deliberations and decisions.

Sexual offences expert evidence panel pilot

The Taskforce noted that expert reports would be required for the affirmative consent safeguard provision, as outlined above, to ascertain the extent of any cognitive or mental health impairment and its impacts. Recommendation 80 of Report Two was to establish an expert evidence panel which could be used by the prosecution, defence and the court, one of the functions of which would be to provide such reports.

The Bill introduces a sexual offence expert evidence panel by inserting new Part 6B, Division 4 into the Evidence Act. The panel is a pilot. The locations of the pilot are prescribed by amendment to the Evidence Regulation as Townsville and Brisbane.

New section 103ZZF allows a party to a relevant proceeding (meaning a criminal offence for a proceeding against Chapter 32 of the Criminal Code in which the matters in the affirmative consent safeguard provision are likely to be relevant and held before a court at a place prescribed by regulation) to engage an expert from the panel to give relevant evidence (meaning evidence about the affirmative consent safeguard provision) about the defendant in the proceeding. A party to the proceeding is not prevented from engaging an expert other than one who is on the panel.

New section 103ZZG provides that an expert who is engaged by a party to a relevant proceeding to give relevant evidence, can request material from the prosecution, regardless of whether they are an expert who is included on the sexual offence expert evidence panel or not.

New section 103ZZH provides that the sexual offence expert evidence panel is to be established and maintained by the chief executive and the chief executive must be satisfied that the panel of persons are suitable to give relevant evidence about a defendant in a relevant proceeding. Section 103ZZH also provides that a person is not suitable to do so unless they can demonstrate specialised knowledge gained by training study or experience in psychiatry, neuro-cognitive psychology or a field of knowledge relevant to assessing the impairments in the affirmative consent safeguard provision.

New section 103ZZH also provides for matters which make a person unsuitable for the panel and section 103ZZI provides for removal from the panel if a person is no longer suitable. Section 103ZZJ and 103ZZK provide for the request and confidentiality of criminal history information for the purposes of the chief executive considering suitability.

Expansion of preliminary complaint evidence

Preliminary complaint evidence is a category of evidence that pertains to disclosures, by the complainant, that are made before the complainant's first formal witness statement to a police officer. It is admissible for the person who received the complaint (a disclosure), to give evidence about what the complainant told them and any surrounding context. The evidence may only be used to assess the complainant's credibility and does not independently prove anything. This category of evidence is presently only admissible in sexual offence proceedings, as an exception to the general rule that evidence of previous consistent statements is inadmissible.

The Taskforce observed that DFV offences are similar to sexual offences in so far as both types of offending involve contact of an intimate nature between two people and most frequently occur in private. This makes both types of offending difficult to prove. The Taskforce considered that legislating to enable preliminary complaint evidence to be admitted in trials for domestic violence offences may better contextualise the complainant's evidence. The Taskforce considered this particularly important where the case involves coercive and controlling behaviour, which requires a consideration of the whole relationship over time.

The Taskforce recommended removing section 4A of the CLSO Act in its entirety to a discrete division in the Evidence Act and expanding the admissibility of preliminary complaint evidence to proceedings related to domestic violence offences (recommendation 76 of Report Two).

The Bill inserts new section 94A of the Evidence Act . This provision will appear in Part 6 of the Evidence Act, alongside other provisions that concern the admissibility of statements and representations.

New section 94A expands the admissibility of preliminary complaint evidence to proceedings for both sexual offences and domestic violence offences. New section 94A otherwise maintains the existing preliminary complaint provision in section 4A of CLSO Act.

The Bill also includes new section 103ZD which provides for a jury direction about lack of complaint or delay in making a complaint specific to domestic violence offences. This is in the same terms as the jury direction about delay or absence of complaint relating to sexual offences in the Bill.

Prohibited directions

Recommendation 66 of the Royal Commission was that the New South Wales Government, the Queensland Government and the government of any other state or territory in which *Markuleski* directions are required should consider introducing legislation to abolish any requirement for such directions.

The Bill inserts new 132B into the Evidence Act which abolishes the jury direction attributed to *R v Markuleski* (2001) 52 NSWLR 82, whilst providing that a judge is not prevented from making a comment on the evidence that is appropriate to make in the particular circumstances of the case and in the interests of justice.

Consistent with recommendation 65 of the Royal Commission, the Bill also inserts new section 132B into the Evidence Act which prohibits the judge from giving certain directions in relation to children's evidence.

Limits on publishing information in relation to sexual offences

The Taskforce acknowledged that empowering people who are victim-survivors of sexual violence to share their story publicly can be an important part of the healing process. It may also contribute to positive social change to address and prevent sexual violence. The Taskforce found that victim-survivors should be empowered to tell their story and consent to publication of their identity, or information that may lead to their identification, should they so choose.

The Bill implements recommendation 81 of Report Two by amending the existing provisions pertaining to publication of sexual violence cases, currently in CLSO Act. In line with the Taskforce's recommendation, the draft Bill modernises these provisions in contemporary language and moves them to a new part 7A of the Evidence Act.

The amendments in the Bill maintain the existing prohibition on publishing identifying information about a complainant. The prohibition on publication applies to a complainant (defined as a person in relation to whom a sexual offence has been or is alleged to have been committed) once a person is charged with a sexual offence.

The Bill provides for exceptions to the publication offence where an adult or child complainant has self-published, where an adult has given written consent, or where a child has given written consent and there is a supporting statement from a doctor or psychologist verifying the child has capacity to consent and understands what it means to be identified as a victim of a sexual offence and the consequences of losing anonymity.

In each of those cases, the publication must not identify or be likely to lead to the identification of another sexual offence complainant or a child who is a complainant, defendant or witness in a criminal proceeding about the sexual offence. The requirement for a supporting statement where a child gives consent to another is a safeguard to minimise the risk that children are exploited. Where consent is given to another to publish, the publication must be in accordance with any limits set by the complainant.

The Taskforce did not directly address how prohibitions on publication of the identification of a deceased victim should be addressed. The CLSO Act does not specifically address the issue. There is a need for clarity to ensure the public know how the law applies in such cases. This is particularly important in cases of sexual violence homicide.

The Bill provides that the prohibition on identifying a complainant for a sexual offence does not apply where the complainant is deceased. However, taking into account stakeholder feedback, the Bill provides a framework establishing complainant privacy orders. This is based on similar provisions in the *Judicial Proceedings Reports Act 1958 (Vic)* regarding victim privacy orders. The new framework will allow persons with sufficient interest to apply to the court for a complainant privacy order provided certain conditions are present. It is an offence to breach such an order.

The Bill also moves to the Evidence Act recently amended provisions in the CLSO Act which allow for the naming of adult defendants charged with a prescribed sexual offence prior to finalisation of committal proceedings and establish a non-publication order regime in respect of those matters.

Release of transcript for research purposes

The Bill implements the last component of recommendation 81 and recommendation 82 of Report Two by inserting new section 134AA into the Evidence Act which will allow the chief executive to release transcripts of sexual offence proceedings for approved research purposes. The *Recording of Evidence Regulation 2018* has been amended to allow these transcripts to be provided at reduced or no cost. To ensure research is genuine, the research will need to have ethics approval.

**Amendment of *Penalties and Sentences Act 1992* and related amendment to the *Youth Justice Act 1992***

In Report Two, the Taskforce expressed concern in response to women and stakeholders reporting that relevant factors such as victimisation history, trauma, and hardship to both women and their children were not being presented to sentencing courts, or not being adequately considered. In response to recommendation 126 of Report Two, the Bill makes several amendments to the factors that a court must have regard to, under section 9(2) of the PS Act, when sentencing an offender.

Firstly, the Bill inserts a new requirement for the court to consider the hardship that any sentence imposed would have on the offender, having regard to the offender's characteristics, including age, disability, gender identity, parental status, race, religion, sex, sex characteristics and sexuality.

Secondly, the Bill inserts a new requirement for the court to consider the probable effect that any sentence imposed would have on a person with whom the offender is in a family relationship and for whom the defendant is the primary caregiver, or a person with whom the defendant is in an informal care relationship. Where a defendant is pregnant, the Bill requires a court to consider the probable effect of the sentence on the child, once born.

As recommended by the Taskforce, the Bill is explicit in stating that this requirement will operate regardless of whether exceptional circumstances exist which is intended to override the common law principle that any hardship suffered by the person's family and dependants can only mitigate a sentence in 'exceptional circumstances'.

Consistent with similar amendments to the Bail Act, 'family relationship' and 'informal care relationship' are defined by reference to the DFVP Act. The term 'primary caregiver' is not defined, however.

Thirdly, the Bill provides that, without limiting existing subsection 9(2)(g), the court must have regard to the defendant's history of being abused or victimised.

Fourthly, the Bill provides that when a court is sentencing an Aboriginal or 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 Bill also clarifies that 'cultural considerations' as presently set out in section 9(2)(p)(ii) of the PS Act includes the impact of systemic disadvantage and intergenerational trauma on the offender.

The Bill also amends section 150 of the YJ Act to mirror the amendments to section 9 of the PS Act, so that a court must have regard to the same considerations as those being inserted for adults when sentencing a child.

## Alternative ways of achieving policy objectives

There are no alternative ways of achieving the policy objectives other than by legislative amendment.

## Estimate cost for government implementation

The Bill is likely to increase demand for courts, police, the legal profession and funded domestic, family and sexual violence service providers due to the increase in the number of matters being reported or coming before the courts, as well as an increase in the complexity of matters being heard. This demand will be monitored and any cost impacts will be assessed and included in future budget processes.

Any costs arising from amendments to the Security Providers Act will be met from existing agency resources. Any funding required beyond existing agency resources will be subject to normal budget processes.

## Consistency with fundamental legislative principles

The Bill has been drafted with regard to the fundamental legislative principles (FLPs) in the *Legislative Standards Act 1992* (LSA). Potential infringements of fundamental legislative principles (FLPs) are addressed below.

Amendments to the failure to report offence – clause 9 of the Bill

The amendment to the failure to report offence includes the introduction of a reasonable excuse, for failing to report a belief of a child sexual offence. This excuse applies to a ''relevant professional''. The term ''relevant professional'' is defined to include members of prescribed professional groups and *'a person who is of a class of persons prescribed by regulation'.* This means the reasonable excuse provision, as provided in the Bill, may be extended to apply to additional classes of person through subordinate legislation.

The capacity to amend an Act expressly or impliedly, through subordinate legislation, is significant in the context of the principle enunciated at section 4 (2)(b) of the LSA, which requires that legislation has sufficient regard to the institution of parliament.

It is considered that this provision is justified as it will enable the operation of the new reasonable excuse to be monitored, and if necessary, consideration be given to prescribing further professional groups to ensure that the established policy objectives are being achieved.

Affirmative consent, mistake of fact and stealthing – clauses 13 to 16 of the Bill

Some aspects of the amendments to introduce an affirmative consent model may depart from the FLPs in section 4(3)(d) of the LSA which provides that legislation should not reverse the onus of proof in criminal proceedings without adequate justification, and the requirement in section 4(3)(f) that legislation provide appropriate protection against self-incrimination.

The amendment introducing a requirement that a defendant say or do something before a mistaken belief as to consent can be considered reasonable, arguably might place an onus on the defendant to adduce evidence of what they said or did. In this way, it may also provide insufficient protection against self-incrimination.

The Taskforce acknowledged this potential infringement of a defendant's rights and noted that while in most cases the defendant's version would need to be before the Court to allow an assessment of their version, there were other ways of proving that a defendant said or did something, which include cross-examination of a complainant or evidence from another witnesses.

The amendment does not compel a defendant to give evidence, nor does it reverse the onus for a defence of mistake of fact; the Crown will still have to disprove the defence beyond reasonable doubt where the legal onus has been discharged by the defendant. This requires there to be facts in the case that justify consideration of the issue; this is already required under the existing law. Under the amendments, in the absence of evidence that the defendant said or did something, the legislation provides that such a belief is not reasonable.

However, this is appropriate given the purpose of the proposed amendments to make sexual offence prosecutions fairer and legislation concerning consent more representative of community standards.

The affirmative consent safeguard provision does place an onus on an accused person to adduce expert evidence of a relevant impairment that was the substantial cause of the person not saying or doing something immediately before or at time of the offence to ascertain whether the complainant was consenting. If the defendant proves this on the balance of probabilities, the mistake of fact defence will revert to the current law.

The existence of a relevant impairment is information uniquely within a defendant's knowledge. The defendant is also uniquely placed to engage with an expert to determine the nature and effect of any impairment. For these reasons, the reversal of the onus is justified.

Given the purpose of the proposed amendments, any potential departure from FLPs is justified.

Criminal offence of coercive control – clause 20 of the Bill

The amendments creating a new offence to criminalise coercive control may be considered a departure from FLPs which require that legislation is unambiguous and drafted in a sufficiently clear and precise way. The offence criminalises a course of conduct, consisting of ''domestic violence occurring on more than 1 occasion'' rather than a specific act and does not require a finder of fact to be satisfied of particular individual acts.

Coercive control and controlling behaviours are a violation of the human rights of victims. The potential departure is justified because, presently, there is not a single criminal offence that sufficiently holds perpetrators of coercive control accountable for the full spectrum of physical and non-physical abuse against their victims. It is also justified in light of the imprecise, subtle and insidious nature of coercive control which involves the use of patterns of abusive behaviour over time to control another person, and in light of the manipulative and pervasive nature of coercive control which may be only visible to the victim and perpetrator.

Several measures are included in the Bill which will mitigate the identified limitation:

- including a definition of domestic violence for the purposes of the offence;
- providing an explicit non-exhaustive list of behaviours which are domestic violence for the purposes of the offence;
- including an element requiring that the person intended the course of conduct to coerce or control the other person; and
- including a defence that the course of conduct was reasonable in the context of the relationship as a whole.

The new offence incudes a reverse onus defence, where a defendant shows their conduct was reasonable in the context of a relationship as a whole. This is a potential departure from the FLP that legislation should not reverse the onus of proof in criminal proceedings without adequate justification. The reversal is justified as the existing defences and excuses in the Criminal Code are not suited or tailored to the new offence. Further, the reversal of the onus, as it relates to this defence, is justified in circumstances where considerations of 'reasonableness' are likely to involve proof of facts that are uniquely within the knowledge of the defendant, who would be in a better position to prove this defence (on a balance of probabilities).

The amendments may also infringe upon a person's freedom of expression and freedom of movement by limiting the way they express themselves towards another in a relevant relationship. Freedom of movement and the right to liberty and security may be infringed in circumstances where a person is arrested, detained, convicted and/or sentenced in relation to the new offence. These potential infringements to the rights and liberties of an individual are justified in the interests of deterring people from engaging in coercive control, to increase the safety of victims, and to educate the wider community about coercive control.

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, consequences are proportionate and relevant to the actions to which the consequences are applied by the legislation. Legislation must impose penalties which are proportionate to the offences.

The maximum penalty for the coercive control offence of 14 years imprisonment was recommended by the Taskforce, who observed that a wide spectrum of offending behaviour could be captured under the offence, including serious offending such as Grievous bodily harm (section

320 of the Criminal Code) and torture (section 320A of the Criminal Code), which both carry maximum penalties of 14 years imprisonment. The penalty is considered proportionate to the offence and seriousness of the conduct, taking into account these comparable existing provisions, and the findings of the Taskforce as to the severity of the impact on victims.

The maximum penalty for a person who knowingly contravenes a restraining order under section 334E (Court may restrain coercive control) is 120 penalty units or 3 years imprisonment. If the person has been convicted of a domestic violence offence in the 5 years before the contravention, the person is liable to a maximum penalty of 240 penalty units or imprisonment for 5 years. This is consistent with the penalties under existing section 359F of the Criminal Code (Court may restrain unlawful stalking, intimidation, harassment or abuse), upon which this provision is modelled. It is also consistent with the penalties for contravention of a DVO under s 177 of the DFVP Act. The penalties are considered proportionate to the offence and seriousness of the conduct, taking into account these comparable existing provisions.

Related amendments to Schedules 2 and 4 of the WWC Act – Schedule 1 of the Bill

The Bill amends the WWC Act to categorise coercive control as a disqualifying offence, if the offence is committed against a child, or if a child was exposed to the domestic violence which constituted the coercive control. The proposed amendments will also categorise coercive control as a serious offence if the offence is committed against an adult.

This is a potential departure from the principle that sufficient regard be given to the rights and liberties of individuals and, in particular, the right to obtain and keep employment and the right to conduct business without interference. This is because the amendments will automatically exclude a broader range of individuals from child-related work.

In addition, under section 354 of the WWC Act, a person who is convicted of a disqualifying offence is afforded no review rights. This may be considered to be a breach of the fundamental legislative principle that administrative power should be sufficiently defined and subject to review.

However, these amendments are considered justified on the grounds that they are proportionate and reasonably necessary to strike the balance between the rights of individuals and the rights of the community or more general rights. The amendments avoid a blanket categorisation (i.e. regardless of who the offence is committed against) of coercive control as a disqualifying offence, but instead take a more nuanced approach with a child victim qualifier.

Most significantly, the proposed amendments strengthen protections for children, by ensuring that individuals convicted of the heinous crime of coercive control against children are prevented from making a blue card application or continuing to engage in child-related work. Similarly, individuals convicted of coercive control against an adult will be subject to the robust decision-making framework under the WWC Act, if they were to seek a blue card.

The proposed amendments are also consistent with the fundamental principles for administering the WWC Act (section 6), being that the welfare and best interests of the child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing.

Amendment to allow extension of PPNs in exceptional circumstances – Clause 30 of the Bill

The Bill allows for a court, in exceptional circumstances, and without appearances by the parties to the application, to adjourn an application for a protection order and make an order to extend a PPN for the earlier of not more than 5 business days or until the next anticipated sitting date of the court. A court so adjourning an application for a protection order must take reasonable steps to notify the parties of any extension to the PPN.

Allowing the court to adjourn and extend a PPN without appearances may depart from FLPs that legislation has sufficient regard to the rights and liberties of individuals and that it is consistent with the principles of natural justice (per section 4(3)(b) of the LSA), including the right to be heard and the right for decisions to be based on relevant evidence, particularly given the significant impact the extension of a PPN may have. The extension of a PPN may continue conditions such as the ouster of a person from their home and otherwise impact upon their freedom of movement and to choose where to live and their freedom of expression, the impacts of which may be heightened during periods of emergency.

