

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

## Statement of Compatibility

### Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

## Overview of the Bill

The Bill will amend: the *Bail Act 1980* (Bail Act); the Criminal Code; the *Domestic and Family Violence Protection Act 2012* (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* (Recording of Evidence 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 and makes related consequential and transitional amendments.

- **Amendments in response to the Women's Safety and Justice Taskforce**

One of the main purposes of the Bill is to implement the second stage of legislative reforms arising out of recommendations made by the Women's Safety and Justice Taskforce (the Taskforce) in its two reports: *Hear her voice – Report One – Addressing coercive control and domestic and family violence in Queensland* (Report One), released on 2 December 2021; and *Hear her voice – Report Two – Women and girls' experiences across the criminal justice system* (Report Two), released on 1 July 2022.

Reforms include a number of legislative amendments recommended by the Taskforce in Chapter 3.9 of Report One (Recommendations 74 to 79). These amendments will build on the groundwork established by the first stage of legislative reform to address coercive control in Queensland (implemented by the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Act 2023*, which fully commenced on 1 August 2023), including by introducing a new offence to criminalise coercive control.

The Bill also progresses the government's response to a range of recommendations from Report Two, including amendments to introduce an affirmative model of consent in Queensland and to

expressly reference stealthing conduct as non-consensual sexual activity (Recommendations 43 to 44). The Bill will also address other recommendations from Report Two relating to sexual violence (Recommendations 7, 56, 58 to 59, 77 and 80), domestic and family violence (DFV) (Recommendation 76), publication in DFV and sexual violence proceedings (recommendations 81, 82 and 86), and in relation to and women and girls as accused persons and offenders (Recommendations 110 and 126).

- **Amendments in response to the Royal Commission**

The Bill will 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).

- **Amendments in response to QPS COI**

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 to the Queensland Government its report, *A Call for Change* (the QPS COI Report). On 21 November 2022, the Queensland Government indicated it supported the intent of all 78 recommendations in the QPS COI Report. The Bill makes the legislative amendments to address the Queensland Government's response to recommendations 20 and 50 of the QPS COI. The Bill also makes a further amendment to allow a court to make an order to extend a police protection notice (PPN) in exceptional circumstances.

### **A. Amendment of *Bail Act 1980* (and related amendments to the *Youth Justice Act 1992*)**

#### **Bail considerations**

The Taskforce found that women are proportionately 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 unacceptability of 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 caregiving responsibilities.

## **B. Amendment of Criminal Code**

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

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. The Taskforce 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.

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 – clauses 10 to 17 of the Bill**

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 in Chapter 22, consent is also defined by amendments in the Bill..

The Bill replaces existing section 348 and provides 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 a concept of agreement 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 on section 61HJ of the *Crimes Act 1900* (NSW), with some adjustments taking into account stakeholder feedback.

New section 348AA(2) implements part (c) of recommendation 43 of Report Two. 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.

The Bill amends section 348A in accordance with the Taskforce’s recommendation to provide that voluntary intoxication is not considered when deciding whether a defendant had a reasonable but mistaken belief as to consent.

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’.<sup>1</sup>

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. This approach 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.

### **Offence of coercive control – clauses 19 to 23 of the Bill**

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.

The Taskforce found that there is no one criminal offence in Queensland that sufficiently holds perpetrators of coercive control accountable for the full spectrum of physical and non-physical abuse against their victims.

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.

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

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<sup>1</sup> 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.

person's physical, emotional, financial, psychological or mental wellbeing, whether temporary or permanent).

The offence is a crime which carries a maximum penalty of 14 years imprisonment, which recognises this is a serious offence which has significant adverse impacts on victims and the wider community.

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 child 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.

### **Jury directions – corroboration – clause 18 of the Bill**

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.

### ***C. 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 – clause 29 of the Bill**

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 PPN) at the first mention to consider whether a temporary protection order (TPO) 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.

The amendments 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 – clause 30 of the Bill**

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 five business days or until the next anticipated sitting date of the court. A PPN may only be extended once under this provision.

The term 'exceptional circumstances' is defined as unforeseen circumstances that cause the operation of the court to be significantly reduced. 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.

### **Court to consider appropriate period for protection order – clauses 27 to 28 of the Bill**

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 five 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 transcripts of domestic violence applications – clauses 32 to 37 of the Bill**

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 domestic violence order (DVO).

The Taskforce also recommended clarifying 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.

The Bill amends the DFVP Act to allow media to report in a de-identified way on applications for a DVO. The Bill also amends section 160 and inserts a new section 161A to allow an accredited media entity to apply to the court to obtain a transcript of an application for a DVO.

The Bill also amends the DFVP Regulation to clarify that a person who is convicted of a criminal offence under the DFVP Act (a breach of a DVO) can be named.

The policy rationale for the amendments is to promote open justice and more balanced reporting by media on DFV matters, while maintaining current protections against identifying parties, witnesses or children. The amendment to the DFVP Regulation ensures the conviction of an offence under the DFVP Act is treated in the same way as a conviction for other domestic violence offences.

### **Court-based perpetrator diversion scheme – clause 40 of the Bill**

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.

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.

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 it 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 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.

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

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. 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.

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

Recommendation 75, Report One was for the introduction of a new ‘facilitation’ offence to stop a person facilitating domestic violence on behalf of a perpetrator against a person named as an aggrieved in a DVO.

The Bill amends the DFVP Act to insert 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. 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.

As recommended by the Taskforce, the maximum penalty for the offence is 120 penalty units or three 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 five years’ imprisonment.

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 of the DFVP Act) 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 amendments will apply to all categories of licence under the Security Providers Act.

**Additional standard condition on protection orders and police protection notices - clauses 48 to 50 of the Bill**

Report One, recommendation 76, recommended that courts making a DVO impose a new standard condition that the perpetrator must not counsel or procure someone else to engage in behaviour that if engaged in by the perpetrator would be domestic violence.

The Bill amends section 56 of the DFVP Act to require the inclusion of a new standard condition in domestic violence orders 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 inserts 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 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.

**D. Amendment of *Evidence Act 1977* and the *Evidence Regulation 2017***

**Improper questions – clause 56 of the Bill**

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. Further, the Bill states 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 the public and evidence of a complainant's sexual reputation and sexual activities – clause 59 of the Bill**

The Bill inserts new provisions which apply to criminal proceedings that relate, wholly or partly, to a charge for a sexual offence, defined to mean an offence of a sexual nature, including, for example, an offence against a provision of Chapter 22 or 32 of the Criminal Code.

The Bill provides that the court is to be closed when a complainant is giving evidence, regardless of the way the complainant gives their evidence, and provides examples of ways in which the complainant may give evidence. If the court is closed under the section, the judge will be required to instruct the jury (in a trial by jury) about the exclusion of the public (to the effect that the jury 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).