The proposed amendments are intended to promote a victim's right to life, right to protection of children and families and right to be protected from torture and cruel, inhuman and degrading treatment. The departure is justified on the basis of the need to uphold the safety protections provided by the PPN in circumstances where the court's operations are significantly reduced and the PPN would otherwise lapse. The departure is particularly justified in the context of the 'exceptional circumstances' anticipated by the amendments, given the likely corresponding reduction in the ability of emergency services to respond to help-seeking by victims in such circumstances.

The impacts are also justified given the period of adjournment anticipated by the provisions is intended to be as short as practicable to minimise the potential adverse consequences to parties, and that a PPN may be extended only once under the section.

Media may apply for transcripts of DVO applications – Clauses 32 to 35 of the Bill

Sections 4(2)(a) and 4(3)(b) of the LSA requires legislation to have sufficient regard to the rights and liberties of individuals and to be consistent with principles of natural justice. The proposed amendments depart from these principles.

Principles of natural justice provide a person is entitled to adequate notice and an opportunity to be heard before any judicial order is pronounced against the person. A person cannot incur the loss of liberty or property for an offence until there has been a fair opportunity of answering the charge against them unless the legislature has given authority to act. Failure to adequately address the rights and expectations of third parties can also be a breach of natural justice.

Natural justice also requires procedural fairness which involves a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the case. This includes adequate notice of hearing.

The rights and liberties of individuals includes the right to privacy and confidentiality.

The proposed amendments to the DFVP Act give a judicial officer the power to authorise release of a transcript of an application for a DVO upon application by an accredited media entity. There

is no requirement for service of notice, nor specific provision for standing of parties to the original order. This is to facilitate faster resolution of any application for a transcript, noting that Queensland is the only jurisdiction in Australia which provides that applications for DVOs occur in closed court.

The Taskforce did not recommend amending the provision which provides for applications to occur in closed court. The provision of a transcript of the application is designed to promote open justice and increased reporting about domestic violence in circumstances where media does not otherwise have access to court when such proceedings are heard. Closed court proceedings are designed to ensure that the complainant and other witnesses can give their best evidence.

Parties and witnesses in domestic violence proceedings will continue to have their privacy protected as media are not able to publish identifying information – which is given a wide definition – about a party, witness or child. Any media reporting in relation to DFV civil proceedings will be restricted to publication of evidence given in the proceeding provided it does not identify or is not likely to lead to the identification of a person as a party, witness or child.

Given the amendments are designed to promote expeditious resolution of matters and open justice, where the authorisation of release of a transcript does not otherwise affect the liberty or property of a person, the approach taken in the legislation is considered appropriate. A judicial officer will be required to consider the public interest and obtain an undertaking from media (that they will comply with the DFV Media Guide), as well as have regard to the principles in section 4 of the DFVP Act, which will ensure the authorisation power is appropriated utilised. The departure is considered appropriate and justified in the circumstance.

Amendments to the DFVP Regulation – clause 53 of the Bill

Sections 4(2)(a) and 4(3)(g) of the LSA require legislation to have sufficient regard to the rights and liberties of individuals. The proposed amendments to the DFVP Regulation depart from the rights and liberties of individuals, particularly in relation to privacy and confidentiality, as the amendments allow the publication of identifying information of persons, other than a child, where a respondent to a DVO is subsequently convicted of a criminal offence under the DFVP Act.

Presently, the regulation only allows publication where the subsequent criminal offence is under another Act. The purpose of the amendment to the DFVP Regulation is to promote open justice and wider media reporting about criminal convictions of breaches of DVOs. The amendments also promote freedom of speech. The amendments to the DFVP Regulation will also bring offences under the DFVP Act into line with other criminal offences that already fall under the exception in the DFVP Regulation.

In light of the above, it is considered that there are adequate reasons for the departure from the right to privacy and that the departure is justified.

Court based perpetrator diversion scheme – Part 4, Division 5 of the Bill

Amendments in relation to the operation of the court-based perpetrator diversion scheme may infringe upon a defendant's right to privacy, which is relevant to whether the legislation has sufficient regard to the rights and liberties of individuals as provided for in section 4(2)(a) of the LSA.

Aspects of the scheme that may infringe upon the right to privacy include a requirement that a defendant's criminal history be provided to the court and an approved provider, and further, that a defendant must participate in a suitability assessment before a diversion order can be made. The suitability assessment, and an associated suitability assessment report, must address a range of matters that are personal to the defendant – including, the defendant's character and personal history. A copy of that report must be disclosed to the court, the prosecutor, and the defendant.

This departure is considered justified, as the purpose of these provisions is to provide the court with sufficient information to decide the eligibility of a defendant for the scheme, assess the acceptability of risk to the safety, protection, or wellbeing of an aggrieved (or another person prescribed in the legislation), and determine whether it is appropriate and desirable to make the diversion order. The disclosure of this personal information is in the public interest, as it will reduce the risk to victims of DFV.

The fundamental legislative principles provided for in section 4(3)(f) & (h) of the LSA, relate to appropriate protection against self-incrimination and the conferral of immunity. These considerations intersect with aspects the diversion scheme.

A potential departure with respect to the protection against self-incrimination arises by virtue of an eligibility requirement that the court must be satisfied the defendant has accepted responsibility for the alleged facts constituting the alleged offence in the prosecution's written summary. The Bill balances this potential departure by making clear that the acceptance of responsibility is not taken to be a plea, and by providing immunity from prosecution.

The Bill is clear that the acceptance of responsibility is not admissible in evidence against the defendant in any proceeding. It is further provided that a police officer must not use information derived from the defendant's acceptance of responsibility for an investigation or for a proceeding for an offence. Similar immunity provisions apply to any statements made by the defendant during the suitability assessment.

The eligibility requirement that the defendant accept responsibility for the alleged conduct is justified as a means of holding the defendant accountable for their actions. The conferral of immunity is justified on the basis of facilitating the defendant's participation in the scheme. The absence of immunity provisions would significantly disincentivise engagement, and the conferral of an immunity is intended to encourage full and frank disclosures to ensure a defendant can be accurately assessed and receives appropriate and targeted support.

The scheme otherwise provides for the delegation of administrative power which may depart from section 4(3)(c) of the LSA, which requires the delegation of administrative power only in appropriate cases and to appropriate persons. The chief executive is granted the power to approve an entity as an approved provider and is required to prepare and keep up to date a list of approved providers and diversion programs. This is intended to allow the roll-out of the scheme to be limited operationally to specific locations where providers have been approved. This is a necessary and justifiable delegation of power that is essential for the efficient and proper management of the scheme.

Criminal offence of engaging in domestic violence or associated domestic violence to aid respondent – clause 46 of the Bill

The amendments to introduce a new offence of engaging in domestic violence or associated domestic violence to aid respondent, imposing penalties on those who commit DFV on behalf of a respondent, will potentially depart from the FLP that the legislation has sufficient regard to the rights and liberties of individuals as provided for in section 4(2)(a) of the LSA, in particular, the right to freedom of speech and freedom of movement.

The new offence may limit freedom of speech to the extent that it would make it an offence for third parties to communicate with, and express themselves to, the aggrieved named on a DVO, where it would constitute domestic violence if done by the respondent. It would also prohibit individuals from following and monitoring an aggrieved or named person on a DVO if done with intention to aid the named respondent and where such conduct constitutes domestic violence.

Criminalising this type of abusive conduct seeks to preserve the rights and liberties of people who are subject to domestic violence. The potential departure is therefore considered justified.

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, consequences are proportionate and relevant to the actions to which the consequences are applied by the legislation. Legislation must impose penalties which are proportionate to the offences.

The maximum penalty for the new offence (120 penalty units or 3 years imprisonment) is consistent with the penalty for contravention of a DVO under section 177 of the DFVP Act. The circumstance of aggravation (where a benefit is derived from engaging in the behaviour) increases the maximum penalty to 240 penalty units or 5 years' imprisonment, which is consistent with the penalty for an aggravated contravention of a DVO. The penalties are considered proportionate to the offence and seriousness of the conduct, taking into account these comparable existing provisions.

Amendments to the Security Providers Act – clauses 93 and 94 of the Bill

The amendments to the Security Providers Act are consistent with fundamental legislative principles, including the principle that legislation have sufficient regard to the rights and liberties of individuals.

Given the private security industry undertakes a range of sensitive and high-risk functions and activities, it is imperative that persons working in the industry meet high standards of probity and conduct. While the amendments will prevent persons with certain convictions from being eligible for a licence under the Security Providers Act, they are an appropriate and proportionate approach to promoting public safety by ensuring that licensees (and prospective licensees) have not engaged in specified DFV-related offences.

Improper questions – clause 56 of the Bill

The amendments requiring the court to disallow an improper question regardless of whether an objection is raised by a party will potentially depart from the principle that legislation should be consistent with principles of natural justice, particularly in relation to procedural fairness and unbiased decision-makers.

Requiring the court to disallow improper questions may limit the defendant's right to cross-examine the witness, thereby failing to give the defence a reasonable opportunity to put forward their case. However, the amendments do not completely restrict the defendant's right to cross-examine a witness. Defence will still be able to challenge the evidence of the witness and present their case. The amendments will only restrict the right to the extent that the questions asked are improper, noting that misleading, harassing, offensive or confusing questions are improper.

Although not specifically mentioned in section 4 of the LSA, judicial independence has been considered to be one of the FLPs. Arguably, the amendments will depart from this principle by removing a judge's discretion on whether to disallow an improper question. Given the purpose of the amendments, and the fact that misleading, harassing, offensive or confusing questioning of witnesses does not serve the interests of justice, the departure is justified.

Exclusion of the public and evidence of a complainant's sexual reputation and sexual activities – clause 59 of the Bill

The amendments to the Evidence Act to impose prohibitions and restrictions in relation to particular questions and evidence and to close the court while a complainant is giving evidence may infringe upon the principle that legislation be consistent with the principles of natural justice, including requirements for procedural fairness.

The amendments may limit a defendant's ability to put forward their case by making evidence of a complainant's sexual reputation inadmissible and restricting the defendant's right to cross-examine with respect to the complainant's prior sexual activities without the leave of the court.

Advance notice of an application for leave and a requirement for the application to be in writing may also depart from procedural fairness requirements by placing a defendant at a disadvantage where defence counsel is briefed in a matter shortly before a trial, and by limiting a defendant's ability to put their case orally. It may also impact the right to natural justice in that it requires advance notice, including of particular questions to be asked, which impacts the rights of the defendant who is otherwise not required to reveal their case.

Proposed amendments pertaining to closing the court during a complainant's evidence may depart from the principle of natural justice by limiting the defendant's right to a fair hearing, including a public hearing.

The amendments are being progressed because it is in the public interest to preserve the privacy, reputation and dignity of the complainant in sexual offence proceedings. The amendments are intended to promote the interests of victim-survivors by minimising the trauma of recounting sexual violence. This may more broadly assist in addressing the community's lack of confidence in the criminal justice system and the under-reporting and prosecution of sexual offences by providing witnesses with a level of protection from public exposure and embarrassment. These purposes are consistent with a free and democratic society based on human dignity, equality and freedom.

The amendments include adequate safeguards to ensure that procedural fairness is maintained. Safeguards for the provisions regarding evidence of a complainant's sexual reputation and sexual activities include the court retaining an overriding discretion to admit the evidence or allow the

cross-examination and the ability of the court to waive the requirements for advance notice and a written application where it is in the interests of justice to do so.

In relation to the exclusion of the public, safeguards include that defence is not subject to exclusion from the courtroom while the complainant is giving evidence and the judge must direct the jury about the exclusion of the public, to the effect that they should not draw any inference as to the defendant's guilt, the probative value of the evidence is not increased or decreased, and the evidence is not to be given any greater or lesser weight.

Given the purpose of the amendments and the safeguards, any departures from FLPs are justified.

Jury directions – sexual offences – clause 59 of the Bill

The amendments in the Bill to introduce jury directions to address rape myths will potentially depart from the principle that legislation be consistent with principles of natural justice, particularly in relation to unbiased decision-makers.

The overall test regarding unbiased decision-makers is whether the relevant circumstances would give rise, in the mind of a party or a fair-minded and informed member of the public, to a reasonable apprehension or suspicion of a lack of impartiality on the part of the decision-maker.

The amendments will require a judge to give the jury relevant directions to neutralise the extent to which rape myths influence their deliberations and decisions. This may give rise to the perception that the judge is partial to the complainant by giving jury directions, or being prohibited from giving certain directions, which may result in the jury considering the complainant's evidence through a more favourable lens.

The purpose of the amendments is to recognise and address juror bias in cases involving sexual violence. This will assist juries to correctly assess the evidence before them, apply the law and reach a verdict in complex criminal trials. Any departures from FLPs are considered to be justified as the amendments will ensure juries receive appropriate directions to understand evidence given in cases involving sexual violence, which is consistent with a fair hearing.

Sexual offence expert evidence panel – clause 59 of the bill

The maximum penalty for a person who discloses confidential criminal history information under section 103ZZK is 100 penalty units. This is consistent with penalties for similar offences. The penalty is considered proportionate to the offence and seriousness of the conduct.

Expansion of preliminary complaint evidence – clause 62 of the Bill

The Bill extends the admissibility of preliminary complaint evidence to proceedings for domestic violence offences. This means the judge and jury may hear additional evidence about what a complainant told others about the alleged offences (provided that such disclosures were made before the complainant's first formal witness statement). The effect of this amendment will depend on the state of the evidence in each case. The introduction of preliminary complaint evidence in DFV cases may assist juries to better understand the broader context of an offence. Theoretically, this may lead to increased rates of conviction. Alternatively, in cases where a jury receives preliminary complaint evidence that is inconsistent with another account by the complainant, this may cause detriment to the credibility of the complainant and increase the prospects of an acquittal.

The admission of this type of evidence is relevant to the principle enunciated at s 4(3)(b) of the LSA, which requires that legislation be consistent with principles of natural justice. It is considered that any effect to this principle is minimal.

A defendant will be granted ample opportunity to assess any preliminary complaint evidence prior to a trial (noting the prosecutions strict disclosure obligations), and to cross-examine both the complainant and preliminary complaint witness about the matters raised in their evidence. For this reason, the proposed approach is considered reasonable and fair, and any proposed departure from FLPs is justified. It is noted that the judge retains the discretion to exclude any preliminary complaint evidence where the court is satisfied admission would be unfair to the defendant.

Limits on publishing information in relation to sexual offences – clause 69 of the Bill

The Bill repeals the CLSO Act and replaces the publication regime concerning sexual offences previously contained in the CLSO Act with a dedicated Part 6C in the Evidence Act.

The relevant amendments make it an offence, with a maximum penalty of 100 penalty units or two years imprisonment for an individual, and 1000 penalty units for a corporation, to publish identifying information in relation to a complainant of a sexual offence. This ensures that the identity of a complainant is protected, as is presently the case under CLSO Act. The penalty remains the same as for existing publication offences and is considered reasonable and proportionate.

The Bill provides for 'defences' to a publication offence, being that the complainant self-published, or that another person published with the complainant's written consent, and that the publication does not identify another sexual offence complainant or a child (witness, defendant, or complainant). The publication must be in accordance with any limits set by the complainant.

Additional protections are provided for child complainants who provide consent to publication; because of immature age they may be vulnerable to exploitation or lack the capacity to understand the consequences of publication. This is addressed through requiring a supporting statement, to be provided by a doctor or psychologist, to affirm the child has capacity and understands the consequences of being identified as a victim and losing anonymity.

The general prohibition on publication may be viewed as contrary to principles of open justice. However, it is noted that this general prohibition is designed to ensure that victims of sexual violence cannot be identified without their consent, or a court order. This ensures the privacy and safety of victims are protected, and other victims are not inadvertently discouraged from making complaints.

Sections 4(2)(a) and 4(3)(g) of the LSA requires legislation to have sufficient regard to the rights and liberties of individuals. Section 4(3)(k) provides that legislation should be unambiguous and drafted in a sufficiently clear and precise way. The Taskforce noted that the existing provisions in the CLSO Act are antiquated and unclear. The amendments are drafted in a way to make sure the law provides clarity around when publication is prohibited, promoting the principle that legislation should be clear and unambiguous.

The proposed amendments will make clear when the prohibition on identifying a victim of a sexual offence applies and will empower victim-survivors to tell their story (should they desire to do so) by making it clear that self-publishing, or giving consent to publish, is permissible.

The proposed amendments will apply where criminal proceedings are commenced after commencement of the new provisions, regardless of when the offence was committed. This may infringe on the fundamental legislative principles provided for in section 4(3)(g) as it relates to retrospectivity. However, the amendments do not represent a significant departure from the existing law, consent already being a defence to a publication offence. The regime under the proposed amendments will make clear the ability to self-publish (consistent with promoting victim rights) and provide clearer guidance as to what is required for 'informed consent'.

The maximum penalty for an offence of contravening a complainant privacy order or interim complainant privacy order under section 103ZZZQ is 100 penalty units or 2 years imprisonment for an individual or 1000 penalty units for a corporation. This is considered proportionate to the offence and seriousness of the conduct.

It is therefore considered that the proposed amendments are consistent with FLPs.

Release of sexual offence transcript for research purposes – clause 72 of the Bill

The amendments which allow for release of sexual offence transcripts for research purposes, depart from the FLP concerning the rights and liberties of individuals, in particular the right to privacy and confidentiality.

The amendments will allow release of transcripts for approved research purposes and allow the chief executive to contact parties (or authorise the researcher to contact parties) to find out whether they would like to participate in the research. The researcher will have access to the names of parties as revealed in the transcript. However, the amendment preserves the confidentiality of information obtained by the researcher, imposing upon the researcher an obligation to preserve the confidential nature and the anonymity of the persons to whom the transcript relates. The amendments promote better quality research and evidence based future reform.

Given the purpose of the amendment, and the protections built into the provision, any departure is justified.

The maximum penalty for failing to comply with any condition imposed by the chief executive without reasonable excuse, under section 134AA (Access to transcripts of sexual offence proceedings for research) is 100 penalty units. This is considered proportionate to the offence and seriousness of the conduct.

New aggravating factors and domestic violence averments – clause 86 of the Bill

The Bill requires a court to treat the following circumstances as aggravating when sentencing an offender for a domestic violence offence:

- If an adult offender is convicted of a domestic violence offence committed against a child;
- If an offender is convicted of a domestic violence offence and a child was exposed to the domestic violence within the meaning of the DFVP Act; and

- If an offender is convicted of a domestic violence offence that was also a contravention of an order (including a DVO, PPN, or another order of a court), or a contravention of an injunction.