The Bill also includes prohibitions and restrictions in relation to questions and evidence of a complainant's sexual reputation and sexual activities. While these are existing prohibitions and restrictions, the Bill updates the language to reflect contemporary community attitudes to sexual offences and strengthens the threshold test for granting leave to cross-examine or admit evidence as to the sexual activities of the complainant.

Under the amendments, the court must not grant leave unless 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 the listed factors. In particular, the court will be required to consider 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.

The Bill also imposes requirements for an application for leave to cross-examine or admit evidence as to the sexual activities of the complainant, including the contents of the leave application, that it be made in writing, and that it be filed in advance of the relevant proceeding.

### **Jury directions – sexual offences – clause 59 of the Bill**

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*.

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 that, consistent with the approach for jury direction for sexual offences under new section 103ZP, 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.

### **Sexual offence expert evidence panel – clause 59 of the Bill**

The Taskforce noted that expert reports would be required for the affirmative consent safeguard provision 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 will operate as 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 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.

### **Expansion of preliminary complaint evidence – clause 62 of the Bill**

The Taskforce recommended removing section 4A of the CLSO Act (Evidence of complaint generally admissible) 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 Taskforce observed that domestic and family violence 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 and family 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 Bill inserts new section 94A of the Evidence Act (Admissibility of preliminary complaint in sexual assault and domestic violence offences). This provision will appear in Part 6 of the Evidence Act, alongside other provisions that concern the admissibility of statements and representations.

The 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.

### **Prohibited directions – clause 65 of the Bill**

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 – clause 69 of the Bill**

The Bill implements recommendation 81 of the Taskforce's second report by amending the existing provisions pertaining to publication of sexual violence cases, currently in the 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 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.

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.

### **Release of transcript for research purposes – clause 72 of the Bill**

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 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.

## **E. Amendment of *Penalties and Sentences Act 1992* (and related amendments 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 (clauses 83 and 100) makes several

amendments to the factors that a court must have regard to, under section 9(2) of the PS Act and section 150(1) of the YJ Act, when sentencing an offender, including inserting requirements in relation 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;
- regardless of whether there are exceptional circumstances, 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; and
  - if the offender is pregnant—the child of the pregnancy;
- the offender’s history of being abused or victimised; and
- if the offender is an Aboriginal or Torres Strait Islander person—any cultural considerations, including the effect of systemic disadvantage and intergenerational trauma on the offender.

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

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 offender’s 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 the Criminal Code, and 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.

## **F. Amendments to the Security Providers Act 1993**

The Security Providers Act provides an occupational licensing framework for the private security industry (which includes individuals and businesses providing the services of security officers,

private investigators, crowd controllers, bodyguards, security equipment installers and security advisers).

A person must meet specified identification and probity standards to be eligible for a licence under the Security Providers Act. A person will not be eligible for a licence if in the preceding 10 years the person has been convicted of a disqualifying offence (as defined in schedule 2 of the Security Providers Act) for which a conviction was recorded.

The Bill (clauses 93 and 94) amends the definition of disqualifying offence in the Security Providers Act to include the new offence of ‘Coercive control’ in Chapter 29A of the Criminal Code (Coercive control) and the new offence of ‘Engaging in domestic violence or associated domestic violence to aid respondent’ (new section 179A of the DFVP Act).

## **G. Other amendments**

The Bill also makes related consequential and transitional amendments.

## **Human Rights Issues**

### **Human rights relevant to the Bill (Part 2, Division 2 and 3 HR Act)**

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are relevant to the Bill are:

- recognition and equality before the law (section 15);
- right to life (section 16);
- freedom from forced work (section 18);
- freedom of movement (section 19);
- right to freedom of thought, conscience, religion or belief (section 20);
- freedom of expression (section 21);
- taking part in public life (section 23);
- right to privacy and reputation (section 25);
- protection of families and children (section 26);
- cultural rights (section 27);
- cultural rights of Aboriginal and Torres Strait Islander people (section 28);
- right to liberty and security of person (section 29);
- right to a fair hearing (section 31);
- rights in criminal proceedings (section 32);
- rights of children in the criminal process (section 33);
- right to education (section 36); and
- right to health services (section 37).

### **Amendments that promote human rights**

In my opinion the human rights that are promoted by the criminal offence of coercive control are:

- right to enjoy human rights without discrimination (section 15(2));
- right to life (section 16);
- protection from torture and cruel, inhuman or degrading treatment (section 17);

- privacy and reputation (section 25);
- protection of families and children (section 26); and
- right to liberty and security of person (section 29).

Coercive control violates these human rights of victims. The Taskforce recognised that the Queensland Government has a positive obligation under the HR Act to protect the lives and physical and psychological safety of victims of coercive control. It recognised that the current criminal law in Queensland does not adequately protect Queensland citizens from violations of these human rights. The introduction of the coercive control offence is intended to ensure victims' rights are protected and promoted.

In addition, it is my opinion that the following human rights may be promoted by the criminal offence of coercive control, wherever an individual defendant's domestic violence behaviours which constitute the course of conduct for the coercive control offence limit any of their victim's:

- freedom from forced work (section 18);
- freedom of movement (section 19);
- freedom of thought, conscience, religion and belief (section 20);
- freedom of expression (section 21);
- freedom of association (section 22);
- taking part in public life (section 23);
- property rights (section 24);
- cultural rights – generally (section 27);
- cultural rights – Aboriginal and Torres Strait Islander peoples (section 28);
- right to education (section 36); and
- right to health services (section 37).

## **A. Amendments to the Criminal Code (and related amendments)**

### **Amendments to the failure to report offence**

#### **(a) the nature of the right**

In my opinion, the human right limited by these amendments is the protection of families and children (section 26).

The right to protection of families and children recognises that every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests because they are a child. This right extends to the guarantee of institutional protection of the family, and positive measures for protection of children by the society and the State.

The amendments limit this right by removing criminal responsibility under the failure to report offence where there is a reasonable excuse, noting the provision is intended promote protection to children by imposing a positive obligation on all adults in the community. The amendments may result in a relevant professional responding passively to disclosure of information about a child sexual offence, to the detriment of the protection of the child (and of children more generally, noting the risk a perpetrator may offend against multiple children). This is because the onus will rest with the professional to determine the risk associated with a disclosure, and to exercise their discretion appropriately when deciding how to respond.

The amendments may also result in a disclosure by a 16 or 17 year-old child, about a child sexual offence, not being acted upon because of the child victim's wishes.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on the right to protection of families and children is to foster trust and rapport in the relationships between relevant professionals and their young clients or patients. A further purpose of the limitation is to acknowledge the decision-making capacity of older adolescents (16 and 17 years old).

It is necessary to make these amendments to remove disincentives to young people seeking advice and help from adults, particularly professionals. Stakeholder feedback indicated that the provisions have had a detrimental impact on client engagement, particularly in circumstances where a vulnerable young person does not want a law-enforcement response to their experiences of childhood sexual abuse.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether limitation helps to achieve the purpose

The limitation on the right to protection of families and children will achieve its purpose by removing a blanket approach to mandatory reporting of a belief of a child sexual offence that has been or is being committed.

The amendment will provide relevant professionals with scope to determine whether a child is at risk of serious harm, and consequently, if the professional must report the matter to police. This will allow a relevant professional to assess risk on a case-by-case basis. Where there is no risk of serious harm to a child, a relevant professional may choose not to report the disclosure in favour of maintaining confidentiality, trust, and rapport with the child (or any other informant). Whilst there will continue to be cases where a professional must report their beliefs of a child sexual offence to police (in cases where a child is at risk of serious harm), this amendment will tend to reduce instances where a professional is required to report information to police, against the wishes of a vulnerable client.

The limitation will also achieve its purpose by providing greater autonomy to older adolescents (aged 16 and 17 years old) in respect to how a disclosure pertaining to their experience as a victim of a child sexual offence is managed by an adult.

The amendments will reduce unintended negative consequences that may arise when information is disclosed to police, by a professional or another adult, without the young person's consent.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the Bill.

There is no less restrictive and reasonably available way of achieving the purpose of the amendments.

- (e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation on the right to protection of families and children, the importance of promoting a young person's access to medical and psychological treatment (and other professional support services) outweighs the harm caused by the limitation to the right to protection of families and children. The amendments are proportionate and strike an appropriate balance between the right to protection of families and children, and the rights to health services, and privacy.

**Affirmative consent, mistake of fact and stealthing**

In my opinion, the human rights that are limited by these amendments are:

- right to liberty and security of person (section 29);
- fair hearing (section 31); and
- rights in criminal proceedings (section 32).

(a) the nature of the right

The Bill implements the government's commitment to legislate an affirmative model of consent, including explicitly legislating that 'stealthing' is a circumstance where there is no consent.

Rights in criminal proceedings (section 32) protects several rights which concern how police conduct investigations and how proceedings are conducted in court. The right may be affected by changes to the law, including changes that impact on the right to be presumed innocent (including any changes to the law relating to self-incrimination), which regulate criminal trial procedure, or which amend the legal or evidential burden placed on a defendant.

Regarding the presumption of innocence and the right to not incriminate oneself, the High Court has found that a change to the legal system which does not abrogate the right to silence but which may impact the decision an accused person would make about how to defend the charge (including a decision about whether to give evidence) is a fundamental alteration of the adversarial system adopted in Australia, and thus constitutes a limit on the right against self-incrimination and the right to the presumption of innocence.<sup>2</sup>

The amendments mean that before an accused person can claim that their mistaken belief is reasonable, there will need to be evidence that they said or did something to find out whether the other person was consenting. Where a defendant is unable to point to evidence that they said or did something to ascertain consent, such a belief will not be considered reasonable. While the Crown retains the evidential onus to prove an absence of mistake of fact where it reasonably arises on the evidence, this will place an additional evidential burden on an accused person which may limit their right to the presumption of innocence and right to a fair hearing.

It is acknowledged that it would be difficult for an accused person to show they said or did something to determine consent without their account being before the court in some way, which may limit a defendant's right to silence (which arises from the right against self-incrimination and presumption of innocence). However, this evidence could be adduced through questioning the victim, evidence of another witnesses (if present), or through a recorded police interview. The proposed amendments will not require a defendant to give evidence.

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<sup>2</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92

The amendments place an evidential onus on an accused person who wishes to rely on the safeguard provision. An accused person would be required to prove, on the balance of probabilities, that they had a relevant impairment that impacted their ability to communicate and that it was a substantial cause of their failure to say or do something. Where this is proven on the balance of probabilities, it is not the case that their belief will automatically be considered reasonable; rather, the applicable ‘test’ will revert to that currently applied by the courts. Application of the existing mistake of fact defence considers any impairment suffered by the defendant while still ensuring there is an objective element to reasonableness.

In moving to this model of affirmative consent, the proposed amendments impact the right to a fair hearing and rights in criminal proceedings by potentially impacting the decisions to be made by the defendant regarding how to run their defence.

The requirement to adduce expert evidence of an impairment may impact the right to liberty and security of person (section 29) by causing delay in trial proceedings, particularly in circumstances where there are often delays associated with securing appointments with an expert. However, the amendments include a notice provision (new section 590AB) to facilitate early identification and notice of the issue so appropriate steps can be taken to minimise any potential delay.

The right to a fair hearing (section 31) addresses procedural fairness and encompasses the right to a fair and public hearing. This right may be considered to have been limited where there is a reversal of the onus of proof, where there are changes or regulation for how evidence may be adduced, or where there is regulation of media reporting on proceedings.

The proposed model of affirmative consent recognises that a person’s ability to understand and engage in the communication required under an affirmative model of consent may be impacted by a cognitive or mental health impairment. The inclusion of a safeguard promotes the right of equality under the law and does not amount to discrimination under section 15(5).

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of introducing a model of affirmative consent is to address the prevalence of sexual violence within the community, noting the high incidence of sexual violence against women in particular, significant underreporting of offences to police, and high attrition rates in cases where a charge is laid. A secondary purpose of the amendments is to improve the fairness of trials for sexual offences by ensuring it is not only the conduct of a victim which is scrutinised.

The amendments will ensure the law recognises modern community standards about consent and sexual relationships where all parties are responsible for ensuring there is agreement to sexual activity and the serious impact that sexual offences have on victim-survivors. Sexual offences have lifelong impacts on victims, and there is a pressing need to improve how the criminal justice system responds to these offences.

Clearly defining consent as an agreement, together with other amendments to the meaning of consent, and the provision of a non-exhaustive list of circumstances where there is no consent, will send a strong message of what consent requires, and will assist in ensuring comprehensive community education and understanding of consent laws. The amendments requiring a defendant

to have said or done something to ascertain consent reinforces a contemporary understanding of sexual consent, namely that consent cannot be assumed and should be clearly communicated.

In this way, the limitation on the defendant's rights, particularly the right to silence and right to a fair hearing, is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

Introducing a requirement to say or do something to ascertain consent—which will require evidence of the defendant's actions—and placing the onus on the defendant to prove the elements for the safeguard provision, is directly connected to the purpose of making prosecutions for sexual offences fairer and better aligning them with community standards. It will ensure the actions of the defendant are properly considered when determining the reasonableness of a defendant's conduct. The information required to be adduced by the amendments would generally be peculiarly within the knowledge of the defendant and not something that is readily available to the prosecution. For these reasons the requirement is not considered too burdensome. It is hoped that by making prosecutions fairer, and focusing on the actions of the accused, there will be increased reporting of sexual offences to police, and higher rates of conviction for sexual offences.