The proportionality of a penalty to an offence is a relevant consideration when determining whether legislation has sufficient regard to the rights and liberties of individuals. While the aggravating factors do not increase the applicable maximum penalty, the amendments may leave an offender liable to a higher sentence.

The introduction of these aggravating factors is considered justified, and proportionate and relevant to the actions to which the consequences are applied, based on the Taskforce's recommendations and findings about the immense harm caused to children who are victims of domestic violence or are exposed to domestic violence.

The requirement to expressly recognise the aggravating factors is justified to protect DFV victims, deter reoffending, and in light of the inherent seriousness of breaching an order or exposing a child to DFV. The impact of the aggravating factors on the rights and liberties of individuals is also mitigated by the fact that the court may currently consider such features when determining an appropriate sentence.

# Consultation

The Taskforce undertook extensive consultation in preparing both its reports. For Report One, the Taskforce received over 700 submissions from stakeholders including individuals sharing their lived experience, conducted stakeholder forums throughout Queensland and held over 125 individual meetings with stakeholders including the judiciary, legislators, police, the legal profession, policy makers, academics and service providers.

For Report Two, the Taskforce received 19 submissions from women who were offenders and 250 submissions from victim-survivors of sexual assault. Submissions came from all over Queensland, including from people who identified as First Nations, culturally and linguistically diverse, people with disability and people from the LGBTIQA+ community. The Taskforce also held 79 consultations and engagements across Queensland with stakeholders including the judiciary, legislators, police, policy makers, academics and service providers.

Targeted preliminary consultation was also undertaken on a discussion paper with the judiciary, relevant statutory bodies, key domestic, family and sexual violence stakeholders, media stakeholders and approved security industry associations. Stakeholder feedback arising from this consultation process informed the development of a consultation draft copy of the Bill (consultation draft Bill).

Further targeted consultation was undertaken on a confidential basis with the judiciary, relevant statutory bodies, key domestic, family and sexual violence stakeholders, media stakeholders and approved security industry associations on the consultation draft Bill. Feedback received during this consultation process was taken into account in finalising the Bill for the purposes of introduction.

# Consistency with legislation of other jurisdictions

The amendments in the Bill are specific to the legislative framework of the State of Queensland and are not consistent with or complementary to legislation of the Commonwealth or another state, except as identified below.

Affirmative model of consent and stealthing
The amendment of the meaning of consent to be free and voluntary agreement is consistent with the approach taken in all jurisdictions except Western Australia.

The inclusion of a more detailed non-exhaustive list of circumstances where there is no consent is consistent with the approach taken New South Wales (modelled on section 61HJ of the *Crimes Act 190*0 (NSW)), Victoria and the Australian Capital Territory. Other jurisdictions have a more limited list of circumstances which largely reflects Queensland existing list in section 348(2).

The specific provision pertaining to non-payment of a sex worker is modelled on the Victorian equivalent. However, New South Wales, Australian Capital Territory, and Tasmania have fraud provisions which can capture this conduct.

Most jurisdictions have recently passed amendments to specifically criminalise stealthing. The approach taken by Queensland is most similar to the Victorian approach. However, the provision in the Bill specifically extends to circumstances where a defendant becomes aware that the condom has become ineffective but continues with the sexual activity.

The amendments to mistake of fact as to consent which require a defendant to have said or done something to ascertain consent are largely consistent with the approach taken to implementing affirmative consent in New South Wales, Victoria and the Australian Capital Territory. Queensland has adopted the term ‘immediately before’ rather than a ‘reasonable time before’ which better reflects the need for ongoing communication between parties to reach agreement, particularly where a defendant is seeking to rely on the excuse.

Inclusion of a ‘safeguard provision’ for persons with a cognitive or mental health impairment is consistent with the approach taken in New South Wales and Victoria. The definitions of cognitive impairment and mental health impairment are modelled on similar provisions in New South Wales.

Jury directions – Corroboration
The prohibition on directing the jury that it would be dangerous or unsafe to convict the defendant on the uncorroborated evidence of a witness brings Queensland into closer alignment with the legislation in Victoria.

Improper questions
The new provisions pertaining to improper questions are broadly consistent with equivalent provisions in the Commonwealth, Australian Capital Territory, New South Wales, Victoria, South Australia and Tasmania.

Exclusion of the public and evidence of a complainant’s sexual reputation and sexual activities
Amendments requiring the court to consider the distress, humiliation, and embarrassment that the complainant may experience as a result of cross-examination or evidence relating to their sexual activities more closely aligns Queensland with other Australia jurisdictions (including New South Wales, South Australia, Tasmania, Victoria and Western Australia).

The provisions in the Bill are modelled on those in the *Criminal Procedure Act 2008* (Vic), including the contents of an application for leave and the requirements for the application to be filed in advance and made in writing.

The amendments which clarify that the court is to be closed while a complainant is giving evidence, regardless of the form in which the evidence is given, will enhance alignment with New South Wales which also clarifies that the court is to be closed even if the complainant gives evidence by means of closed-circuit television or other technology or under alternative arrangements.

Jury directions – sexual offences

These amendments are modelled on provisions in the *Criminal Procedure Act 1986* (NSW) and *Jury Directions Act 2015* (Vic) and will ensure greater consistency in jury directions for sexual offences. New Zealand has also legislated a requirement for a judge to give directions to the jury to address any relevant misconceptions relating to sexual cases.

Prohibited directions

The prohibition on directions relating to the reliability of children's evidence will ensure greater consistency between the law in Queensland, the Australian Capital Territory, New South Wales, Tasmania and Victoria. The prohibition of directions relating specifically to the uncorroborated evidence of a child will also ensure greater alignment with legislation in South Australia and Western Australia.

The amendments abolishing the *Markuleski* direction will more closely align Queensland with the position in Victoria, South Australia and Western Australia (noting that the direction is not abolished in Western Australia, but is not given).

Coercive control offence

As recommended by the Taskforce, the amendments for the coercive control offence are partly modelled on aspects of the *Domestic Abuse (Scotland) Act 2018* (Scotland), which establishes an offence of 'Abusive behaviour towards partner or ex-partner', with amendments necessary to reflect Queensland laws, systems and particular needs.

Aspects of the coercive control amendments in the Bill will also bring Queensland into closer alignment with the offence in the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW), which will establish an offence of 'Abusive behaviour towards current or former intimate partners'.

The coercive control offence aligns with aspects of the Scottish legislation, including that:

- the offence criminalises a course of conduct consisting of domestic violence (the Scottish offence uses the term 'course of behaviour which is abusive');
- while proof of the offence is not dependent on proof of actual harm to the other person, this does not prevent evidence being led about this matter;
- the offence is aggravated for sentencing purposes, and recorded as such, if committed in relation to or in the presence of a child;
- the offence is subject to an embedded defence;
- the offence has a similar alternative offence provision in relation to stalking; and
- the maximum penalty for the offence, on conviction on indictment, is 14 years imprisonment.

The coercive control offence aligns with aspects of the NSW legislation, including that:

- the offence only applies to adult offenders;
- the offence requires engagement in a 'course of conduct' against another person;
- the offence requires the course of conduct be intended to coerce or control the other person;
- the offence is subject to an embedded defence.

The offence also shares some similarities with Tasmania's *Family Violence Act 2004*. The Tasmanian legislation criminalises the pursuit of courses of conduct intended to unreasonably control or intimidate, or cause mental harm, apprehension and fear to a person's spouse or partner ('Emotional abuse or intimidation'), with a separate offence where the course of conduct is economic abuse.

Limits on publishing information in relation to sexual offences

The proposed regime for complainant privacy orders is modelled on Victorian provisions relating to victim privacy orders in the *Judicial Proceedings Reports Act 1958 (Vic)*.

# Notes on provisions

## Part 1 Preliminary

*Clause 1* provides that the Act may be cited as the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*.

*Clause 2* provides that the following provisions commence on a day to be fixed by proclamation: part 3; part 4, divisions 3 to 7; parts 5 to 8; part 9, divisions 3 and 4; parts 10, 11, 13 and 14; and schedule 1.

Subclause (2) provides that section 15DA of the *Acts Interpretation Act 1954* does not apply to the Act. This has the effect that, if the provisions which are to commence on a day to be fixed by proclamation are not commenced within 1 year of the assent day, they will not automatically commence on the next day.

## Part 2 Amendment of Bail Act 1980

*Clause 3* provides that Part 2 amends the *Bail Act 1980*.

*Clause 4* amends section 6 (Definitions) to insert new definitions of ‘‘family relationship’’ and ‘‘informal care relationship’’ by reference to the definitions of the terms used in the DFVP Act.

*Clause 5* amends section 11 (Conditions of release on bail) to insert a new subsection (3A) which requires a police officer or court considering the imposition of special conditions under subsection (2) to have regard to the likely effect that a bail condition would have on the defendant’s ability to carry out the defendant’s responsibilities for family members for whom the defendant is the primary caregiver, a person with whom the defendant is in an informal care relationship or the child of a pregnancy (if the defendant is pregnant). Examples of responsibilities include transporting a child to an appointment, childcare or school, attending a medical appointment in relation to a pregnancy and cultural obligations to a family member.

*Clause 6* amends section 16 (Refusal of bail generally) to insert a new subsection (2)(i) which requires a police officer or court assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) (which includes that the defendant would fail to appear and surrender into custody, or would, while released on bail, commit an offence or endanger the safety or welfare of a victim or another person) to have regard to the likely effect that a refusal of bail would have on a family member for whom the defendant is the primary caregiver, a person with whom the defendant is in an informal care relationship or a child of a pregnancy (if the defendant is pregnant).

*Clause 7* inserts new section 51 (Transitional provision for *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*).

Subsection (1) provides that sections 6, 11 and 16, as amended, apply in relation to the release of a person on bail on or after the commencement.

Subsection (2) provides that for subsection (1) it is irrelevant whether the offence in relation to which the decision is made happened or the proceeding for the offence was started before or after the commencement.

# Part 3 Amendment of Criminal Code

## Division 1 Preliminary

*Clause 8* provides that Part 3 amends the Criminal Code.

## Division 2 Failure to report offence

*Clause 9* amends section 229BC.

Subsection (1) amends section 229BC(4)(c) by replacing the words 'becomes an adult', with 'turns 16 years'. This amendment broadens an existing 'reasonable excuse' that exists where an adult person gains information that causes them to believe a child sexual offence is being or has been committed against a child. This reasonable excuse will now apply in cases where the alleged victim has turned 16 years of age, instead of when the alleged victim becomes an adult, and where the adult person reasonably believes the alleged victim does not want the information to be disclosed to a police officer.

Subsection (2) amends 229BC(4)(c) by inserting new subsection (e) to establish a reasonable excuse where an adult reasonably believes there is no real risk of serious harm to the child or any other child in not disclosing the information to a police officer and the adult person gains the information:

- as a relevant professional while acting in their professional capacity, and
- in the course of a confidential professional relationship with the child in which there is an express or implied obligation of confidentiality between the adult and the child;

Subsection (3) amends section 229BC(6) by providing definitions for key terms used in the new reasonable excuse provision. In particular, this includes 'relevant professional' which is defined to mean a medical practitioner, a person registered to practise in the psychology, midwifery or registered nursing profession other than as a student, a person who is a member of the Australian Association of Social Workers, or a counsellor.

## Division 3 Affirmative consent, mistake of fact and stealthing

*Clause 10* amends the definition of consent in section 223 (Distributing intimate images) to provide that consent means free and voluntary agreement by a person with the cognitive capacity to make the agreement.

*Clause 11* amends the definition of consent in section 227B (Distributing prohibited visual recordings) to provide that consent means free and voluntary agreement by a person with the cognitive capacity to make the agreement.

*Clause 12* amends the definition of consent in section 2279A (Threats to distribute intimate image or prohibit visual recording) to provide that consent means free and voluntary agreement by a person with the cognitive capacity to make the agreement.

*Clause 13* replaces existing section 348 (Meaning of consent) with new section 348 (Consent) and adds a new section 348AA (Circumstances in which there is no consent).

New section 348 provides a definition of consent for the purpose of offences in chapter 32.

New subsection (1) provides that consent means free and voluntary agreement.

New subsection (2) provides a person may withdraw consent at any time.

New subsection (3) provides that a person who does not offer physical or verbal resistance to an act is not, by reason of only that fact, taken to consent to the act. This replaces existing section 348(3) which provides that a person is not to be taken to give consent to an act only because the person does not, before or at the time of the act is done, say or do anything to communicate the person does not consent to the act.

New subsection (4) provides that a person does not consent to an act just because they consented to: a different act with the same person, the same act with the same person at a different time or place; the same act with a different person; or a different act with a different person.

New section 348AA sets out a non-exhaustive list of the circumstances in which a person does not consent to a sexual activity.

New subsection (1)(b), there is no consent if the person does not have the cognitive capacity to consent.

New subsection (1)(c) provides there is no consent if the person is so affected by alcohol or another drug as to be incapable of consenting to the act.

New section (1)(d), there is no consent if the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act. The provision includes a note that this circumstance may apply where a person gave consent when not so affected by alcohol or another drug as to be incapable of consenting.

New subsection (1)(e), there is no consent if the person is unconscious or asleep. A person who is unconscious or asleep lacks cognitive capacity to give consent.

New subsection (1)(f) provides, there is no consent if the person participates in the act because of force, a fear or force, harm of any type or a fear of harm of any type, whether to that person or someone else or to an animal or property. This is regardless of (i) when the force, harm or conduct giving rise to the fear occurs; or (ii) whether it is, or is a result of, a single incident or part of an ongoing pattern.

A list of examples is provided which includes economic or financial harm; reputational harm; harm to the person's family, cultural or community relationships; harm to the person's employment; family violence involving psychological abuse or harm to mental health; or sexual harassment. This list is non-exhaustive.

New subsection (1)(g) provides there is no consent where the person participates in the act because of coercion, blackmail or intimidation regardless of when it occurred or whether it was a single incident or ongoing pattern.

New subsection (1)(h) provides there is no consent where a person participates in the act because the person or another person is unlawfully confined, detained or otherwise deprived of their personal liberty.

Under new subsection (1)(i), there is no consent where the person participates in the act because the person is overborne by the abuse of a relationship of authority, trust or dependence.

New subsection (1)(j) provides that there is no consent where the person participates in the act because of a false or fraudulent representation about the nature or purpose of the act, including about whether the act is for health, hygienic or cosmetic purposes.

New subsection (1)(k) provides that there is no consent where the person, being the complainant, participates in the act with another person because the person is: mistaken about the identity of the other person, or that the person is married to the other person.

New subsection (1)(l) provides there is no consent where the person, being the complainant, 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 sexual act. 'Sex worker' is defined in 348AA(4) as a person who provides services to another person that involve the person participating in a sexual activity with the other person for payment or reward.

New subsection (1)(m) provides there is no consent where a person, being the complainant, participates in the act with another person because of false or fraudulent representation by the other person about whether the person has a serious disease; and the other person transmits the serious disease to the person.

The disease must constitute a serious disease as defined in section 1 of the Criminal Code. This requires the disease to be one that would, if left untreated, be of such a nature as to cause or be likely to cause a loss of a distinct part or organ of the body, serious disfigurement, or permanent injury to health; or endanger or be likely to endanger life. This would usually be the subject of expert medical opinion.

New subsection (1)(n) provides that there is no consent to an act where the person participates in the sexual act with another person on the basis that a condom will be used for the act and the other person does any of the following before or during the act: does not use a condom; tampers with the condom; removes the condom; or becomes aware that the condom is no longer effective but continues with the sexual act.

New subsection (2) provides that if a person, who is the complainant for a rape, attempted rape, assault with intent to rape, or sexual assault, suffers grievous bodily harm as a result of, or in connection with, the offence, the grievous bodily harm suffered is evidence of the lack of consent on the part of the person unless the contrary is proved. 'Grievous bodily harm' is defined in section 1 of the Criminal Code.

New subsection (3) explicitly provides that the circumstances listed in the provision do not limit the grounds on which it may be established that a person does not consent to an act.

*Clause 14* amends section 348A (Mistake of fact in relation to consent).

Subclause (1) amends section 348A(1) to replace the words 'gave consent' with 'consented'.

Existing subsections 348(2) and 348(3) are removed and replaced with new provisions (2)-(6).

New subsection (2) provides that in deciding whether an accused's belief that a complainant was consenting was honest and reasonable, voluntary intoxication should not be considered.

New subsection (3) provides a belief that another person consented to an act is not reasonable if the person did not, immediately before or at the time of the act, say or do anything to ascertain whether the other person consented to the act.

New subsection (4) provides that subsection (3) does not apply if the person proves they had a cognitive or mental health impairment that was a substantial cause of them not saying or doing anything. The defendant bears the onus of proving a relevant impairment and that it was a substantial cause of them not saying or doing anything (new subsection (5)). New subsection (6) provides that proof of this requires expert evidence from a suitably qualified person.

*Clause 15* inserts new sections 348B (Cognitive impairment) and 348C (Mental health impairment) which define cognitive and mental health impairment.

New section 348B defines cognitive impairment for the purpose of section 348A(4)(a)(i). It requires proof of three things (as defined in subsection (1)):

a) that the defendant has an ongoing impairment in adaptive functioning;

b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory so as to affect functioning in daily life to a material extent; and

c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind. Such dysfunction, delay or deterioration may arise from a condition listed in subsection (2) or for other reasons.

New subsection (2) provides a non-exhaustive list of conditions that may give rise to a cognitive impairment: intellectual disability, borderline intellectual functioning, dementia, an acquired brain injury, drug or alcohol related brain damage (including fetal alcohol spectrum disorder), or autism spectrum disorder. However, the existence of one of these conditions on its own is not sufficient; there must be evidence concerning the matters listed in subsection (1)(a)-(c) with proof that it affected a defendant's functioning in daily life to a material extent.

New section 348C defines mental health impairment for the purposes of section 348A(4)(a)(ii). A mental health impairment requires proof of three things:

a) a temporary or ongoing disturbance of thought, mood, volition, perception or memory;

b) that the disturbance would be regarded as significant for clinical diagnostic purposes; and

c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person so as to affect functioning in daily life to a material extent.