The safeguard provision, which reduces criminal responsibility for persons who have a relevant impairment, may lead to delays in proceedings. However, given the intent of the safeguard, which is to address the disadvantage that vulnerable persons may face because of the introduction of affirmative consent, any delay arising out of the need to obtain expert evidence would not be unreasonable.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive, reasonably available alternatives for achieving the identified purpose.

The Taskforce considered the option of reversing the onus of proof with respect to the mistake of fact defence. This would have required the defendant to prove the existence of the excuse on the balance of probabilities, together with a requirement that regard must be had to what an accused person said or did. However, the issue with this alternative approach is that it does not impose a positive obligation on a person to actually say or do anything to find out whether a person is consenting to sexual activity.

Under this alternative approach, an accused person could still argue that, in spite of failing to take any steps to find out whether someone was consenting to conduct—even where a jury finds there was no actual consent by a victim—that their belief was reasonable. This is insufficient to reflect modern community standards which embrace 'affirmative consent' and require that there be frank, open and honest communication between equals, where both parties are responsible for ensuring consent. This approach is also unlikely to sufficiently shift the focus to what all parties to a sexual activity said or did.

- (e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Sexual violence is a terrible violation of the human rights of a victim. Despite this, some offenders are not brought to justice because of hurdles victims face with reporting offences and the criminal justice system more generally. Legislative reform is necessary to provide for a fairer criminal justice process that not only scrutinises what a victim did, but properly considers what all parties to the sexual activity did to ensure the encounter was consensual.

The proposed reforms result in a legislative model of consent which better reflects community values about consent in sexual relationships and will hopefully lead to victims having greater confidence to report offending and proceed through the criminal justice system.

The inclusion of a safeguard for persons with a relevant impairment is intended to ensure that the additional requirement to say or do something will not adversely impact vulnerable persons with those impairments.

Relevant matters when assessing proportionality include the seriousness of the sentence likely to be imposed for the offence, whether the nature of the offence makes it difficult for the prosecution to prove an element of the offence, the social problem sought to be addressed, and whether certain information would be exclusively with a defendant's knowledge. Rape and other sexual offences carry a significant maximum penalty, reflecting the seriousness of such offending and the life altering consequences for victims. The limitation on the rights of a defendant, where this information would generally be exclusively within their knowledge, strikes an appropriate balance given the purpose to be achieved by the amendments.

The benefits of moving to an affirmative model of consent and human rights promoted by the approach outweigh the limits placed on the rights to a fair hearing and rights in criminal proceedings. This is particularly so in the context of the triangulation of the interests of the victim, the accused, and the community. The proposed amendments are expected to reduce a witness's trauma and encourage victims to pursue charges, increasing the broader community's confidence in the justice system and having a person brought to justice.

- (f) any other relevant factors

Nil.

### **Criminal offence of coercive control**

In my opinion, the human rights that are limited by these amendments are:

- right to recognition and equality before the law (section 15);
- right to freedom of movement (section 19);
- right to freedom of thought, conscience, religion or belief (section 20);
- freedom of expression (section 21);
- right to privacy and reputation (section 25);
- cultural rights (section 27);
- cultural rights of Aboriginal and Torres Strait Islander people (section 28);
- right to liberty and security of person (section 29);
- right to a fair hearing (section 31); and

- rights in criminal proceedings (section 32).

(a) the nature of the right

The right to recognition and equality before the law (section 15) protects the principle that all individuals are equal under the law and entitled to equal protection and the benefit of the law without discrimination of any kind. Criminalising coercive control may have unintended consequences for people with mental health concerns, people with a disability, older people, people with cognitive decline and people from culturally and linguistically diverse backgrounds.

The right to freedom of movement (section 19) protects the rights of persons who are lawfully within Queensland to move freely within Queensland, as well as to enter and leave the State and choose where to live. The right places an obligation on the State not to act in a way that unduly restricts freedom of movement. The coercive control offence may limit an individual's right to follow and monitor a person they are in a relevant relationship with, in circumstances where such conduct constitutes domestic violence and meets the elements of the offence.

The right to freedom of thought, conscience, religion or belief (section 20) of the HR Act and protects an individual's personal autonomy in relation to their individual thoughts and beliefs, as well as how they demonstrate them through religious observances, worship, teaching and other practices. The right specifically includes the right to demonstrate religion or belief in worship, observance, practice and teaching, individually or in community and in private and public. The coercive control offence will criminalise a course of conduct consisting of domestic violence.

Some behaviours defined as domestic violence for the purpose of the Bill may be done in furtherance of an individual's intention to exercise their right to demonstrate their freedom of thought, conscience, religion, or belief. The Bill may, in defining the domestic violence behaviours which may constitute the domestic violence offence, impinge upon traditional religious, personal or cultural beliefs and practices which influence family and cultural gender norms, traditions and practices and understandings of appropriate behaviour within intimate and broader family and community relationships.

Freedom of expression (section 21) is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.<sup>3</sup> The right protects an individual's ability to hold an opinion and to seek, receive and impart information and ideas of all kinds, including orally, in writing, in print, by way of art, or in any other medium. The right may only be limited where such limitation is proportionate and not capricious, unpredictable, unjust and unreasonable. The coercive control offence will limit this right by limiting a person's communication with another person where that behaviour constitutes domestic violence for the purposes of the new offence.

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<sup>3</sup> William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N.P.Engel, Publisher, 3<sup>rd</sup> rev ed, 2019) 541.

The right to privacy and reputation (section 25) is a very broad right, which relevantly includes the right to a private life. The right prohibits unlawful or arbitrary interferences with home, family, integrity and other aspects of an individual's identity, communications, correspondence, and character. It protects freedom of thought and conscience and includes the right not to have the person's reputation unlawfully attacked. The Bill will limit this right in making public, through prosecution, aspects of a person's life which are normally private matters, as well as personal and private communications.

Cultural rights (section 27) protect the rights people of all cultural, religious, racial or linguistic backgrounds to enjoy their culture, declare and practice their religion and use their languages. Cultural rights encompass traditional beliefs and practices and are likely to extend to private and public expressions of culture.

The cultural rights of Aboriginal and Torres Strait Islander people (section 28) have special protection, which recognises the special importance of human rights for Aboriginal and Torres Strait Islander people. The right acknowledges their distinct cultural rights which must not be denied or forcibly assimilated or destroyed. These rights may include the right to enjoy, maintain, protect and develop their identity, cultural heritage, use of language and traditional cultural expressions and kinship ties.

Some behaviours defined as domestic violence for the purpose of the Bill may be done in furtherance of an individual's intention to exercise their right to enjoy their culture and declare and practice their religion.

In addition, the Taskforce identified that criminalising coercive control may lead to misidentification of victims as perpetrators, or the overcriminalisation of particular groups of people, particularly Aboriginal and Torres Strait Islander women. First Nations people are already significantly over criminalised in relation to breaches of domestic violence orders. Increasing the numbers of First Nations people in prisons will sever the right of indigenous people to maintain kinship ties.

The right to liberty and security of person (section 29) provides that every person has the right to liberty, which includes that a person must not be arrested and detained other than for reasons provided for by law. Detention must not be arbitrary. Where a person is detained, the right protects a person's physical and mental security. It requires a person be brought to trial without unreasonable delay.

The proposed amendments will engage the right to liberty and security if a person is arrested, charged and detained for a domestic violence offence and subsequently convicted and sentenced. The arrest and detention must still otherwise be lawful. The Taskforce identified that the Bill may limit this right if the coercive control offence results in the misidentification of victims as perpetrators of coercive control and consequent incarceration. It is noted that careful consideration has been given to minimising the risks of misidentification.

The amendments limit rights in criminal proceedings (section 32), particularly the right to be informed in detail of the nature and reason for the charge. This right ensures fairness in criminal trials by protecting the right to minimum procedural guarantees and is related to the presumption of innocence, the right to a fair trial and due process. Limitation of this right could impact on an accused person's ability to properly prepare their defence to the allegations against them, including their ability to identify the allegations they face, potential witnesses and their own defence arguments. Rights in criminal proceedings may be limited where it is reasonable and demonstrably justified.

The Bill could limit the right to be informed in detail of the nature and reason for the charge. This is because the prosecution is not required to prove intention for each act of domestic violence, nor are they required to allege the particulars of each act as a separate offence, with similar allowances being made with respect to jury consideration of the charge.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitations to the rights identified above is to deter abusive behaviour to protect victims, families and children from that behaviour. The limitations also serve a secondary educative purpose, aiding the community to understand the nature of harm which may be caused by coercive control. It is vital in a free and democratic society that offences are able to be prosecuted according to law to preserve the human dignity, equality and freedom of victims, where offending may occur within the home and private settings.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

All of the limitations will achieve the purpose of deterring abusive behaviour to protect victims, families and children by enacting a criminal offence which captures the full range of domestic violence behaviours that constitute coercive control. This will serve the broader purpose of preventing coercive control and protecting victims of domestic violence. As noted above, coercive control is a violation of the human rights of victims.

There is a rational relationship between the limitation on the right of freedom of movement (section 19) and the identified purpose of the limitation. The new offence aims to stop perpetrators of domestic and family violence who monitor and thereby control and intimidate victims.

The Bill's limitations on domestic violence behaviours which may be informed by traditional religious, personal and/or cultural beliefs and practices serve the identified purpose. The limitation on the cultural rights of First Nations people to maintain their kinship ties serves the purpose of holding perpetrators of coercive control accountable for their abuse of their victims.

There is a rational relationship between the limitation on the right to freedom of expression (section 21) and the identified purpose. Criminalising a course of conduct that involves the perpetration of different forms of domestic and family violence, including verbal and emotional violence, will significantly limit the ways in which perpetrators of domestic and family violence can control and intimidate victims.

The limitation on the right to privacy and reputation (section 25) will allow defendants who commit offences in the privacy of homes to be held accountable. It is vital in a free and democratic society that offences are able to be prosecuted according to law to preserve the human dignity, equality and freedom of victims, where offending may occur within the home and private settings.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The amendments are considered to be the least restrictive, reasonably available way to achieve the purpose.

An alternative approach to addressing coercive control behaviour would be through non-legislative means, for example through community education alone, or through otherwise not criminalising the conduct. This would not as effectively achieve the purpose of holding perpetrators of domestic violence accountable for the full range of domestic violence behaviours, as supported by the Taskforce's recommendation.

Consideration has also been given to whether the offence could be constructed differently, for example to carve out particular behaviours from the definition of 'domestic violence' that would limit impacts on the various rights limited by the Bill. This would not as effectively achieve the purpose of increasing the safety of victims, noting the Taskforce has identified that a broad range of behaviours can constitute coercive control.

Further significant care has been given to ensure that the offence focuses on the nature of coercive control so that the offence is targeted at behaviour intended to coerce and control, which it is submitted also significantly decreases the risks of misidentification of victims who use violence in response to coercive control.

Extensive consideration and consultation has focused on minimising the risks to the right to liberty and security of person (section 29). Proof of intent to coerce and control should prevent criminalisation of misidentified victims. The Bill should therefore only limit this right in the most exceptional circumstances, if at all.

It is anticipated that in most cases the intent element of the offence will also significantly minimise the risks of unintended consequences for the identified classes of people whose right to recognition and equality of the law (section 15) may otherwise be limited.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Coercive control is a violation of various human rights of victims. The Queensland Government has a positive obligation under the HR Act to protect the lives and physical and psychological safety of victims of coercive control. The current criminal law in Queensland does not adequately protect Queensland citizens from violations of these human rights. The introduction of the coercive control offence is intended protect and promote the human rights of victims, particularly the right to life, and protection from torture and cruel, inhuman or degrading treatment and the right to liberty and security of person.

I have considered the importance of the coercive control amendments to the Bill which recognises the true nature of coercive control as the exertion of power or dominance over victims using patterns of abusive behaviours over time which create fear and deny liberty and autonomy. The limitations identified are proportionate to achieve this purpose.

On balance, the purpose of the amendments, and the importance of the promotion of the human rights of victims and their children, outweighs the identified limitations.

(f) any other relevant factors

Not applicable.

### **Related amendments to schedules 2 and 4 of the WWC Act**

The amendments to the WWC Act to categorise the offence of coercive control for the purposes of the blue card system limit the right to recognition and equality before the law (section 15).

(a) nature of the right

The right to recognition and equality before the law (section 15) encompasses the right to recognition as a person before the law and the right to enjoy the person's human rights without discrimination. Section 15(4) of the HR Act provides a right to equal and effective protection against discrimination and entitles every person to a separate and positive right to be effectively protected against discrimination.

A person's eligibility to work with children under the WWC Act is assessed based on their criminal record. It is possible that criminal conviction could come within the scope of discrimination under the HR Act.

The proposed amendments will limit individual rights to recognition and equality before the law, by expanding the range of disqualifying and serious offences under the WWC Act. Such an expansion will likely have an indirect and disproportionate impact on employment prospects for First Nations people, who are overrepresented in the criminal justice system.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on recognition and equality before the law is to protect children from harm. This is consistent with the rights of children enshrined in section 26(2) of the HR Act.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation on the right to recognition and equality before the law will achieve the purpose of protecting children by ensuring that individuals convicted of coercive control offences are either prohibited from applying for a blue card, or subject to a presumption that a blue card must not be issued (unless there is a finding of an exceptional case in which it would not harm the best interests of children). The amendments also ensure that existing blue card applicants and cardholders

charged with a coercive control offence will have their blue card suspended, or their blue card application withdrawn.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

There are no less restrictive, reasonably available alternatives for achieving the identified purpose.