New subsection (2) provides a non-exhaustive list of conditions from which a mental health impairment may arise including an anxiety disorder, an affective disorder, a psychotic disorder, or a substance induced mental disorder. Personality disorders have been deliberately excluded from this list and are not intended to be covered by the provision. Subsection (3) provides that a person does not have a mental health impairment for the purposes of section 348A(4)(a)(ii) where an impairment was caused solely by the temporary effect of ingesting a substance.

*Clause 16* inserts new section 590BA (Advance notice of intention to rely on expert evidence under s 348A) which requires a defendant to give advance notice of an intention to rely on expert evidence under section 348A. The provision requires the defendant to give written notice to the

Office of the Director of Public Prosecutions of this intention within 14 days after finalisation of committal proceedings. Where notice is not given, a defendant will be required to seek the leave of the court before being allowed to adduce such evidence.

*Clause 17* inserts transitional provisions in a new chapter 109 (Transitional provisions for *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*) in Part 9 of the Criminal Code.

New section 761 (Application of ch 32 to proceedings) provides that the amendments to sections 348, 348AA and 348A, discussed above, only apply to offences committed wholly after commencement of those provisions. Where an offence was committed before commencement, or where the offence was committed across a time period and it started before commencement, the former provisions will apply.

## Division 4 Jury directions – corroboration

*Clause 18* omits section 632(2) and (3) and inserts new subsections (2) and (3).

New subsection (2)(a) provides that, on a trial of a person for an offence, a judge must not direct, warn or suggest to the jury that the law regards any class of persons as unreliable witnesses. This is largely consistent with the existing prohibition in section 632(3).

New subsection (2)(b) provides that, on a trial of a person for an offence, a judge must not direct, warn or suggest to the jury in relation to the uncorroborated evidence of a witness that it would be dangerous or unsafe to convict the defendant on the evidence or that the evidence should be scrutinised with great care. A note is included to also see other sections which prohibit certain directions (some of which are inserted by the Bill).

New subsection (3) clarifies that subsection (1) (which provides that a person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless the Code expressly provides to the contrary) or (2) does not prevent a judge from making a comment on the evidence given that it is appropriate to make in the interests of justice.

## Division 5 Criminal offence of coercive control

*Clause 19* amends section 1 (Definitions) for new chapter 29A (Criminal offence of coercive control), defining the terms ‘coercive control’, ‘economic abuse’, ‘emotional or psychological abuse’, ‘harm’ and ‘unauthorised or unreasonable surveillance’ by reference to new section 334A, and ‘domestic violence’ by reference to new section 334B. The existing note to the definition of ‘domestic relationship’ is also amended to insert after ‘that Act’, ‘An intimate personal relationship includes a former intimate personal relationship.’

*Clause 20* inserts new Part 5, chapter 29A (Coercive control).

New section 334A (Definitions for chapter) defines the terms ‘coercive control’ as the offence mentioned in section 334C and ‘domestic violence’ by reference to section 334B. It also defines the terms ‘economic abuse’, ‘emotional or psychological abuse’, ‘harm’ and ‘unauthorised and unreasonable surveillance’.

New section 334B (What is *domestic violence*) defines ‘domestic violence’ for the purposes of the coercive control offence.

New subsection (2) provides that domestic violence behaviour may occur over a period of time, may be more than 1 act or series of acts that when considered cumulatively is abusive, threatening, coercive or causes fear and is to be considered in the context of the relationship between the first person and the second person as a whole.

New subsection (3) includes a non-exhaustive list of examples of domestic violence behaviours, which expands upon the corresponding list in section 8 of the DFVP Act to include additional examples which illustrate domestic violence behaviours common in cases of coercive control. This includes: (j) making a person dependent on, or subordinate to another person; (k) isolating a person from friends, relatives or other sources of support; (l) controlling, regulating or monitoring a person's day-to-day activities; (m) depriving a person of, or restricting a person's, freedom of action'; and (n) 'frightening, humiliating, degrading or punishing a person.

New subsection (4) defines 'coerce' and defines 'unlawful stalking, intimidation, harassment or abuse' by reference to sections 359B and 359D.

New section 334C (Coercive control) inserts the criminal offence of coercive control.

New subsection (1) provides that an adult commits a coercive control offence if:

a) a person is in a domestic relationship with another person;

b) engages in a course of conduct against the other person that consists of domestic violence occurring on more than 1 occasion;

c) intends the course of conduct to coerce or control the other person; and

d) the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm.

New subsection (1) imposes a maximum penalty of 14 years imprisonment.

New subsection (2) provides that an offence against subsection (1) is a crime.

New subsection (3) provides that for subsection (1)(c), the prosecution is not required to prove that each act of domestic violence constituting the course of conduct was intended to coerce or control the other person.

New subsection (4) provides that the circumstances in subsection (1)(d) include, but are not limited to, the behaviour of the person and the other person in the context of their relationship as a whole.

New subsection (5) provides that, in relation to the domestic violence constituting the course of conduct:

a) the prosecution is not required to particularise any individual act or acts of domestic violence which also constitute an offence or offences as if the act or acts were charged as a separate offence; and

b) the jury is not required to be satisfied of the particulars of any individual act or acts of domestic violence which also constitute an offence or offences as it would have to be satisfied if the act or acts were charged as a separate offence; and

c) all the members of the jury are not required to be satisfied about the same acts of domestic violence.

New subsection (6) provides that a person may be charged with the coercive control offence and 1 or more other offences of domestic violence alleged to have been committed during the course of conduct for the coercive control offence.

New subsection (7) provides that the offences mentioned in subsection (6) may be charged in the same indictment.

New subsection (8) provides that a person charged with the coercive control offence and 1 or more other offences of domestic violence as mentioned in subsection (6) may be convicted of and punished for any or all of the offences charged.

New subsection (9) provides that if a person charged with the coercive control offence and 1 or more other offences of domestic violence as mentioned in subsection (6) is sentenced to imprisonment the sentencing court may not order that the sentence for the coercive control offence be served cumulatively with the sentence or sentences for the other offence or offences.

New subsection (10) provides that it is a defence to the offence to prove the course of conduct for the coercive control offence was reasonable in the context of the relationship between the person and the other person as a whole.

New subsection (11) provides that it is not a defence to the offence that the person believed that any single act of domestic violence which formed part of the course of conduct for the offence, or each act that constituted the course of conduct considered in isolation, was reasonable in the context of the relationship between the person and the other person as a whole.

New section 334D (What is immaterial for coercive control) provides that certain matters are immaterial for coercive control.

New subsection (1) provides that for subsections 334C(1)(b) and (c), it is immaterial whether the domestic violence that constituted the course of conduct against the other person was carried out in relation to another person or the property of another person.

New subsection (2) provides that for subsection 334C(1)(d), that is, determining whether the course of conduct would, in all the circumstances, be reasonably likely to cause the other person harm:

a) it is immaterial whether the course of conduct actually caused the other person harm; and

b) if an act of domestic violence that formed part of the course of conduct was unauthorised or unreasonable surveillance or economic abuse of the other person it is immaterial whether the other person was aware of the act.

New subsection (3) provides that despite matters being immaterial for section 334C(1), as mentioned in subsections (1) or (2), nothing prevents evidence being adduced about the matters.

New subsection (4) provides that in section 334D, ‘other person’ has the meaning provided in subsection 334C(1)(a).

New section 334E (Court may restrain coercive control) sets out the process for a court hearing a charge of coercive control to make a restraining order to restrain a person, regardless of whether a person is found guilty of the charge of coercive control. This provision is modelled on the restraining order provision in section 359F of the Criminal Code which applies in relation to the crime of unlawful stalking, intimidation, harassment or abuse, and it is intended that this provision operate in a consistent manner to section 359F.

New subsection (1) provides that section 334E applies on the hearing of a charge of coercive control.

New subsection (2) provides that, regardless of whether a person is found guilty or not guilty or the prosecution ends in another way, if the presiding judge or magistrate considers it desirable, they may constitute the court to consider whether a restraining order should be made against the person.

New subsection (3) provides that the judge or magistrate may at under subsection (2) on application by the Crown or an interested person or on their own initiative.

New subsection (4) provides that if a restraining order proceeding is started before the Supreme Court or District Court the court may order the proceeding to be transferred to a Magistrates Court.

New subsection (5) provides that if a court makes an order to transfer a restraining order proceeding to a Magistrates Court in accordance with subsection 334E(4), the registrar of the court must send a copy of the order and the record of proceedings of the hearing of the charge and any application mentioned in subsection 334E(3) to the clerk of the relevant Magistrates Court.

New subsection (6) provides that the court hearing the restraining order proceeding may make a restraining order against the person in relation to any person or any property if it considers it desirable to do so having regard to the evidence given at the hearing of the charge, any application under subsection 334E(3) and any further evidence the court may admit.

New subsection (7) provides that a restraining order takes effect on the day it is made and continues in force until the day stated in the order or for 5 years.

New subsection (8) provides that a restraining order may only be made for a period of less than 5 years if the court is satisfied that the safety of a person protected by the order is not compromised by the shorter period.

New subsection (9) provides for a restraining order to be varied or revoked at any time by the court and if the order provides, another court.

New subsection (10) provides that a person who knowingly contravenes a restraining order commits an offence and imposes a maximum penalty of 120 penalty units or 3 years imprisonment.

However, subsection (11) provides that if the person has been convicted of a domestic violence offence in the 5 years before the contravention, the person is guilty of a misdemeanour and liable to a maximum penalty of 240 penalty units or imprisonment for 5 years.

New subsection (12) provides that a restraining order may be made against a person whether or not another order is made against the person in the proceedings for the charge.

New subsection (13) provides that a restraining order proceeding is not a criminal proceeding, the effect of which is that the standard of proof applicable in a restraining order proceeding is the civil standard, the balance of probabilities.

New subsection (14) provides that a question of fact for a decision under subsection (2) and for a restraining order proceeding must be decided on the balance of probabilities.

New subsection (15) provides definitions of 'charge', 'restraining order' and 'restraining order proceeding' and defines 'domestic violence offence' as including an offence under the DFVP Act and includes a note referencing the definition of 'domestic violence offence' in section 1 *Criminal Code*.

New section 334F (Alternative offence to crime of coercive control) provides that a person indicted on a charge of the crime of coercive control may alternatively be convicted of the crime of unlawful stalking, intimidation, harassment or abuse if that offence is established by the evidence.

*Clause 21* amends section 552A (Charges of indictable offences that must be heard and decided summarily on prosecution election) to include the coercive control offence in (1)(a) as an indictable offence which must be heard and determined summarily on prosecution election, only if the defendant has pleaded guilty.

*Clause 22* amends section 552B (Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial) to provide that an offence against new section 334E must be heard and decided summarily unless the defendant elects for jury trial if the defendant is liable to the penalty mentioned in section 334E(11). The clause also renumbers section 552B (1).

*Clause 23* inserts new sections 762 (Application of s 334C to acts of domestic violence constituting coercive control) and 763 (Conviction for domestic violence offence before commencement).

New subsection (1) provides that section 334C (Coercive control) only applies to acts of domestic violence constituting the course of conduct done after commencement.

New subsection (2) provides that this section does not limit the operation of part 6A, division 1A of the Evidence Act.

New section 763 (Conviction for domestic violence offence before commencement) provides that where a person commits an offence against subsection 334E(10) (Contravening a coercive control restraining order) and is liable to the penalty in subsection 334E(11) because they have been convicted of a domestic violence offence in the 5 years before the contravention, subsection 334E(11) applies regardless of whether any of the acts constituting the prior offence were done before or after the commencement, despite section 11(2) and the *Acts Interpretation Act 1954*, section 20C(3).

## Division 6 New aggravating factors and domestic violence averments

*Clause 24* amends section 564 (Form of indictment) by omitting and replacing existing subsection 564(3A). Subsection (a) replicates the existing provision, to state that an indictment for an offence may state the offence is also a domestic violence offence. Subsection (b) provides that an indictment for an offence may state the offence is also a domestic violence offence committed

against a child. Subsection (c) provides that an indictment for an offence may state the offence is also a domestic violence offence that exposed a child to domestic violence.

*Clause 25* amends section 572 (Amendment of indictments) by inserting new section 572(1A) and (1B). New 572(1A) and (1B) operate in conjunction with each other. New section 572(1A) provides that subsection (1B) will apply if the court considers that an offence charged in the indictment is also a domestic violence offence, a domestic violence offence committed against a child, or a domestic violence offence that exposed a child to domestic violence. These are each tagged a 'relevant domestic violence offence' for the purposes of the provision. New section 572(1B) enables a court to order that an indictment be amended to state the offence is also a relevant domestic violence offence.

# Part 4 Amendment of Domestic and Family Violence Protection Act 2012

## Division 1 Preliminary

*Clause 26* provides that Part 4 amends the DFVP Act and includes a note that schedule 1 contains an additional amendment to the DFVP Act.

## Division 2 Court to consider appropriate period for a protection order

*Clause 27* amends section 37 (When court may make protection order) to insert a new subsection 37(4A) which provides that when a court decides to make a protection order against the respondent it must consider the appropriate period for which the order will continue in force, and renumbers the provision.

*Clause 28* inserts a new Part 10, division 6 (Transitional provisions for *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*) which includes new section 237 (Deciding period for which protection order continues in force). Section 237 provides that the amendment of section 37 under the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023* only applies to an application for protection order filed after the commencement.

## Division 3 Requirement for court to consider making a temporary protection order

*Clause 29* inserts new section 47B (When court must consider making temporary protection order on adjournment).

New subsection (1) provides that section 47B applies to a proceeding for an application for a protection order and includes a note that under section 112, a police protection notice is taken to be an application for a protection order.

New subsection (2) provides that if a hearing of an application is adjourned at the first mention of the proceeding, the court must consider whether to make a temporary protection order.

*Clause 30* amends section 113 (Duration).

Subclause (1) amends subsection (3)(c) to provide that a police protection notice continues in force until the proceeding is adjourned if the court adjourns the application for a protection order and

does not make a domestic violence order or order to extend the police protection notice under subsection (4).

Subclause (2) inserts new subsections (3A) to (3F).

New subsection (3A) provides that for subsection (3)(c), in exceptional circumstances a court may adjourn the application for a protection order and make an order to extend the police protection notice for not more than 5 business days, or if the court is not sitting in the next 5 business days, until the next anticipated sitting date for the court.

New subsection (3B) provides that an order to extend the police protection notice may be made without appearances by the parties to the protection order application.

New subsection (3C) provides that a police protection notice may only be extended once.

New subsection (3D) provides that the court must take reasonable steps to notify the police commissioner and the parties to the protection order application of any extension of the police protection notice.

New subsection (3E) provides that a failure to comply with the previous subsection does not invalidate or otherwise affect the extension of the police protection notice.

New subsection (3F) provides that if the court makes an order to extend the police protection notice, section 47B applies at the first mention for the proceeding which occurs after the making of the order.

Subclause (3) inserts a new subsection (5) which defines 'exceptional circumstances' as unforeseen circumstances that cause the operation of the court to be significantly reduced, and includes examples 'natural disaster, severe weather event, major public health event'.

Subclause (4) renumbers subsections (3A) to (5), as inserted by the Bill, as subsections (4) to (11).

*Clause 31* inserts new sections 238 (Application of s47B to particular proceedings) and 239 (Application of s 113 to particular proceedings).

New section 238 provides that section 47B only applies to a proceeding for an application for a protection order filed after the commencement, or if the application is a police protection notice taken to be an application for a protection order under section 112, section 47B only applies to the proceeding if the police protection notice is issued after the commencement.

New section 239 provides that the amendment of section 113 under the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023* applies to a police protection notice whether the notice is issued before or after the commencement.

## Division 4 Media may apply for transcript of domestic and family violence proceedings

*Clause 32* inserts new sections 157D (Definitions for division) and 157E (What information identifies or is likely to identify a person).

New section 157D inserts new definitions into Part 5, division 4 of the DFVP Act, for the terms: accredited media entity, identifying matter, and Supreme Court's media accreditation policy. It

also includes a definition of 'proceedings under this Act' which provides a proceeding includes proceedings under Part 7 (breach offences).

New section 157E provides that information identifies, or is likely to lead to the identification of, a person if the information includes identifying matter about the person.

*Clause 33* amends section 159 (Prohibition on publication of certain information for proceeding).

Subclause (1) amends section 159(1)(a) to provide that information includes a photograph, picture, videotape and other visual representation.

Subclause (2) amends section 159(1)(b) , which provides that it is an offence to publish certain information, by removing the existing subsection (1)(b) and replacing it with a new section 159(1)(b). The amendment replaces 'a child concerned in a proceeding under this Act' with 'child'. The provision otherwise prevents publication of identifying information about the same persons, being a party to the proceeding, a witness in a proceeding, or a child.

Subclause (3) inserts new subsection (ea) into section 159(2), which provides that the offence provision in section 159(1) does not apply to a publication of information by an accredited media entity if the information does not identity, and is not likely to lead to the identification of, a person mentioned in subsection (1)(b).

Subclause (4) renumbers subsection (2)(ea) to (g) as (2)(f) to (h).

Subclause (5) removes the definition of information from subsection (3).

*Clause 34* amends section 160 (prohibition on obtaining copies of documents for proceeding).

The existing section 160(1) provides that a person is not entitled to any part of the record of a proceeding or any document used or tendered in the proceeding. Subsection (2) provides for exceptions to subsection (1).

Subclause (2) inserts a new exception under subsection (2) which provides 'an accredited media entity authorised by a judicial officer under section 161A'. Section 160(2)(d) is also amended to exclude media from being able to utilise that provision to obtain any part of the record of proceeding. Accredited media should instead utilise the new process under new section 161A to obtain a transcript of a DVO application.

Subclause (3) renumbers subsections (2)(ea) to (h) as (2)(f) to (i).

*Clause 35* inserts new section 161A (Accredited media entity may apply for copy of transcript of proceeding for application) in relation to an application for a domestic violence order.

New subsection (1) allows a judicial officer to authorise an accredited media entity to receive a copy of a transcript of a proceeding for an application for a domestic violence order.

New subsection (2) provides that, in making a decision under subsection (1), a judicial officer must consider the principles in section 4, which include that the Act is to be administered under the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount.

New subsection (3) provides that a judicial officer may only give authorisation where the applicant provides an undertaking to comply with the Domestic and Family Violence Media Guide and the judicial officer is satisfied it is in the public interest to give the authorisation.

New subsection (4) defines 'Domestic and Family Violence Media Guide' for the purposes of the new section as the document made by the chief executive and published on the department's website.

*Clause 36* inserts new transitional provisions, sections 240 and 241, into new Division 6 of Part 10.