The approach taken has specifically considered the impacts of the WWC Act on women and girls who have been involved in the criminal justice system (particularly First Nations women). The Bill avoids a blanket categorisation (i.e. regardless of who the offence is committed against) of coercive control as a disqualifying offence.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the purpose of protecting children outweighs the limitation on the right to equality before the law as it ensures that individuals who pose a significant risk to the safety of children are prohibited from performing child-related work. The 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.

(f) any other relevant factors

Not applicable.

## **B. Amendment of *Domestic and Family Violence Protection Act 2012*, and *Domestic and Family Violence Protection Regulation 2023***

### **Extension of PPNs in exceptional circumstances**

In my opinion the human rights that are limited by this amendment are:

- right to life (section 16);
- right to freedom of movement (section 19);
- right to protection of families and children (section 26); and
- right to fair hearing (section 31).

(a) the nature of the right

The right to freedom of movement (section 19) protects the rights of persons who are lawfully within Queensland to move freely within Queensland, as well as to enter and leave the State and choose where to live. The right places an obligation on the state not to act in a way that unduly restricts freedom of movement. It may be engaged by orders which restrict where a person may live.

The extension of a PPN in the manner anticipated by the amendment may continue the ouster of a person from their home when the PPN may have otherwise been ended at the scheduled hearing date, which will impact upon the person's freedom of movement (section 19), in particular their

right to choose where to live, the impacts of which may be heightened during periods of emergency when accessing alternative accommodation may be difficult.

The right to fair hearing (section 31) relates to procedural fairness and allows a right for parties to be heard and respond to allegations made against them in a public hearing before a competent, independent and impartial court or tribunal established by law. This right is limited by the grant of power to the court to adjourn and extend a PPN without appearances. It may limit the right by preventing a person against whom a PPN has been issued from having the opportunity to be heard and to respond to the allegations which resulted in the issue of the PPN. The limitation would continue to have this effect for either five business days or until the next scheduled sitting date of the court. It may have a significant impact on that person, especially in circumstances of emergency as foreshadowed by the list of examples included in the provision.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of these limitations is to ensure that the protection afforded to victims of domestic violence by a PPN can be extended, when unforeseen circumstances cause the operations of the court to be significantly impacted.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

Restricting a person's right to freedom of movement (section 19) and freedom of expression (section 21) when a PPN is extended will help achieve the purpose of ensuring PPN protections are able to be extended when court operations are significantly impacted.

Restricting a person's right to a fair hearing (section 31) by granting a court the power to adjourn and extend a PPN without appearances when court operations are significantly impacted will also help achieve the purpose of ensuring PPNs are able to be extended when court operations are significantly impacted, such that the court is unable to convene in the usual manner with appearances by the parties.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There is no reasonably available alternative to achieve the purpose of the amendments. If the limitations were not imposed, courts would not have any means available to extend PPNs when the court is unable to sit due to such exceptional circumstances.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The provisions provide significant safety protections by the extension of the PPN for a short period of time, in circumstances where the court's operations are significantly reduced. In such circumstances the protections provided by the PPN would otherwise lapse, and the consequences for the safety of a victim may be significant. This is particularly so given the likely corresponding reduction in the ability of emergency services to respond to help-seeking by victims in such

circumstances and the heightened risk to victims caused by the increased stress during periods of emergency. 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 respondents.

On balance, having regard to the extent of the limitations on the rights to freedom of movement (section 19) and a fair hearing (section 31), it is considered that the importance of achieving the purpose to ensure the safety of victims and their families, which is a fundamental purpose of the justice system in our society, outweighs the harm caused to the limitation to the rights identified.

(f) any other relevant factors

Nil.

**Media may apply for transcripts of DVO applications**

(a) the nature of the right

The amendments will allow accredited media to apply to the court for authorisation to receive a DVO transcript and anonymously publish reports about these applications. This will limit the right to privacy and reputation (section 25).

The right to privacy protects individuals against unlawful or arbitrary interference with their privacy, family and home. Arbitrary interference includes when something is lawful, but also unreasonable, unnecessary or disproportionate. The right to reputation protects individuals from unlawful attacks on their reputation.

The proposed amendments will limit the right to privacy and reputation by allowing accredited media to access transcripts of a DVO proceeding. This may contain identifying information about a party to the proceeding, witness or child. Some of this information may adversely reflect on parties to the proceeding. However, the confidentiality provisions make it an offence to publish any identifying information about a party, witness or child, ensuring they cannot be publicly identified. The amendments do not affect the protections provided by other laws. They therefore do not permit unlawful attacks on a person's reputation.

The amendments will also mean that someone convicted of a breach of a domestic violence order will be able to be identified, which will limit their right to privacy and reputation. The publication of personal information is currently allowed if the person involved in the DFV proceedings is later convicted of a criminal offence under legislation other than the DFVP Act. While the amendments will make such an interference lawful, and it is not considered the interference is arbitrary, the right is limited because the amendments remove a current restriction on the publication of such personal information.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation on the right to privacy and reputation is to promote open justice and wider media reporting about DFV proceedings. It is hoped this will increase community understanding of domestic violence, and lead to increased reporting and community safety. The

amendment to the regulation to allow identification of persons convicted of a breach of a domestic violence order also promotes open justice and aligns these offences with the rules that apply in relation to other criminal offences.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

The removal of the restriction on publication will achieve the purpose of promoting open justice—with consequential increased reporting—as it will allow access to, and publication of, this information. Media cannot currently access information about applications for domestic violence orders because such applications are held in closed court. Queensland is the only jurisdiction where this occurs.

It will mean that those named on a DVO that are convicted for an offence under the DFVP Act, for example, a contravention of a DVO, are able to be identified in the same way as those who are convicted of other criminal offences that are factually related to the DVO they are named on.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

It is considered that there is no reasonably available alternative to achieve the purpose of the amendments.

Removing the closed court requirement that applies to applications for a DVO was considered, and rejected, by the Taskforce. This would have allowed media to view such proceedings and report on them. However, the Taskforce rejected noting that closed court proceedings helped ensure victim safety and assisted them giving their best evidence.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, having regard to the extent of the limitation on the right to privacy (which will only allow media access to transcripts and prohibits publication of identifying information), and the importance of the principle of open and increased reporting about the spectrum of domestic violence offence, the limitation imposed by these amendments is considered proportionate and reasonable.

(f) any other relevant factors

Nil.

### **Court-based perpetrator diversion scheme**

In my opinion the human rights that are relevant to this amendment are the rights to:

- privacy (section 24); and
- rights in criminal proceedings (32)

(a) the nature of the right

The right to privacy (section 25) protects an individual from unlawful or arbitrary interferences and attacks on their privacy. An arbitrary interference is conduct that is capricious, unpredictable or unjust, or an interference that is unreasonable in that it is disproportionate to the aim. Accordingly, any limitation on the right to privacy must be proportionate.