New section 240 (Section 159(2)(f) applies to proceedings started after commencement) provides that the amendment to section 159(2) applies to information that relates to a proceeding only if the proceeding started after commencement.

New section 241 (Section 161A applies to proceedings started after commencement) provides that a judicial officer may only give authorisation under new section 161A in relation to a copy of a transcript of a proceeding for an application for a DVO only if that proceeding started after commencement.

*Clause 37* inserts the following definitions into schedule (Dictionary): accredited media entity, identifying matter, proceeding under this Act and Supreme Court's media accreditation policy.

## Division 5 Court-based perpetrator diversion scheme

*Clause 38* amends section 37(2)(a)(ii) and (b) and (3) (When a court may make a protection order) by inserting 'or a diversion order' at relevant points to ensure that a diversion order is treated consistently with an intervention order, when a court determines whether to make a protection order.

*Clause 39* amends section 91(3)(a) and (b) and (4) (When a court can vary domestic violence order) by inserting 'or a diversion order' at relevant points to ensure that a diversion order is treated consistently with an intervention order, when a court determines whether to vary a domestic violence order.

*Clause 40* inserts new Part 4A (Diversion Orders scheme).

Division 1 deals with preliminary matters.

New section 135A (Definitions for part) defines the following key terms used in the new Part 4A: alleged offence, approved diversion program, counselling, diversion order, eligibility criteria, notice of completion, scheme, and suitability assessment report.

New section 135B (Diversion orders scheme) provides the purpose of the Part, and the purposes of making a diversion order.

Division 2 deals with eligibility requirements.

New section 135C (Eligibility criteria for participation in the scheme) provides the preliminary requirements that a defendant must satisfy to be eligible for the scheme. It is an overarching requirement that the defendant be an adult.

New subsection (1)(a) requires that the defendant be charged with either the offence of contravening a domestic violence order or contravening a police protection notice. The term 'alleged offence' is tagged, to create subsequent reference to that contravention offence.

New subsection (1)(b) requires that the alleged offence be the only offence of contravening the domestic violence order or police protection notice that the defendant has been charged with.

New subsection (1)(c) requires that the facts constituting the alleged offence are not otherwise charged as an indictable offence.

New subsection (1)(d) requires the defendant to accept responsibility for the alleged facts constituting the alleged offence detailed in the prosecution's written summary.

New subsection (1)(e) requires that the defendant has been granted bail in relation to the alleged offence.

New subsection (1)(f) requires that another domestic violence order or police protection notice has not previously been made or issued against the defendant.

New subsection (1)(g)(i) and (ii) require that the defendant does not have a prior conviction for the offences of contravening a domestic violence order, police protection notice or release conditions or any other offence involving domestic violence, that were committed when the defendant was an adult.

New subsection (1)(h) requires that the defendant has not previously been referred to participate in an approved diversion program or counselling with an approved provider under the scheme.

New subsection (1)(i) requires that the defendant indicate a willingness to participate in an approved diversion program or counselling with an approved provider under the scheme, including a willingness to be assessed for suitability to participate in the scheme under section 135F.

New subsection (2) provides an exception to the general eligibility requirement set out at subsection (1)(b). The effect of subsection (2)(a) is to provide a court with discretion to divert an offender charged with multiple offences of contravening the domestic violence order or police protection notice, if particular requirements are met.

New subsections (2)(b) to (2)(e) provide the requirements that must be satisfied for the discretion, under subsection (2), to be enlivened.

New subsection (3) clarifies when subsections (2)(a) to (e) apply, a reference to an 'alleged offence' in another provision of this part, includes a reference to the other offences or offences.

New subsection (4) provides that a court may decide that a defendant is not eligible for the scheme, despite subsection (1), having regard to the seriousness of the conduct constituting the alleged offence or other offence or offences, and the defendant's criminal history and domestic violence history.

New subsection (5) provides that the police commissioner must ensure the court is informed when a defendant does not have a criminal history or domestic violence history.

New section 135D (Evidence relating to requirement to accept responsibility relating to alleged offence) sets out rules for the use of evidence arising from the defendant's acceptance of responsibility.

New subsection (1) clarifies that the defendant is not required to plead guilty to the alleged offence to be eligible for the scheme.

New subsection (2) provides that the defendant's acceptance of responsibility is not: (a) taken to be a plea to the charge for the offence entered by the defendant, and (b) is not admissible in evidence against the defendant in any criminal proceeding.

New subsection (3) provides that a police officer who receives information derived from the defendant's acceptance of responsibility must not use the information for a proceeding for an offence. Subsection (3) is intended to prohibit derivative use of the acceptance of responsibility.

New subsection (4) provides that subsection (3) operates despite section 169L(3) of the DFVP Act. For clarity, subsection (4) provides that the provisions of section 135D override an information sharing provision at section 169L(3) of the Act.

Division 3 deals with suitability assessment reports.

New section 135E (Adjournment for obtaining suitability assessment report) applies in cases where a court is satisfied the defendant meets the eligibility criteria and is considering making a diversion order in relation to the defendant.

New subsection (2) requires the court to order the defendant to report to a stated approved provider at a stated place, and within a stated period, to allow the approved provider to assess the defendant's suitability to participate in an approved diversion program or counselling; and to comply with every reasonable direction given to the defendant by an approved provider.

New subsection (3) provides that the stated period must be 14 days after the order is made, or a longer period allowed by the court.

New subsection (4) requires that, if the court makes an order to obtain a suitability assessment report, the prosecution must give the court a written summary of the alleged facts constituting the alleged offence and a copy of the defendant's criminal history. In turn, the clerk of the court must give the approved provider the order, a written summary of the alleged facts constituting the alleged offence and a copy of the defendant's criminal history.

New subsection (5) provides that an approved provider must advise the registrar within 2 business days if the defendant fails to report as required under the order.

New section 135F (Assessment of suitability of defendant) provides that an approved provider must assess the defendant's suitability to participate in an approved diversion program or counselling taking into consideration:

a) the defendant's character and personal history;

b) the defendant's language skills;

c) the defendant's cultural background, including whether the defendant identifies as an Aboriginal or Torres Strait Islander person;

d) any disabilities, psychiatric or psychological conditions of the defendant;

e) Any alcohol or drug problems of the defendant;

f) the effect of the above-mentioned matters mentioned on the defendant's ability to participate in an approved diversion program or counselling;

g) whether there is an approved diversion program or counselling that is available and suitable, including culturally appropriate for the defendant;

h) whether and, if so, how the defendant's participation in the scheme could affect the safety, protection, or wellbeing of the aggrieved or a named person in the domestic violence order or police protection notice or of someone else;

i) any other relevant matters.

New section 135G (Suitability assessment report) requires the approved provider to prepare a suitability assessment report for the court, within 14 days of completing the assessment, or a longer period allowed by the court, and to provide a copy of that report to both the prosecutor and the defendant. The report must state:

a) whether the defendant is suitable for participation in the scheme, having regard to the matters mentioned in section 135F; and

b) if the defendant is suitable for participation in the scheme—

- the date when it is anticipated the defendant will start attending the approved diversion program or counselling; and
- the name of the approved provider who will provide approved diversion program or counselling; and
- the estimated period within which the defendant is likely to complete the approved diversion program or counselling.

New section 135H (Immunity from prosecution) sets out immunity provisions related to statements against interest, made by the defendant for the purposes of preparing a suitability assessment report.

Subsection (1) provides that a person is not liable to prosecution for an offence resulting from an admission made by the person for the purposes of preparing a suitability assessment report for the person.

Subsection (2) provides that the admission and any evidence obtained because of the admission, is not admissible against the person in a prosecution for the offence.

Subsection (3) clarifies that subsections (1) and (2) do not prevent the person from being prosecuted for the offence if evidence of the offence, other than the admission made by the person or evidence obtained because of the admission, exists.

Subsection (4) clarifies that a police officer who receives information derived from any admission made by the person for the purposes of preparing the suitability assessment report must not use the information for a proceeding for an offence.

Subsection (5) provides that section (4) applies despite section 169L(3) of the DFVP Act.

Division 4 deals with the making of diversion orders.

New section 135I (When court may make diversion order) provides the requirements that must be satisfied before a court may make a diversion order. The requirements are that:

a) the court is satisfied the defendant still meets the eligibility criteria; and

b) the defendant consents to the making of the order; and

c) the court is satisfied that, immediately or within a reasonable period, the defendant will be able to start attending an approved diversion program, or have counselling with an approved provider, that is accessible and otherwise suitable for the defendant; and

d) the court is satisfied that, if the order were made, the defendant would not pose an unacceptable risk to the safety, protection or wellbeing of—

    (i) the aggrieved or a named person in the domestic violence order or police protection notice; or

    (ii) a person who is in a relevant relationship with the defendant; or

    (iii) a person employed or engaged by an approved provider; and

e) It is appropriate and desirable to make the order, having regard to the purpose of making a diversion order under the scheme.

New subsection (2) provides that, in deciding whether it is appropriate or desirable to make a diversion order in relation to a defendant, the court must consider:

a) the principles mentioned in section 4; and

b) the suitability assessment report about the defendant; and

c) any other relevant matter, including any expressed wishes of the person named as the aggrieved in the domestic violence order police protection notice.

New subsection (3) clarifies that, if the complainant is not the person named as the aggrieved in the domestic violence order or police protection notice, a reference to the aggrieved in subsection (2)(c) includes a reference to the complainant.

New subsection (4) provides that the court may make a diversion order requiring the defendant to attend counselling with an approved provider only if there is no appropriate approved diversion program that the defendant can attend.

New subsection (5) provides that the court must state the period, of not more than 1 year, within which the defendant is required to complete the approved diversion program or counselling.

New section 135J (Adjournment of proceeding on making of diversion order) provides that, if the court makes a diversion order, the court may adjourn the proceeding for the alleged offence for a period of not more than 1 year to allow the defendant to attend and complete the approved diversion program or counselling under the order.

New section 135K (Diversion order to be explained) provides that before making a diversion order, the court must explain or cause to be explained to the defendant:

a) the purpose and effect of the order; and

b) the consequences of contravening the order; and

c) the potential effect on the defendant's right to privacy if the defendant participates in the scheme; and

d) that the order may be amended or revoked on the application of the defendant or a prosecutor or on the court's own initiative.

New subsection (2) provides that the explanation must be made in a language or in a way likely to be readily understood by the defendant.

New subsection (3) provides that a failure to comply with this provision will not invalidate or otherwise affect the diversion order.

Division 5 deals with the variation or revocation of diversion orders.

New section 135L (Power of court to vary or revoke diversion order) provides a mechanism for the court to revoke or vary a diversion order, either on its own initiative or on application by either the prosecution or defendant.

New subsection (2) requires that before the court or applicant acts under subsection (1), the court or applicant must advise the approved diversion program of the court's intention to vary or revoke the diversion order, or the applicant's intention to apply for a variation or revocation.

New subsection (3) provides the court with the power to either continue the diversion order or vary the diversion order or revoke the diversion order.

New subsection (4) clarifies that the court may vary the diversion order to extend the period within which the defendant is required to complete the approved diversion program or counselling despite section 135J.

New subsection (5) requires the defendant to enter a plea to the charge of the alleged offence in the event the court revokes the diversion order.

New section 135M provides the relevant factors the court must consider when determining whether to continue, vary or revoke a diversion order. These considerations are:

a) the defendant's continued eligibility for the approved diversion program or counselling, in which the defendant is participating, including but not limited to—

    (i) whether the defendant has been charged with, or convicted of, another contravention of the domestic violence order or police protection notice;

(ii) whether the defendant has been charged with, or convicted of, another domestic violence offence;

(iii) whether another domestic violence order or police protection notice has been made or issued against the defendant;

(iv) the defendant's willingness to continue to participate in the approved diversion

(v) program or counselling; and

b) any information about the defendant the approved provider for the program or counselling in which the defendant is participating gives the court; and

c) any material change to the defendant's circumstances since the diversion order was made; and

d) any risk to the safety, protection or wellbeing of the aggrieved or a named person in the domestic violence order or police protection notice or of someone else, including any statements provided by the aggrieved or another person; and

e) any other relevant matter, including any expressed wishes of the person named as the aggrieved in the domestic violence order or police protection notice.

New subsection (2) provides that, if the complainant is not the person named as the aggrieved in the domestic violence order or police protection notice, a reference to the aggrieved in subsection (1)(e) includes a reference to the complainant.

Division 6 outlines the effect of diversion orders.

New section 135N (Ending of diversion order) applies if a notice of completion (as defined for the Part by reference to new section 135S) in relation to the defendant is given to the registrar of the court.

New subsection (2) provides that, on the day the notice is received by the court:

a) the diversion order ends;

b) the defendant is not required to enter a plea to the charge of the alleged offence;

c) the charge is taken to be dismissed by the court;

d) the defendant is taken to be discharged by the court without any finding or guilt; and

e) the proceeding for the alleged offence ends.

New subsection (3) provides that the defendant is not liable to be further prosecuted for the alleged offence.

New section 135O (When court may have regard to partial compliance under diversion order) provides that, if the defendant is, at any stage, convicted of the alleged offence, the court when sentencing the defendant may have regard to any participation by the defendant in an approved diversion program or counselling.

New section 135P (Operation of part and power of court) clarifies that the making of a diversion order, or an order for the defendant to report to an approved provider does not affect the operation of any other order made under the DFVP Act in relation to the defendant, nor does anything in the Part affect the power of the court to make or vary any other order the court may make.

Division 7 outlines the obligations of approved providers.

New section 135Q (General obligation) imposes an ongoing obligation on an approved provider, while carrying out an assessment or providing the program or counselling to assess whether the defendant's behaviour may pose a risk to the safety, protection or wellbeing of the aggrieved or a named person in the domestic violence order or police protection notice and to assist with providing services to the aggrieved or named person in the domestic violence order or police protection notice.

New section 135R (Contravention of diversion order) imposes an obligation on an approved provider to give the court and police commissioner a notice in the approved form, stating details of the contravention, within 7 days of becoming aware that a defendant has contravened a diversion order.

New section 135S (Notice of completion) requires an approved provider to issue a notice of completion, in the approved form and stating prescribed information, to the defendant, the registrar of the court and the police commissioner if satisfied the defendant has completed the approved diversion program or counselling. The approved provider must issue the notice within 14 days after the defendant completes the program or counselling.

Division 8 deals with approvals.

New section 135T (Approval of providers and diversion programs) provides that the chief executive may approve an entity as an approved provider if satisfied the entity has the appropriate experience and qualifications to provide an approved diversion program or counselling under the scheme.

New subsection (2) provides that the chief executive may approve a program as an approved diversion program if satisfied that:

a) the program aims to—

    (i) increase participant's accountability for domestic violence; and

    (ii) help participants to change their behaviour; and

    (iii) increase the safety, protection and wellbeing of persons against whom domestic violence has been committed; and

b) the program satisfies any other criteria prescribed by regulation.

New subsection (3) requires that an approval must be in writing.

New subsection (4) requires that the chief executive must prepare, and keep up to date, a list of approved providers and approved diversion programs, and give a copy of the Chief Magistrate and the police commissioner.

*Clause 41* amends section 184 (Service of order on respondent) to apply when a diversion order is made in relation to a defendant.

Subclause (1) amends the heading of section 184 to include 'or defendant' after 'respondent'.

Subclause (2) inserts in subsection (1), '(d) makes a diversion order.'

Subclause (3) inserts 'or defendant' in subsections (2) and (3) after 'respondent'.

Subclause (4) amends subsection (4) to provide that subsections (2) and (3) do not apply if the respondent or defendant is present in court when the order is made or varied and the clerk of the court:

a) gives a copy of the order, or varied order, to the respondent or defendant, or the respondent's or defendant's appointee, at the court; or

b) sends a copy of the order, or varied order, to the respondent's or defendant's last known address.

Subclause (5) amends subsection (8) to insert the words ', an intervention order or a diversion order'.

Subclause 6 amends subsection (10) to insert the words 'or defendant' after 'respondent'.

*Clause 42* amends section 184A (Substituted service) to apply to a defendant (not merely a respondent) when a diversion order is made in relation to a defendant.

*Clause 43* inserts new section 186A (Complainant to be informed of diversion order).

New subsection (1) states the section applies if a court makes a diversion order in relation to a defendant.

New subsection (2) provides that the police commissioner must inform the complainant about the making of any diversion order in relation to the defendant.

New subsection (3) specifies that the obligation does not arise if the complainant was present in court when the order was made or if the police commissioner cannot locate the complainant after making all reasonable enquiries.

New subsection (4) provides that a failure to comply with this section will not invalidate or otherwise affect the diversion order.

*Clause 44* amends section 189 (Evidentiary provision). The clause inserts '(e) a diversion order' in subsection (2), to provide that a document purporting to be a copy of a diversion order is evidence of the making of the order and matters contained in the order.

*Clause 45* amends the Schedule (Dictionary) to include reference to the following key terms used in the new Part: alleged offence, approved diversion program, counselling, diversion order, eligibility criteria, notice of completion, scheme, and suitability assessment report. The terms are defined by reference to their sectional definitions. The clause also makes a minor change to the definition of 'approved provider'.

## Division 6 Criminal offence of engaging in domestic violence to aid respondent

*Clause 46* inserts new section 179A (Engaging in domestic violence or associated domestic violence to aid respondent).

New subsection (1) provides that an adult commits an offence if, without reasonable excuse:

a) they engage in domestic violence behaviour against another person who is the aggrieved or named person in a domestic violence order, police protection notice or release conditions; and

b) the domestic violence behaviour is engaged in with the intent of aiding the respondent to the order, notice or conditions; and

c) they knew or ought to have known the other person was the aggrieved or a named person in the order, notice or conditions.

It also provides a maximum penalty of 120 penalty units or 3 years imprisonment.

New subsection (2) provides that the person is guilty of a crime and liable to a fine of 240 penalty units or imprisonment of 5 years if they derive a benefit from engaging in the domestic violence behaviour.

New subsection (3) provides that it is immaterial whether the respondent to the domestic violence order, police protection notice or release conditions knew that the person had engaged in domestic violence behaviour against the aggrieved or named person.

New subsection (4) places an evidential burden on the defendant in relation to showing a reasonable excused for subsection (1).

New subsection (5) defines ‘benefit’ by reference to its definition in section 1 of the Criminal Code, and defines ‘domestic violence behaviour’ as behaviour that, if engaged in by the respondent to a domestic violence order, police protection notice or release conditions would be domestic violence against the aggrieved or associated domestic violence against a named person in the order, notice or conditions.