New sections 135F and 135G will limit a defendant's right to privacy by requiring the defendant engage in a suitability assessment for the purposes of preparing a report. It is a requirement that the defendant's suitability is assessed taking into consideration a range of personal matters including the defendant's character and personal history, any drug or alcohol problems, and any disabilities, psychiatric or psychologic conditions. It follows that such topics are to be canvassed with the defendant, and then reported upon by an approved provider. The report will be provided to the Court, and in turn, the prosecutor and defendant. Therefore, to be eligible for the scheme, the defendant must be agreeable to disclosing this personal information to an approved provider so that it may be imparted to various parties.

Rights in criminal proceedings are set out in section 32(2) of the HR Act and affirms the right of a person charged not to be compelled to testify against themselves or to confess guilt. New section 135C(1)(d) will limit this right by providing an eligibility requirement that the defendant must accept responsibility for the alleged facts constituting the alleged offence, detailed in the prosecution's written summary. This provision will operate alongside new section 135D which clarifies that the defendant's acceptance of responsibility under section 135C is not taken to be a plea to the charge for the offence entered by the defendant and is not admissible in evidence against the defendant in any criminal proceeding.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality, and freedom

The purpose of limiting the right to privacy (section 25) is to ensure that a court is properly furnished of all relevant information to determine whether to make a diversion order. This decision requires a consideration of whether the defendant would pose an unacceptable risk to the safety, protection or wellbeing of the aggrieved or named person to a domestic violence order or police protection notice, or a person with whom the defendant is in a relevant relationship, or a person employed or engaged by an approved provider. This purpose of the limitation is consistent with a free and democratic society as this will help to ensure that only suitable perpetrators are diverted, and that the risk to a complainant remains low.

The purpose of limiting rights in criminal proceedings (the right not to be compelled to confess guilt) is to ensure that the diversion scheme only captures perpetrators who are willing to be held accountable for their actions, and who are seeking to consciously engage in rehabilitation. This limitation is also intended to reduce the risk that a diverted perpetrator may minimise their behaviour and become emboldened to continue.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation to the right to privacy is essential to achieving the purpose of a court receiving information about a perpetrator's personal circumstances and history, which is relevant to determining both their eligibility and suitability for diversion. This will reduce the risk that an

unsuitable perpetrator is diverted, and in turn, establish protections for a complainant, a person in a relevant relationship with the perpetrator, and employees of approved providers.

The limitation to rights in criminal proceedings (the right not to be compelled to confess guilt) achieves its purpose of holding a perpetrator accountable for their actions, by requiring an acknowledgement of responsibility. The limitation to this right is moderated by section 135D which provides an immunity provision to the defendant.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purposes of the Bill.

There is no less restrictive and reasonably available way of achieving the purpose of the amendments.

The limitation on the right to privacy is proportionate, noting that the information will not be published at large, but only to those who have a legitimate interest.

(e) The balance between the importance of the purpose of the Bill, which, if enacted would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the importance of introducing a court-based diversion scheme to allow for the early intervention of first-time offenders, outweighs the potential limitations on human rights. The limitations are justified on the basis that they will assist in interrupting and stopping a cycle of abuse from the point of the first contravention offence.

### **Criminal offence of engaging in domestic violence or associated domestic violence to aid respondent**

In my opinion, the human rights that are limited by these amendments are:

- freedom of movement (section 19);
- freedom of thought, conscience, religion or belief, and the freedom to demonstrate that belief (section 20);
- freedom of expression (section 21 HR Act);
- cultural rights (section 27);
- cultural rights of Aboriginal and Torres Strait Islander people (section 28); and
- right to liberty and security (section 29.)

(a) the nature of the right

The right to freedom of movement (section 19) protects the rights of persons who are lawfully within Queensland to move freely within Queensland, as well as to enter and leave the State and choose where to live. The right places an obligation on the state not to act in a way that unduly restricts freedom of movement.

The offence of engaging in domestic violence or associated domestic violence to aid respondent will limit an individual's right to follow and monitor an aggrieved on a DVO if they are motivated to act due to their relationship with the respondent on that DVO and such conduct would constitute domestic violence if it were committed by the respondent. It will extend to prevent licenced private

investigators from doing so to at the request of a respondent. It will subsequently result in state intervention in the form of a criminal charge.

The right to freedom of thought, conscience, religion or belief (section 20) protects an individual's personal autonomy in relation to their individual thoughts and beliefs as well as how they demonstrate them through religious observances, worship, teaching and other practices. The right specifically includes the right to demonstrate religion or belief in worship, observance, practice and teaching, individually or in community and in private and public.

The offence will criminalise a person engaging in domestic violence behaviour against an aggrieved on a DVO if they are motivated to act due to their relationship with the respondent on that DVO and such conduct would constitute domestic violence if it were committed by the respondent. Some behaviours defined as domestic violence for the purpose of the Bill may be done in furtherance of an individual's intention to exercise their right to demonstrate their freedom of thought, conscience, religion, or belief.

The Bill may, in using the DFVP Act's broad definition of domestic violence behaviours which may constitute the proposed offence very broadly, impinge upon traditional religious, personal and/or cultural beliefs and practices which influence family and cultural gender norms, traditions and practices and understandings of appropriate behaviour within intimate and broader family and community relationships.

Freedom of expression (section 21) is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. The right protects an individual's ability to hold an opinion and to seek, receive and impart information and ideas of all kinds, including orally, in writing, in print, by way of art, or in any other medium. The right protects the expression of a range of information.

The offence will limit this right as it will limit the ability of persons to communicate and express themselves in a way towards a person named as an aggrieved on a DVO with the intent of aiding the respondent to the DVO, that would constitute domestic violence if done by the respondent as this conduct could be captured by the offence.

Section 27 of the HR Act provides that cultural rights protect the rights people of all cultural, religious, racial or linguistic backgrounds to enjoy their culture, declare and practice their religion and use their languages. Cultural rights encompass traditional beliefs and practices and are likely to extend to private and public expressions of culture. Some behaviours defined as domestic violence for the DFVP Act which may constitute this offence may be done in furtherance of an individual's intention to exercise their right to enjoy their culture and declare and practice their religion.

Section 28 of the HR Act recognises the special importance of human rights for Aboriginal and Torres Strait Islander people, acknowledging their distinct cultural rights which must not be denied or forcibly assimilated or destroyed. Relevantly, these rights may include the right to enjoy, maintain, protect and develop their identity, cultural heritage, use of language and traditional cultural expressions and kinship ties. Some behaviours defined as domestic violence for the DFVP Act which may constitute this offence may be done in furtherance of an individual's intention to exercise their right to enjoy their culture and declare and practice their religion.

The right to privacy and reputation (section 25) is a very broad right, which relevantly includes the right to a private life. The right prohibits unlawful or arbitrary interferences with home, family, integrity and other aspects of an individual's identity, communications, correspondence, and character. It also protects freedom of thought and conscience. It also includes the right not to have the person's reputation unlawfully attacked. The Bill will limit this right in making public aspects of a person's life which are normally private matters, as well as personal and private communications.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitations to these rights is to increase the safety of victim-survivors of domestic and family violence by deterring third parties, including persons who do so for gain, from furthering their abuse and intimidation, including by engaging in verbal abuse against an aggrieved, on behalf of the perpetrator.