*Clause 47* amends section 180 (Aggrieved or named person not guilty of offence) to extend the provision’s protection of an aggrieved from criminalisation pursuant to sections 177, 178 or 179 to an aggrieved who encourages, permits or authorises conduct which constitutes the offence pursuant to new section 179A.

## Division 7 Additional standard condition on protection orders and police protection notices

*Clause 48* amends section 56 (Domestic violence order must include standard conditions).

Subclause (1) inserts a new subsection (aa) to provide that a court making a domestic violence order must impose the new standard condition that a respondent ‘must not organise, encourage, ask, tell, force or engage another person to do something that, if done by the respondent, would be domestic violence against the aggrieved’.

Subclause (2) inserts new subsection (1)(b)(iii) to provide that a court making a domestic violence order must impose the new standard condition that a respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that, if done by the respondent, would be associated domestic violence against the named person'.

Subclause (3) inserts new subsection (1)(c)(iv) to provide that a court making a domestic violence order must impose the new standard condition that a respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that, if done by the respondent, would be associated domestic violence against the child'; and a new subsection (1)(c)(v) that a respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that exposes the child to domestic violence'.

Subclause (4) renumbers section 56(1)(aa) to (c) as section 56(1)(b) to (d).

*Clause 49* inserts a new subsection (1A) in section 60 (Contact by lawyer not prohibited) which, to remove any doubt, declares that a condition inserted in section 56 by clause 48 does not prohibit:

a) a respondent from asking a lawyer to contact the aggrieved or a named person; or

b) another person, including a lawyer, to contact or locate the aggrieved or a named person for a purpose authorised under an Act.

Subclause (2) renumbers the amended provision as subsection (2) and (3).

*Clause 50* amends section 106 (Standard conditions) which relates to standard conditions for police protection notices.

Subclause (1) inserts a new subsection (aa) to provide that a court making a police protection notice must include the new standard condition that the respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that, if done by the respondent, would be domestic violence against the aggrieved'.

Subclause (2) inserts a new subsection (b)(iii) to provide that a court making a police protection notice must include the new standard condition that a respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that, if done by the respondent, would be associated domestic violence against the named person'.

Subclause (3) inserts a new subsection (c)(iv) to provide that a court making a police protection notice must include the new standard condition that a respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that, if done by the respondent, would be associated domestic violence against the child'; and a new subsection (c)(v) that a respondent 'must not organise, encourage, ask, tell, force or engage another person to do something that exposes the child to domestic violence'.

Subclause (4) renumbers section 106(aa) to (c) as section 106(1)(b) to (d).

*Clause 51* inserts new section 242 (Amendments of standard conditions for domestic violence orders and police protection notices) after new section 241 (also inserted by this Bill).

New subsection (1) provides that the amendment of section 56 by the amending Act applies to domestic violence orders made or varied after the commencement.

New subsection (2) provides that the amendment of section 106 by the amending Act applies to police protection notices issued after the commencement.

New subsection (3) defines 'amending Act' as the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*.

# Part 5 Amendment of Domestic and Family Violence Protection Regulation 2023

*Clause 52* provides that Part 5 amends the DFVP Regulation.

*Clause 53* amends section 2 to remove the reference to section 159(2)(g) and replace it with 159(2)(h). This reflects updated numbering to section 159(2) of the DFVP Act.

Subclause (2) amends section 2(3)(b) to insert the words 'the Act or' after 'under' in the existing provision. This amendment clarifies that the exemption provided by section 2(3)(b) extends to criminal offences under both the DFVP Act (for example, breach of a domestic violence order) or any other Act.

Subclause (3) also inserts new section 2(5) which provides that publication is not permitted if the publication is of information that identifies, or is likely to lead to the identification, of a child.

*Clause 54* inserts new section 7 (Transitional provision for *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*), a transitional provision regarding the amendment to section 2(3)(b) to provide that new section 2(3)(b) only applies to a conviction for an offence under the DFVP Act where a charge was laid after commencement.

# Part 6 Amendment of Evidence Act 1977

## Division 1 Preliminary

*Clause 55* provides that Part 6 amends the *Evidence Act 1977*.

## Division 2 Improper questions

*Clause 56* omits section 21 and inserts new section 21 (Improper questions). New subsection (1) provides that the court must disallow a question put to a witness in cross-examination or inform a witness a question need not be answered, if the court considers the question is an improper question.

New subsection (2) provides that for subsection (1), an improper question includes a question that:

a) is misleading or confusing; or

b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or

c) is put to a witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or

d) has no basis other than a stereotype (for example, a stereotype based on the witness's age, race, culture, gender, sex, sex characteristics, sexuality or mental, intellectual or physical disability).

New subsection (3) provides that in deciding whether a question is an improper question, the court must take into account:

a) any relevant condition or characteristic of the witness of which the court is, or is made, aware, including age, race, culture, gender identity, sex, sex characteristics, sexuality, education, language background and skills and level of maturity and understanding; and

b) any mental, intellectual or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and

c) the context in which the question is put, including:
   (i) the nature of the proceeding; and

   (ii) in a criminal proceeding—the nature of the offence to which the proceeding relates; and

   (iii) the relationship (if any) between the witness and any other party to the proceeding.

New subsection (4) provides that subsection (3) does not limit the matters the court may take into account in deciding whether a question is an improper question.

New subsection (5) provides that a question is not an improper question merely because:

a) the question challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness; or

b) the question requires the witness to discuss a subject that the witness could consider to be private or distasteful.

New subsection (6) provides that a party may object to a question put to a witness on the ground that it is an improper question. However, new subsection (7) provides that the duty imposed on the court by the section applies whether or not an objection is raised to a particular question.

New subsection (8) provides that a failure by the court to disallow a question under the section, or to inform the witness that it need not be answered, does not affect the admissibility in evidence of any answer given by the witness in response to the question.

*Clause 57* inserts new Division 14 (*Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 202*3) into Part 9 (Transitional and declaratory provisions) which contains new section 160 (Application of section 21 to criminal proceedings).

## Division 3 Exclusion of public and evidence about complainant's sexual reputation and sexual activities; Jury directions for sexual offences; Sexual offence expert evidence panel

*Clause 58* inserts new section 103SA (Judge may request indication from parties) into Part 6A, Division 3 (Jury directions related to domestic violence).

New subsection (1) provides that before a criminal proceeding that is a trial by jury commences, the judge may request that the prosecution or defence (or, if the defendant is unrepresented, the defendant) each inform the judge of whether it is likely that evidence will be adduced in the trial that would require a direction about all or some of the matters mentioned in subdivision 2 (Content of jury directions about domestic violence).

New subsection (2) provides that if the judge is informed under subsection (1) that it is likely that that evidence will be adduced that would require a particular direction, the judge is not required to form a view, at that time, about whether to give that direction.

New subsection (3) provides that nothing in the section prevents the prosecution, defence or defendant from later requesting, or making submissions in relation to, the giving of a direction about which the judge was not informed under subsection (1).

*Clause 59* inserts new Part 6B (Evidence related to sexual offences).

Division 1 deals with the exclusion of the public.

New section 103ZE (Court to exclude public while complainant gives evidence) provides the court with the power to exclude members of the public.

New subsection (1) provides that the section applies in relation to a criminal proceeding that relates, wholly or partly, to a charge for a sexual offence.

New subsection (2) provides that while a complainant gives evidence in the proceeding, the court must exclude from the courtroom all persons other than those listed in subparagraphs (a) to (i).

New subsection (3) provides that subsection (1) applies regardless of the way in which the complainant gives evidence. Examples of ways in which the complainant may give evidence are also provided.

New subsection (4) provides that subsection (1) does not limit the power of the court to exclude from the courtroom any person, including the defendant.

New subsection (5) provides that if the criminal proceeding is a trial by jury, the judge must instruct the jury in accordance with subsection (5).

Division 2 deals with prohibitions and restrictions in relation to particular questions and evidence.

New section 103ZF (Application of division) provides that Division 2 applies in relation to a criminal proceeding that relates, wholly or partly, to a charge for a sexual offence. The definition of '*sexual offence*' is provided in schedule 3, as amended by the Bill (*Clause 61*), and means an offence of a sexual nature, including, for example, an offence a provision of Chapter 22 or 32 of the Criminal Code.

New section 103ZG (Prohibition on questions and evidence concerning sexual reputation of complainant) provides the court must not allow any questions as to, or evidence of, the sexual reputation of the complainant.

New section 103ZH (Restriction on questions and evidence concerning complainant's sexual activities) provides that the complainant must not be cross-examined, and the court must not admit

any evidence, as to the sexual activities, whether consensual and non-consensual, of the complainant (other than those to which the charge relates), without the leave of the court.

New section 103ZI (Application for leave) sets out that an application for leave under section 103ZH must be filed in the relevant court and served on each other party to the proceeding within the specified time limit. For a summary trial or committal proceeding, the relevant time limit is at least 7 days before the trial or proceeding, and for a trial, the relevant time limit is at least 14 days before the trial is listed to commence or at least 14 days before a special hearing, if a special hearing is to be held.

New section 103ZJ (Application for leave out of time) provides that the court may hear and decide an application for leave under section 103ZH after the expiry of the relevant time limit in section 103ZI, if it is in the interests of justice to do so.

New section 103ZK (Contents of application for leave) sets out the requirements for an application for leave under section 103ZH. New subsection (1) provides that the application for leave must be in writing and set out the matters required by subsection (2) or (3), as the case requires.

New subsection (2) applies to an application for leave to cross-examine the complainant as to their sexual activities. The application must set out the initial questions sought to be asked of the complainant, the scope of the questioning sought to flow from the initial questioning, and how the evidence sought to be elicited from the questioning has substantial probative value or why it is a proper it is a proper matter for cross-examination as to credit.

New subsection (3) applies to an application for leave to admit evidence as to the sexual activities of the complainant. The application must identify the evidence that is sought to be admitted and set how the evidence has substantial probative value.

New subsection (4) allows the court to waive the requirement under subsection (1) that an application for leave be made in writing, if it is in the interests of justice to do so.

New section 103ZL (Hearing of an application for leave) provides that an application for leave must be heard in the absence of the jury (if any) and may be heard in the absence of the complainant.

New section 103ZM (Determination of application for leave during summary trial, committal proceeding or trial) sets out the test for the court when determining an application for leave under section 103ZH. The court must not grant leave unless it is satisfied that the evidence has substantial probative value or is a proper matter for cross-examination as to credit and that it is in the interests of justice to allow the cross-examination or to admit the evidence, having regard to:

a) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked; and

b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility; and

c) the need to respect the complainant’s personal dignity and privacy; and

d) the right of the defendant to fully answer and defend the charge; and

e) any other relevant matter.

New section 103ZN (Limitation on evidence of complainant's sexual activities) provides that evidence of the complainant's sexual activities is not to be regarded as having substantial probative value by virtue of any inferences it may raise as to general disposition, or as being a proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely to materially impair confidence in the reliability of the evidence of the complainant.

Division 3 deals with jury directions related to sexual offences.

Subdivision 1 outlines some preliminary matters.

New section 103ZO (Application of division) provides that Division 3 applies in relation to a criminal proceeding that is a trial by jury or by a judge sitting alone, and that relates, wholly or partly, to a charge of a sexual offence. The definition of '*sexual offence*' is provided in schedule 3, as amended by the Bill (*Clause 61*).

New subsection (2) provides that, for a trial by a judge sitting alone, the court's reasoning with respect to the matters mentioned in subdivision 3 or 4 must, to the extent the court thinks fit, be consistent with how a jury would be directed about the matter in the particular case.

Subdivision 2 deal with general matters.

New section 103ZP (Judge may request indication from parties) enables the judge to seek certain indications from the prosecution and defence.

New subsection (1) provides that before a criminal proceeding that is a trial by jury commences, the judge may request that the prosecution or defence (or, if the defendant is unrepresented, the defendant) each inform the judge of whether it is likely that evidence will be adduced in the trial that would require the giving of a direction under subdivision 3 or 4.

New subsection (2) provides that if the judge is informed under subsection (1) that it is likely that that evidence will be adduced that would require the giving of a particular direction, the judge is not required to form a view, at that time, about whether to give that direction.

New subsection (3) provides that nothing in the section prevents the prosecution, defence or defendant from later requesting, or making submissions in relation to, the giving of a direction about which the judge was not informed under subsection (1).

New section 103ZQ (When directions under subdivisions 3 and 4 must be given) sets out the situations in which directions must be given.

New subsection (1) provides that the judge must give any 1 or more of the directions set out in subdivision 3 in the criminal proceeding:

a) if there is a good to give the direction; or

b) if requested to give the direction by a party to the proceeding, unless there is a good reason not to give the direction.

New subsection (2) provides that, if the judge is required to give a direction under subdivision 3 or 4, the direction must be given at the earliest time that the judge determines is appropriate.

New subsection (3) provides that subsection (2) does not prevent the judge from giving a direction under subdivision 3 or 4 at any time during the criminal proceeding, including:

a) before any evidence is adduced; and

b) in the judge's summing up to the jury.

New subsection (4) enables the judge to repeat a direction under subdivision 3 and 4 at any time in the criminal proceeding.

New subsection (5) further provides that the judge is not required to use a particular form of words in giving a direction.

New section 103ZR (No limit of court's duty to direct jury) provides that Division 3 does not limit the matters the court may direct the jury about, including in relation to evidence given by an expert witness.

Subdivision 3 relates to jury directions about consent and mistake of fact.

New section 103ZS (Direction about circumstances in which non-consensual sexual activity occurs) provides that the judge may direct the jury that non-consensual sexual activity can occur in many different circumstances and between different kinds of people, including those listed in subsection (b).

New section 103ZT (Direction about responses to non-consensual sexual activity) provides that the judge may direct the jury that there is no typical, normal or proper response to non-consensual sexual activity and people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything.

A note is included that states that under the Criminal Code, section 348AA(1)(a) (inserted by the Bill), for the purposes of Chapter 32 of the Criminal Code a person does not consent to an act if the person does not say or do anything to communicate consent. The judge may also direct the jury that they must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.

New section 103ZU (Direction on lack of physical injury, violence or threats) provides that the judge may direct the jury that people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and the absence of injury or violence, or threats of injury or violence, does not, of itself, mean that a person is not telling the truth about a sexual offence.

New section 103ZV (Directions on responses to giving evidence) provides that the judge may direct the jury that trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about a sexual offence, but others may not, and the presence or absence of emotion or distress does not, of itself, mean that a person is not telling the trust about a sexual offence.

New section 103ZW (Direction on behaviour and appearance of complainant) provides that the judge may direct the jury that it should not be assumed that a person consented to a sexual activity because the person wore particular clothing or had a particular appearance, consumed alcohol or another drug, was present in a particular location, acted in a flirtatious or sexual manner, or worked as a sex worker.

New section 103ZX (Direction on mistake of fact in relation to consent) provides that the judge may direct the jury that if the jury concludes that the defendant knew or believed that a circumstance mentioned in section 348AA(1) of the Criminal Code (inserted by the Bill) existed in relation to a person, that knowledge or belief is enough to show that the defendant did not reasonably believe that the person was consenting to the act.

Subdivision 4 deals with other jury directions.

New section 103ZY (Direction on differences in complainant's account) applies if evidence is given, or likely to be given, or a question is asked, or likely to be asked, of a witness that tends to suggest a difference in the complainant's account that may be relevant to the complainant's truthfulness or reliability.

New subsection (2) sets out the matters the judge must direct the jury about and that it is up to the jury to decide whether or not any differences in the complainant's account are important in assessing the complainant's truthfulness and reliability.

New subsection (3) defines '*difference*', in an account, for the purposes of the section.

New section 103ZZ (Direction on lack of complaint or delay in making complaint) applies if evidence is given, or likely to be given, or a question is asked, or is likely to be asked, of a witness that tends to suggest an absence of complaint or delay in making a complaint by the complainant in relation to the commission of the sexual offence the subject of the proceeding.

New subsection (2) sets out the matters the judge must, and must not, direct the jury about.

New subsection (3) apples where a criminal proceeding also relates to a domestic violence offence alleged to have been committed by the defendant against the same complainant and allows the judge to also give a warning under section 103ZD (inserted by the Bill) or give a single warning to address both types of offences.

New subsection (4) provides that for '*domestic violence offence*', see section 103B.

New section 103ZZA (Direction on evidence of post-offence relationship) applies if evidence is given, or is likely to be given, or a question is asked, or is likely to be asked, of a witness that tends to suggest that, after the sexual offence the subject of the criminal proceeding is alleged to have been committed, the complainant continued a relationship with the defendant, or otherwise continued to communicate with the defendant.

New subsection (2) sets out the matters the judge must direct the jury about the matters.

Subdivision 5 deals with prohibited directions.

New section 103ZZB (Prohibited directions etc. in relation to credibility of complainant's evidence) provides that the judge must not direct, warn or suggest to the jury that complainants who do not make a complaint or who delay in making a complaint are, as a class, less credible than other complainants. In relation to the evidence of complainants who do not make a complaint or who delay in making a complaint, the judge must also not direct, warn or suggest to the jury that it would be dangerous or unsafe to convict the defendant on the evidence or that the evidence should be scrutinised with great care.

Division 4 deals with expert evidence in relation to sexual offences.

Subdivision 1 outlines preliminary matters.

New section 103ZZC (Definitions for division) provides definitions for the following terms: relevant evidence, relevant proceeding and sexual offence expert evidence panel.

New section 103ZZD (Meaning of *relevant proceeding*) provides the meaning of relevant proceeding, being an offence within chapter 32 of the Criminal Code where matters mentioned in section 348A(4) are likely to be relevant, at a location prescribed in regulation. New subsection (2) further provides that, for subsection (1)(a), it does not matter whether the criminal proceeding also relates to other offences.

New section 103ZZE (Meaning of *relevant evidence*) provides the meaning of relevant evidence about a defendant, being evidence of a cognitive impairment of the defendant within the meaning of section 348B of the Criminal Code, mental health impairment of the defendant within the meaning of section 348C of the Criminal Code, or the effect of such an impairment including whether it was a substantial cause of the person not saying or doing anything as mentioned in section 348A(4)(b) of the Criminal Code.

Subdivision 2 deals with the engagement of persons on the sexual offence expert evidence panel.

New section 103ZZF (Engagement of person included on sexual offence expert evidence panel) provides that a party to a relevant proceeding may engage a person who is included on the sexual offence expert evidence panel to give relevant evidence about the defendant in the proceeding. This does not prevent a party from engaging an expert with relevant expertise who is not on the panel. The provision provides that an excluded person (being a relative, friend or acquaintance of the defendant, or party to, or witness in, the proceeding) cannot be engaged.

New section 103ZZG (Particular information to be given to person engaged) provides that copies of certain documents (indictment, bench charge sheets, particulars, witness statement, exhibits, transcripts of proceedings, a record of interview or transcript of record of interview, defendant's criminal history or defendant's educational and word records) may be given by the prosecution to an expert engaged by a party to the proceeding if a request is made by the expert.

New subsection (3) provides that subsection (2) does not apply to information contained in a document if it is sensitive evidence under section 590AF of the Criminal Code, or that the prosecution would be prevented under another Act or law from giving to the defendant or a lawyer acting for the defendant during a proceeding for the offence, or consisting of contact details for witnesses to the alleged commission of the offence.

New subsection (4) refers to section 590AFA of the Criminal Code for the meaning of '*Evidence Act section 93A device statement*'.

Subdivision 3 deals with the establishment of the sexual offence expert evidence panel.

New section 103ZZH (Chief executive to establish sexual offence expert evidence panel) provides that the chief executive must establish and maintain a sexual offence expert evidence panel. The panel will consist of persons considered suitable to give 'relevant evidence' about a defendant in a 'relevant proceeding'.

New subsection (2) provides that a person is not suitable unless they can demonstrate specialised knowledge, gained by training, study or experience, in psychiatry, neuro-cognitive psychology, or

a field of knowledge relevant to assessing cognitive or mental health impairment and the effect of such an impairment on a person's ability to communicate.

New subsection (3) further provides that a person is not suitable if the person has been the subject of professional discipline, had their professional registration denied or removed, or has a criminal history indicating a lack of suitability.

New subsection (4) explains that subsections (2) and (3) do not limit the matters which may be relevant to assessing suitability, though the chief executive may take into account other matters.

New subsection (5) clarifies that the panel established under section 103ZZH is the '*sexual offence expert evidence panel*'.

New section 103ZZI (Removal of person from sexual offence expert evidence panel) provides for the removal of a person from the sexual offence expert evidence panel if the person is no longer suitable in the opinion of the chief executive.

New section 103ZZJ (Criminal history report) provides the chief executive may request a criminal history, together with a brief description of the circumstances of the conviction, from the police commissioner. Written consent must be obtained from the person before a check is undertaken. The police commissioner must comply with the request however, the duty to comply applies only in relation to information in the commissioner's possession or to which the commissioner has access. The meaning of a person's *criminal history* in section 103ZZJ is defined as the person's criminal history under the *Criminal Law (Rehabilitation of Offenders) Act 1986*, other than spent convictions.

New section 103ZZK (Confidentiality of criminal history information) provides for the confidentiality of criminal history information obtained under new section 103ZZJ. It creates an offence to directly or indirectly disclose the criminal history information to another person, with a maximum penalty of 100 penalty units.

New subsection (3) provides the circumstances in which the criminal history information may be disclosed to another person.

New subsection (4) provides requires destruction of a document containing criminal history information as soon as practicable after it is no longer needed.

New subsection (5) defines '*criminal history information*' in section 103ZZK to mean a report, or information contained in a report, given to the chief executive under section 103ZZJ.

*Clause 60* inserts new section 161 into part 9, division 14 to provides that divisions 1 to 3 of Part 6B apply to a criminal proceeding regardless of when the offence was committed, the defendant was charged, or the proceeding started.

*Clause 61* adds definitions for the following terms to schedule 3: relevant evidence, sexual offence, sexual offence expert evidence panel, and relevant proceeding for part 6B, division 4.

## Division 4 Expansion of preliminary complaint evidence

*Clause 62* inserts new section 94A (Admissibility of preliminary complaint in sexual assault and domestic violence offences).

New subsection (1) states that the section applies in relation to a committal proceeding, or a trial, in relation to a sexual assault offence or domestic violence offence.

New subsection (2) provides that evidence of how and when any preliminary complaint was made by the complainant about the commission of the alleged offence by the defendant is admissible in evidence regardless of when the preliminary complaint was made.

New subsection (3) provides that nothing in subsection (2) derogates from the power of the court in a criminal proceeding to exclude the evidence if the court is satisfied it would be unfair to the defendant to admit the evidence.

New subsection (4) provides that if a defendant is tried by a jury, the judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary complaint or other complaint.

New subsection (5) provides that subject to subsection (4), the judge may make any comment to a jury on the complainant's evidence that it is appropriate to make in the interests of justice. A note refers to sections 103ZD, 103ZZ, 103ZZB and 132BA and the Criminal Code, section 632.

New subsection (6) provides definitions of key terms used in the provision. The key terms that are defined are '*complaint*' and '*preliminary complaint*'.

*Clause 63* inserts new section 103ZD (Direction about lack of complaint or delay in making complaint).

New subsection (1) states that this section applies if, in a criminal proceeding for a domestic violence offence, evidence is given, or is likely to be given, or a question is asked, or is likely to be asked, of a witness that tends to suggest:

a) an absence of complaint in relation to the commission of the domestic violence offence by the person against whom the offence is alleged to have been committed (the ***complainant***), or

b) delay by the complainant in making a complaint in relation to the commission of the domestic violence offence.

New subsection (2) provides that the judge:

a) must direct the jury that the absence of complaint or delay in complaining does not, of itself, indicate that the allegation that the domestic violence offence was committed is false; and

b) must direct the jury that there may be good reasons why a complainant of domestic violence may hesitate in making, or may refrain from making, a complaint about a domestic violence offence; and

c) must not direct the jury that the absence of complaint or delay in complaining is relevant to the complainant's credibility unless there is sufficient evidence to justify the direction.

New subsection (3) provides that the judge may also repeat the direction at any time during the criminal proceeding.

New subsection (4) provides that if the criminal proceeding also relates to a sexual offence alleged to have been committed by the defendant against the same complainant, the judge may also give a warning under section 103ZZ or give a single warning to address both types of offences.

*Clause 64* inserts a transitional provision in new section 162 (Application of s 94A to sexual offences and domestic violence offences charged before commencement) which provides that section 94A applies in relation to a person charged with a sexual assault offence or domestic violence offence after the commencement, whether the offence was committed before or after the commencement.

## Division 5 Prohibited directions

*Clause 65* inserts new sections 132B (Prohibited direction in relation to doubts regarding truthfulness or reliability of complainant's evidence) and 132BAA (Prohibited directions etc. in relation to reliability of children's evidence).

New section 132B prohibits the judge in a criminal proceeding in which more than 1 offence is charged from directing the jury that if they doubt the truthfulness or reliability of the complainant's evidence in relation to a charge, that doubt must be taken into account in assessing the truthfulness or reliability of the complainant's evidence generally or in relation to other charges. The section provides that any rule of common law under which a judge is required or permitted to give a jury direction mentioned in subsection (1) is abolished. Further, the section does not prevent a judge from making a comment on the evidence that is appropriate to make in the interests of justice.

New section 132BAA provides that the judge in a criminal proceeding must not direct, warn or suggest to the jury that children as a class are unreliable witnesses, that the uncorroborated evidence of a child should be scrutinised with great care or that it would be dangerous or unsafe to convict the defendant on the evidence, or about the reliability of a child's evidence solely on account of the child's age.

*Clause 66* inserts new section 163 (Application of ss 132B and 132BAA to criminal proceedings) into Part 9, division 14 (Transitional and declaratory provisions). New sections 132B and 132BAA will apply to a criminal proceeding whether, before or after commencement of the provisions, the offence was committed, the defendant was charged, or the proceeding was started.

## Division 6 Limits on publishing information in relation to sexual offences

*Clause 67* amends the long title of the Evidence Act to add 'and to protect persons concerned in the commission of sexual offences from identification'. This ensures the long title of the Evidence Act reflects that the Act now includes provisions concerning confidentiality and publication.

*Clause 68* removes the definition of sexual offence from section 21A. A new definition of sexual offence is now contained in schedule 3.

*Clause 69* inserts new Part 6C, Limits on publishing information in relation to sexual offences, into the Evidence Act.

New Division 1, Preliminary, contains relevant definitions for Part 6C, defining the following: accredited media entity, complainant, identifying matter (in relation to a complainant), publish, and Supreme Court's media accreditation policy.

New Division 2, Publishing identifying matter in relation to complainants, contains provisions which prohibit the publication of information that identifies, or may lead to the identification, of a complainant of a sexual offence. Under the definition in division 1, a person is only a 'complainant' for the purposes of the part where a defendant has been charged with, or convicted of, the sexual offence.

New section 103ZZM (Definitions for division) defines '*capacity*' and '*consent*' for the purposes of division 2.

New section 103ZZN (Offence to publish identifying matter in relation to complainant) provides that it is an offence to publish identifying matter in relation to a complainant. The offence carries a maximum penalty of 100 penalty units or 2 years imprisonment for an individual (including an executive officer, see new section 103ZZZR), or 1000 penalty units for a corporation.

New subsection (2) makes clear that the restriction on publication only applies where a defendant has been charged with a sexual offence.

New subsection (3) provides that the offence provision does not apply where a complainant is deceased.

New section 103ZZO (Section 103ZZN does not apply if complainant publishes identifying matter about themself) provides that the 103ZZN offence provision does not apply where a complainant publishes information about themselves. However, such a publication must not identify another complainant of a sexual offence, or identify a child (other than the complainant if the complainant is a child) who is a complainant, defendant or witness in the relevant sexual offence proceeding. A note to the provision provides that this provision allowing publication does not affect other laws which may limit publication (such a provisions in the Mental Health Act, YJ Act or defamation laws).

New section 103ZZP (Defence to prosecution for offence against s 103ZZN—adult gives consent to defendant) provides a defence to a prosecution under section 103ZZN where an adult complainant has given the person who published (the 'defendant' who has been charged with the publication offence) consent. Consent is defined in 103ZZM as 'informed consent by a person with capacity to give consent'. 'Capacity' is defined in section 103ZZM and references the definition in schedule 4 of the *Guardianship and Administration Act 2000*. The complainant must be an adult at the time consent is given. The consent must be provided in writing. The publication must be in accordance with any limits set by the complainant (which gives the complainant increased control over the narrative). The publication must not identify another complainant of a sexual offence or a child.

New section 103ZZQ (Defence to prosecution for offence to s 103ZZN—adult gives consent to court) provides a defence to prosecution for an offence against section 103ZZN where an adult gives consent to a relevant court.

New section 103ZZR (Defence to prosecution for offence to s 103ZZN—adult gives consent to police) provides a defence to prosecution for an offence against section 103ZZN where an adult gives consent to police.

New section 103ZZS (Defence to prosecution for offence against s 103ZZN—child gives consent to defendant) provides a defence to a prosecution under section 103ZZN where a child gives consent. As is the case for adults who give consent, the consent must be writing, and the

publication must comply with any limits sets by the complainant. In addition, there is a requirement for a supporting statement from a '*relevant person*', who may be a medical practitioner or psychologist (other than a student) or a person who is of a class of persons prescribed by regulation. This supporting statement must verify that the child has capacity to consent, and that the complainant understands what is means to be identified as a victim of a sexual offence, and the consequences of losing anonymity.

New section 103ZZT (Section 103ZZN does not apply if ordered by Supreme Court upon application by defendant) and 103ZZU (Section 103ZZN does not apply if ordered by Supreme Court upon application by offender) replicate existing provisions within the CLSO Act which allow a defendant charged with a sexual offence, or who has been convicted and has appealed, to apply to the Supreme Court for an order allowing publication of the victim's identifying matter where the order is required to obtain evidence for trial or the appeal, and where a defendant is likely to suffer substantial injustice if an order is not made.

New Division 3 contains provisions relating to publishing identifying matter in relation to defendants. These provisions, amended in October 2023 by the *Justice and Other Legislation Amendment Bill 2023*, were previously contained in the CLSO Act.

New section 103ZZV (Definitions for division) contains definitions for Division 3 of the following terms: eligible person, identifying matter (in relation to a defendant), interim order, non-publication order, prescribed sexual offence, and sentenced. This replicates some provisions contained in section 3 of the CLSO Act, noting the definition of accredited media and Supreme Court's media accreditation policy is now contained in new Division 1.

New section 103ZZW (Application for non-publication order, and notice of application) replicates section 7 of the CLSO Act, providing for application for a non-publication order, and notice provisions concerning that application.

New subsection (1) provides that section 103ZZW applies if a defendant is charged with a prescribed sexual offence.

New subsection (2) provides that an eligible person may apply for a non-publication order while the matter is before a Magistrates Court, either before the matter is committed for trial or sentence, or if the matter proceeds to sentence in a Magistrates Court, prior to that sentence.

New subsection (3) requires the applicant to give three business days' notice of their intention to make an application for a non-publication order to the court and other eligible persons.

New subsection (4) provides that a Magistrates Court may dispense with the notice requirement in subsection (3) provided there is a good reason for notice not having been given or where it would be in the interests of justice that the court hear the application, without notice having been given.

A court may make an interim order in such circumstances without having to consider the merits of the application (new section 103ZZZA).

New subsection (5)(a) provides that a defendant is not to personally serve a complainant.

New subsection (5)(b) requires the prosecution to provide notice of the application for non-publication to a complainant, or another person nominated to receive correspondence on the complainant's behalf in relation to the matter.

New subsection (6) provides that this notice may be given electronically.

New section 103ZZX (Notifications to accredited media entities) replicates section 7A of the CLSO Act and requires the court to take reasonable steps to ensure accredited media entities are notified of an application for non-publication, and provides that this notification may be by electronic communication or in any other way the court considers appropriate.

New section 103ZZY (Grounds for non-publication order) replicates section 7B of the CLSO Act and outlines three grounds upon which a non-publication order may be made: the order is necessary to prevent prejudice to the proper administration of justice (section 103ZZY(a)); the order is necessary to prevent undue hardship or distress to a complainant or witness in relation to the charge (section 103ZZY(b)); or the order is necessary to protect the safety of any person (section 103ZZY(c)).

New section 103ZZZ (Procedure for making non-publication order) replicates section 7C of the CLSO Act and outlines the procedure for making a non-publication order.

New subsection (1) provides that all relevant persons have a right to appear and be heard on an application, being the applicant and other eligible persons, an accredited media entity and any other person whom the court considers has sufficient interest in the question of whether the order should be made.

New subsection (2) provides that the application for a non-publication order may be heard in a closed court.

New subsection (3)(a) provides that the court may take into account evidence of any kind that it considers credible or trustworthy in the circumstances. New subsection (3)(b) lists the matters the court must consider when determining an application for non-publication, being: the primacy of the principle of open justice; the public interest; any submissions made or views expressed by or on behalf of the complainant about the application; any special vulnerabilities of the complainant or the defendant; any cultural considerations relating to the complainant or the defendant; the potential effect of publication in a rural or remote community; the potential to prejudice any future court proceedings; the history and context of any relationship between the complainant and the defendant (including, for example, any domestic violence history); and any other matter the court considers relevant.

New subsection (4) provides for what a court must state in a non-publication order. The court is required to state the grounds on which the order is made, any identifying matter that is not covered by the order, the extent to which publication of identifying matter is prohibited and that the order ceases when the defendant is committed for trial or sentence, or sentenced on the charge or when the charge is withdrawn, whichever happens first.

New section 103ZZZA (Interim orders) replicates section 7D of the CLSO Act and allows the court to make an interim order, prohibiting publication of identifying matter related to the defendant, without determining the merits of the application (section 103ZZZA(1)). An interim order has effect until it is revoked by the court, or the court finally decides the application.

New subsection (3) provides that if the court makes an interim order, the court must hear and decide the application as a matter of urgency, and where practicable, within 72 hours after making the interim order.

New section 103ZZZB (Review of non-publication order) replicates section 7E of the CLSO Act and provides the court with a power to review a non-publication order, either on its own motion, or if an application to review is made by an eligible person, an accredited media entity or another person who the court considers has sufficient interest in the question of whether an order should be made. Each of those persons is entitled to appear and be heard by the court on the review (section 103ZZB(2)) and on the review the court may confirm, vary or revoke the order (section 103ZZB(3)).

New section 103ZZZC (Contravention of interim order or non-publication order) replicates section 7F of the CLSO Act which makes it an offence to contravene an interim order or a non-publication order, punishable by 100 penalty units or 2 years imprisonment for an individual, or 1000 penalty units for a corporation. Section 7F(2) of the CLSO Act has been removed; the provision was no longer required given other changes to publication provisions.

New Division 4 inserts provisions concerning complainant privacy orders.

New section 103ZZZD (Definitions for division) provides definitions for the division of the following terms: complainant privacy order, interim complainant privacy order, and vexatious.

New section 103ZZZE (Applying for complainant privacy order) provides that a person with sufficient interest may apply to a court for a complainant privacy order in relation to a deceased complainant. New subsection (2) requires the applicant to provides reasons about why the restriction or prohibition is necessary and why publication would cause undue distress to the applicant. An applicant is required to disclose all material facts (new subsection (3)). Victim privacy orders are only available where a defendant has been charged with the sexual offence (that is, it does not apply where a deceased person has made an allegation but no one was charged), see new subsection (5). A defendant cannot make an application for a complainant privacy order (new subsection (6)).

New section 103ZZZF (Notifications to accredited media entities) provides that the court must give accredited media entities notice of an application for a victim privacy order and that this may be done electronically. Accredited media entities have standing to appear on an application.

New Section 103ZZZG(1) gives the court power to make a complainant privacy order.

New subsection (2) provides that a court: must have regard to the public interest (with subsection 3 providing this requires consideration of the principles of open justice and freedom of expression); may have regard to the nature and circumstances of the offending or alleged offending when considering undue distress to the applicant; must have regard to any views of the complainant about being publicly identified, expressed before their death (if known); must take into account any risk of the order or proceeding being used to perpetrate domestic violence or that the application or proceeding is vexatious; and must be satisfied that the applicant is a person with sufficient interest (and lists the various factors in (e) that the court may consider in determining sufficient interest). The views of the defendant cannot be considered when determining an application for a complainant privacy order.

New subsection (3) provides that, despite subsection (1), a court may only make a complainant privacy order if satisfied that the particular circumstances make it necessary to displace public interests in, as relevant, the principles of open justice and freedom of expression, including free communication and disclosure of information.

New section 103ZZZH (Duration of complainant privacy orders) provides the court must decide the duration of a complainant privacy order, which must be stated in the order. The term cannot exceed 5 years. A complainant privacy order is automatically revoked on the death of the applicant, or if there was more than one applicant, the death of the last surviving applicant.

New section 103ZZZI (Application for extension of complainant privacy orders) allows an applicant to apply for extension of a complainant privacy order (for a maximum of 5 years). This must be done before expiration of the (existing) complainant privacy order, which continues in effect until determination of the application.

New section 103ZZZJ (Court may extend complainant privacy order) gives the court power to extend a complainant privacy order and outlines what a court may and must consider when determining the application for extension (the same considerations as above in section 103ZZZG).

New section 103ZZZK (Scope and effect of complainant privacy order) provides the scope and effect of a complainant privacy order. The order must state to whom the order applies (which can be the general public at large) and what identifying matter is covered by the order. A complainant privacy order does not prevent publication of details of a sexual offence, or the defendant, where the publication does not identify, and is not likely to lead to the identification, of the complainant.

New section 103ZZZL (Interim complainant privacy orders) allows the court to make an interim complainant privacy order without deciding the merits of the application. Where an interim order is made, the substantive application must be determined as a matter of urgency.

New section 103ZZZM (Evidence court may receive and take into account) provides for a relaxation of the rules of evidence, allowing a court to receive and take into account evidence of any kind considered credible or trustworthy in the circumstances.

New section 103ZZZN (Where complainant privacy order or interim complainant privacy order applies) provides that a complainant privacy order only limits publication in a place, stated in the order, where it is said the order applies. However, this is not limited to a place in Queensland; an order may apply anywhere in Australia. However, if the order is to apply outside of Queensland, the court must be satisfied that this is necessary to achieve the purpose for which the order is made.

New section 103ZZZO (Disclosure of particular information not prevented) provides that a complainant privacy order does not prevent disclosure of information where required by regulation for the purposes of performing a statutory function.

New section 103ZZZP (Review of complaint privacy order or interim complainant privacy orders) provides for review of a complainant privacy order and how this is done, noting this may be done on the court's own motion, or on application made by: the original applicant; another person with sufficient interest in whether the order could be confirmed, varied or revoked; a party to a current proceeding regarding the sexual offence; or an accredited media entity. The defendant cannot apply for review. On such an applicant, the court may confirm, vary or revoke the complainant privacy order.

New section 103ZZZQ (Offence to contravene complainant privacy order or interim complainant privacy order) provides that it an offence to contravene a complainant privacy order or an interim complainant privacy, with a maximum penalty of 100 penalty units or 2 years imprisonment for an individual, or 1000 penalty units for a corporation. New subsection 2 provides a rebuttable

presumption that a person is taken to be aware of a complainant privacy order where they have been given electronic notice of the order by the court.

New Division 5 provides other relevant provisions for the purposes of new Part 6C.

New section 103ZZZR (Executive officer may be taken to have committed offence) provides for executive officer liability for publication offences under section 103ZZN(1), 103ZZZC or 103ZZZQ(1).

New section 103ZZZS (Part provides additional protection) provides that the provisions contained in new Part 6C are in addition to, and do not prejudice other provisions or rules of law which protect witnesses or other person involved in a criminal proceeding from identification.

New section 103ZZZT (Part does not affect other laws) provides that the provisions in new part 6C does not prevent a person from giving information that is permitted or required to be given under another law.

New section 103ZZZU (Other laws prohibiting or restricting publication not limited or otherwise affected) provides that nothing in new part 6C limits or otherwise affects any other law that prohibits or restricts, or authorises a court or tribunal to prohibit or restrict, the publication of identifying matter in relation to a complainant or defendant.

*Clause 70* inserts transitional provisions in relation to new Part 6C into Part 9, Division 14.

New section 164 (Application of pt 6C, divs 1, 2, 4, and 5 in relation to complainants) provides that new Divisions 1, 2, 4 and 5 apply to a complainant regardless of whether the offence or alleged offence was committed before or after commencement.

New section 165 (Application of pt 6C, divs 1, 3 and 5 in relation to defendants) provides that new Divisions 1, 3 and 5 apply to a defendant charged with a prescribed sexual offence regardless of whether the offence or alleged offence was committed before or after commencement.

New section 166 (Reference to sexual assault) replicates section 14 of the CLSO Act.

New section 167 (Applications for non-publication orders made before commencement) provides that an application for a non-publication order, made under former section 7(2) of the CLSO Act, but not decided at the time of commencement, is taken to be an application under new section 103ZZW. Notice given under former provisions is taken to be notice under new section 103ZZX.

New section 168 (Continued operation of non-publication orders and interim orders) provides for the continued operation of non-publication orders and interim non-publication orders.

New section 169 (Application of repealed Criminal Law (Sexual Offences) Act 1978) deals with the application of the repealed Criminal Law (Sexual Offences) Act 1978.

*Clause 71* inserts new definitions into schedule 3 for the following terms: accredited media entity, capacity, complainant, complainant privacy order, consent, eligible person, identifying matter, interim complainant privacy order, interim order, non-publication order, prescribed sexual offence, publish, sentenced, Supreme Court's media accreditation policy and vexatious.

### Division 7 Release of transcript for research purposes

*Clause 72* inserts new section 134AA (Access to transcripts of sexual offence proceedings for research) which allows the chief executive to authorise access to transcripts of sexual offence proceedings for research purposes. Before authorisation can be given, the chief executive must be satisfied that the research has been approval by the Australian Institute of Aboriginal or Torres Strait Islander Studies if the research pertains to Aboriginal or Torres Strait Islander peoples, or otherwise by a human research ethics committee. The chief executive must also be satisfied that the research will not identify any persons to whom the research relates, and the person has given an undertaking to preserve the confidentiality of the transcript. The provision also allows the chief executive to authorise a person to contact the defendant or complainant, gives access to the transcript to another person, and impose conditions. Breach of any condition imposed is an offence with a maximum penalty of 100 penalty units.

*Clause 73* inserts a new transitional provision for new section 134AA, into Part 9, Division 14. New section 170 (Section 134AA applies to proceedings started after commencement) provides that researchers can only access transcripts of sexual offence proceedings under section 134AA where that proceeding started after commencement.

### Division 8 Criminal offence of coercive control

*Clause 74* amends section 21AC (Definitions for div 4A) to include the coercive control offence as an 'offence involving violence' such that evidence of affected children should be given in accordance with the special provisions of division 4A of the Evidence Act.

### Division 9 Other amendments

*Clause 75* amends section 39PB (Expert witnesses to give evidence by audio visual link or audio link) to remove 'or audio link'. The effect of this is that the rebuttable presumption contained is for expert evidence to be given by audio-visual link, not telephone (audio).

*Clause 76* amends section 39PC (Direction to jury if expert witness gives evidence by audio visual link or audio link) to reflect the above amendment to section 39PB. The amendment ensures the same direction is given for audio-visual and audio link evidence.

## Part 7 Amendment of Evidence Regulation 2017

*Clause 77* provides that this part amends the *Evidence Regulation 2017*.

*Clause 78* inserts new section 4B (Prescribed places for relevant proceedings—Act, s 103ZZD) which provides that Brisbane and Townsville are the prescribed places for the purposes of section 103ZZD(1)(c) of the Evidence Act. These locations will be the pilot locations for the sexual offence expert evidence panel.

## Part 8 Amendment of the Justices Act 1886

*Clause 79* provides that Part 8 amends the *Justices Act 1886*.

*Clause 80* amends section 47 (What is sufficient description of offence) to expand subsection (9) to provide that a complaint for an offence may state an offence is also a domestic violence offence,

a domestic violence offence committed against a child, or a domestic violence offence that exposed a child to domestic violence.

*Clause 81* amends section 48 (Amendment of complaint) to omit existing subsection (2) and insert new subsections (2) and (3).

New subsection (2) provides that subsection (3) applies if the justices hearing a complaint consider that the offence charged is also a domestic violence offence, a domestic violence offence committed against a child or a domestic violence offence that exposed a child to domestic violence (each a 'relevant domestic violence offence') and the complaint does not include a statement to that effect.

New subsection (3) provides that, without limiting subsection (1), the court may order that the complaint be amended to state that the offence is also a 'relevant domestic violence offence'.

# Part 9 Amendment of Penalties and Sentences Act 1992

## Division 1 Preliminary

*Clause 82* provides that Part 9 amends the *Penalties and Sentences Act 1992*.

## Division 2 Sentencing considerations

*Clause 83* amends section 9 (Sentencing guidelines) by inserting new subsections which provide factors that, in sentencing an offender, a court must have regard to.

Subclause (1) inserts new subparagraphs (fa) and (fb) into subsection (2). Subparagraph (fa) provides that a court must have regard to the hardship that any sentence imposed would have on the offender, having regard to the offender's characteristics, including age, disability, gender identity, parental status, race, religion, sex, sex characteristics and sexuality. Subparagraph (fb) provides that a court must, regardless of whether there are exceptional circumstances have regard to the probable effect that any sentence imposed would have on—

- a person with whom the offender is in a family relationship and for whom the offender is the primary caregiver; and
- a person with whom the offender is in an informal care relationship;
- if the offender is pregnant – the child of the pregnancy.

Subclause (2) inserts new subparagraph (gb)(iii) into subsection (2) to provide that a court must have regard to the offender's history of abuse or victimisation.

Subclause (3) inserts new subparagraph (oa) into subsection (2) to require that, if the offender is an Aboriginal or 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.

Subclause (4) amends existing subparagraph 9(2)(p)(ii) to insert the phrase 'including the effect of systemic disadvantage and intergenerational trauma on the offender'.

Subclause (5) amends existing subsection 9(12) to insert definitions of the terms ‘family relationship’ and ‘informal care relationship’, which are each defined by reference to definitions within the Domestic and Family Violence Protection Act 2012.

*Clause 84* inserts new Part 14, Division 23 (Transitional provisions for *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*).

New section 259 (Sentencing guidelines) provides that section 9 as amended by the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*, applies to the sentencing of an offender after the commencement whether the offence or conviction happened before or after the commencement.

## Division 3 New aggravating factors and domestic violence averments

*Clause 85* inserts the definition of ‘exposed’ into section 4 (Definitions). The term ‘exposed’, for a child in relation to domestic violence, is defined by reference to section 10 of the *Domestic and Family Violence Protection Act 2012* and occurs if a child sees or hears domestic violence or otherwise experiences the effects of domestic violence.

*Clause 86* amends section 9 (Sentencing guidelines) by inserting two new subsections.

New subsection (10C) provides that in determining the appropriate sentence for an offender convicted of a domestic violence offence that was committed against a child when the offender was an adult, the court must treat the fact that it is an offence against a child as an aggravating factor.

Subsection (10D) provides that in determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that either of the following circumstances apply as an aggravating factor: (a) that during the commission of the offence a child was exposed to domestic violence; (b) the offence committed was also a contravention of any of the following under the DFVP Act:

- a domestic violence order;
- a police protection notice;
- release conditions;
- an interstate order ;
- a New Zealand order; or
- a contravention of another order of a court or of an injunction.

*Clause 87* amends section 12A (Convictions for offences relating to domestic violence) by omitting and replacing existing subsection 12A(1)(a) (. The new subsection has the same effect as the existing provision to the extent that subsections (2) to (4) will apply if a complaint or an indictment for a charge for an offence states the offence is also a domestic violence offence. The amendment inserts new provisions to the effect that subsections (2) to (4) will also apply if a complaint or an indictment for a charge for an offence states the offence is also a domestic violence offence committed against a child; or a domestic violence offence that exposed a child to domestic violence. These are each tagged, a ‘relevant domestic violence offence’.

Consequential amendments are also made to subsections 12A (2)-(5), (8), (10) and (11) to insert the term ‘relevant’ alongside the term ‘domestic violence offence’. An example is inserted in existing section 12A(2) and existing section 12A(9) is amended to state that a person against whom a relevant domestic violence offence was committed, or a child who was exposed to domestic violence as part of the commission of a relevant domestic violence offence is not compellable as a witness in proceedings before the Court to decide an application under section 12A(10).

*Clause 88* inserts new section 260 (Convictions for offences relating to domestic violence), into Part 14, Division 23. It provides that the amendments to section 12A apply only to a person who commits a relevant domestic violence offence, or any of the acts constituting the offence, from commencement.

### Division 4 Criminal offence of coercive control

*Clause 89* amends schedule 1 (Serious violence offences) to insert the coercive control offence to ensure offenders convicted of the offence are declared to be convicted of a serious violence offence.

## Part 10 Amendment of Recording of Evidence Regulation 2018

*Clause 90* provides that Part 10 amends the *Recording of Evidence Regulation 2018*.

*Clause 91* inserts new section 11AA (Research in relation to sexual offence proceedings) which allows researchers who obtain authorisation under new section 134AA to obtain a transcript of sexual offence proceedings to apply to the chief executive for waiver of all or part of an amount otherwise payable for a copy of the transcription.

## Part 11 Amendment of Security Providers Act 1993

*Clause 92* provides that Part 11 amends the Security Providers Act.

*Clause 93* amends the Security Providers Act, schedule 1 (Disqualifying offence provisions under the Criminal Code) by adding reference to new Chapter 29A (Coercive control), which is inserted by this Bill.

*Clause 94* amends the definition of ‘disqualifying offence’ contained in schedule 2 by adding reference to an offence against section 179A of the DFVP Act, which is the new offence of 'Engaging in domestic violence or associated domestic violence to aid respondent’ inserted by the Bill.

## Part 12 Amendment of Youth Justice Act 1992

### Division 1 Preliminary

*Clause 95* provides that Part 12 amends the *Youth Justice Act 1992*.

### Division 2 Bail considerations

*Clause 96* amends section 48AA (Matters to be considered in making particular decisions about release and bail) by inserting new subsection 48AA(4)(b)(x). It provides that a court or police officer deciding whether to release a child in custody in connection with a charge of an offence

without bail or to grant bail to the child may have regard to the likely impact that refusal to release the child would have on a family member of the child for whom the child is the primary caregiver, a person with whom the child is in an informal care relationship or, if the child is pregnant, the child of the pregnancy.

*Clause 97* amends section 52A (Other conditions of release on bail) to insert new subsection 52A(2)(d) which provides that a court or police officer may only impose conditions other than a condition about appearing before a court or surrendering into custody if satisfied that the condition does not unduly restrict the child's ability to carry out the child's responsibilities for a family member of the child for whom the child is the primary caregiver, a person with whom the child is in an informal care relationship or, if the child is pregnant, the child of the pregnancy. Examples of responsibilities are provided: transporting a child of the child to an appointment, childcare or school; attending a medical appointment in relation to a pregnancy; cultural obligations to a family member.

*Clause 98* inserts new Part 11, Division 23 (Transitional provisions for *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*).

New section 419 (Application of ss 48AA and 52A to release of a child) provides that sections 48AA and 52A, as amended by *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2023*, apply in relation to the release of a child on or after the commencement.

New subsection (2) provides that, for subsection (1), it is irrelevant whether the relevant offence the bail decision relates to happened, or the proceeding for the offence was started, before or after the commencement.

*Clause 99* amends schedule 4 (Dictionary) to insert definitions of 'family relationship' and 'informal care relationship' consistent with those in the DFVP Act.

## Division 3 Sentencing Considerations

*Clause 100* amends section 150 (Sentencing considerations).

New subsection (1)(ea) provides that in sentencing a child for an offence the court must have regard to the hardship any sentence imposed would have with regard to the child's characteristics including disability, gender identity, parental status, race, religion, sex, sex characteristics, and sexuality.

New subsection (1)(eb) provides that in sentencing a child for an offence the court must have regard to the probable effect any sentence imposed would have on a family member for whom the child is the primary caregiver, a person with whom the child is in an informal care relationship, and if the child is pregnant the child of the pregnancy, regardless of whether there are exceptional circumstances.

New subsection (1)(ga)(iii) provides that, without limiting subsection 150(1)(f), in sentencing a child for an offence the court must have regard to the child's history of being abused or victimised.

New subsection (1)(ha) provides that in sentencing a child for an offence the court must have regard to any cultural considerations including the effect of systemic disadvantage and intergenerational trauma if the child is an Aboriginal or Torres Strait Islander person.

Subclause (3) amends existing subsection 150(i)(ii) to include the effect of intergenerational trauma in the examples of matters which may be raised in any submissions made by a representative of the community justice group in the child's community that are relevant to sentencing the child which the court must have regard to.

*Clause 101* inserts new section 420 (Sentencing principles) in Part 11 Division 23, which provides that section 150, as amended, applies to the sentencing of a child after the commencement whether the offence or conviction happened before or after the commencement.

## Part 13 Other amendments

*Clause 102* provides that Schedule 1 amends the legislation it mentions.

## Part 14 Repeal

*Clause 103* provides that the *Criminal Law (Sexual Offences) Act 1978*, No. 28 is repealed.

## Schedule 1 Other amendments

### Division 1 Intervention orders

#### Amendment of Domestic and Family Violence Protection Act 2012

*Clause 1* replaces section 72(2)(a) to (d) of the *Domestic and Family Violence Protection Act 2012* to provide that the suitability assessment criteria for the intervention order scheme are the same as those for the court-based perpetrator diversion scheme.

*Clause 2* amends section 75(4)(b) of the *Domestic and Family Violence Protection Act 2012* to provide that a copy of the approved providers list should be given to the police commissioner as well as the Chief Magistrate.

### Division 2 Criminal offence of engaging in domestic violence or associated domestic violence to aid respondent

### Amendment of Police Powers and Responsibilities Act 2000

*Clause 1* amends section 365(1)(j) of the *Police Powers and Responsibilities Act 2000* to include the criminal offence of engaging in domestic violence or associated domestic violence to aid respondent as an offence for which it is lawful for a police officer to arrest an adult who the officer reasonably suspects the adult has committed or is committing for 1 or more of the listed reasons.

### Division 3 Criminal offence of coercive control

### Amendment of Working with Children (Risk Management and Screening) Act 2000

*Clause 1* amends Schedule 2 of the *Working with Children (Risk Management and Screening) Act 2000* to include the coercive control offence as a serious offence.

*Clause 2* amends Schedule 4 of the *Working with Children (Risk Management and Screening) Act 2000* to include the coercive control offence as a disqualifying offence if the offence was committed against a child or exposed a child to domestic violence.