A secondary purpose is to educate the wider community about how domestic and family violence is not a private matter and encouraging people to take responsibility for their behaviour once they become aware, or ought reasonably to have been aware, that a DVO is in place.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

There is a rational relationship between the limitation on the right to freedom of expression and freedom of movement and the identified purpose. Criminalising behaviour directed towards an aggrieved on a DVO that is undertaken to aid a respondent to a DVO and is behaviour that would constitute domestic violence were it to be committed by the respondent, will significantly limit the ways in which perpetrators of domestic and family violence can continue to indirectly control, monitor, track victims. and intimidate victims.

Further, there is a rational relationship between the limitation on the right to freedom of thought, conscience, religion or belief, cultural rights—generally and cultural rights of Aboriginal and Torres Strait Islander people and the identified purpose. Regardless of their source, attitudes and behaviours that condone and support coercive control and domestic and family violence compromise safety and perpetuate and compound abuse and victim-blaming. It is also important that there is clear signal that such assistance in abuse is inappropriate.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

An alternative to the new offence would be to retain the current legal framework and rely on the party provisions found in section 7 of the Criminal Code. The Taskforce did not address whether the party provisions were being used to charge third parties perpetrating domestic and family violence on behalf of a respondent to a DVO and it is uncertain as to whether the provisions could in fact be used to prosecute some or all of the kind of behaviour that will be captured by the new offence. Even if it was considered that the conduct that will constitute the new offence would be covered by the party provisions, the amendments will create a specific offence that will clarify this issue and specifically target domestic and family violence. As such, it is considered that the

alternative approach would not be as effective in deterring third parties from furthering the abuse against victim-survivors on behalf of a respondent to a DVO.

The secondary purpose of the limitations is to ensure victims are kept safe by ensuring there is community awareness that the actions of third parties towards an aggrieved to a DVO could constitute a criminal offence. It is considered that simply maintaining and relying on the party provisions in the Criminal Code and not legislating to create a new, standalone offence to criminalise such behaviour would not effectively achieve the purpose of the amendments to the DFVP Act.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The rights of victims of DFV, including a victim's right to life (section 16), the right to protection of children and families (section 26), the right to be protected from torture and cruel, inhuman and degrading treatment (section 17), and the right to enjoy human rights without discrimination (section 15), are limited by the continuing perpetration of DFV. The purpose of the amendments, which is to provide greater protection to an aggrieved by deterring third parties from furthering abuse against them on behalf of a perpetrator outweighs the limitation on another person's right to freedom of expression and freedom of movement, and right to privacy and reputation if partaking in behaviour towards a victim named as an aggrieved on a DVO that would constitute domestic violence were it committed by a respondent to that DVO.

On balance, having regard to the extent of the limitation on the right to freedom of movement and freedom of expression, particularly in circumstances where such behaviour would constitute domestic violence were it undertaken by a respondent to a DVO, it is considered that the importance of achieving the purpose of increased safety for victim-survivors of domestic and family violence outweighs the harm caused to the right to freedom of movement.

The limitation on the right to freedom of thought, conscience, religion or belief (section 20), cultural rights—generally (section 27) and cultural rights of Aboriginal and Torres Strait Islander people (section 28), particularly where these rights would only be limited in circumstances where a person commits an offence pursuant to the proposed amendments, is considered necessary to achieve the purpose of protecting and promoting the safety of victim-survivors of domestic and family violence, especially given the significant impact that the criminalised behaviour may have in compounding the impact of the respondent's abuse in culturally and linguistically diverse communities.

The amendments will also promote a victim's right to life (section 16), right to protection of children and families (section 26) and right to be protected from torture and cruel, inhuman and degrading treatment (section 17) by discouraging persons facilitating domestic and family violence on behalf of a perpetrator.

The proposed amendments strike the right balance between these rights and the purpose of the rights of victim-survivors of domestic and family violence.

(f) any other relevant factors

Nil.

**Additional standard condition on protection orders and police protection notices**

In my opinion the human right limited by this amendment is freedom of expression (section 21).

(a) the nature of the right

Freedom of expression (section 21) is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. The right protects an individual's ability to hold an opinion and to seek, receive and impart information and ideas of all kinds, including orally, in writing, in print, by way of art, or in any other medium. The right protects the expression of a range of information. The right may only be limited where such limitation is proportionate and not capricious, unpredictable, unjust and unreasonable.

The amendment limits this right as it will limit the ability, by preventing a person from communicating and expressing themselves in a manner which organises, encourages, asks, tells, forces or engages another person to behave towards a person protected by a protection order or PPN in a manner which would constitute domestic violence if engaged in by the person subject to the condition. It may subsequently result in state intervention in the form of a charge of a contravention offence.

It is noted that if the other person does in fact do anything towards a person protected by a protection order or PPN which would constitute domestic violence if engaged in by the person subject to the additional standard condition then that other person will also commit the new offence of engaging in domestic violence or associated domestic violence to aid respondent introduced by the Bill.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of limiting the right of freedom of expression (section 21) in this way is to reduce domestic violence by preventing the abuse of victims by third parties who are encouraged to commit acts of domestic and family violence on the behalf of respondents to protection orders and PPNs. The limitation is aimed in part at limiting the ability of third parties to monitor and control victims on behalf of perpetrators. It is also intended to promote victims' safety by actively dissuading perpetrators from encouraging third parties to commit acts of domestic and family violence on their behalf.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Restricting a person's freedom of expression (section 21) by limiting their ability to communicate and expressing themselves in a manner which organises, encourages, asks, tells, forces or engages another person to behave towards a person protected by a protection order or PPN in a manner which would constitute domestic violence if engaged in by the person subject to the condition and exposing them to risk of prosecution for contravention of the condition helps achieve both purposes of the amendment.

The new standard condition is targeted at preventing the abuse of victims by third parties who are encouraged to commit acts of domestic violence on the behalf of respondents to protection orders and PPNs. As the Taskforce noted, paragraph 3 of Article 19 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities and limitation on the right is permitted which might relate to respect of the rights or reputation of others.<sup>4</sup> As one purpose of the amendments is to limit the ability of third parties to monitor and control victims on behalf of perpetrators. The limitation directly helps to achieve this purpose.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There is no other reasonably available way to achieve all of the purposes of the Bill.

It is possible that criminalising the actions of third parties is sufficient to achieve the purposes of limiting the ability of third parties to monitor and control victims on behalf of perpetrators, however the new offence of engaging in domestic violence or associated domestic violence to aid respondent does not serve the purpose of educating respondents that it is inappropriate to 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. It also does not carry any negative implication (potential prosecution for contravention of the order) for a respondent who organises, encourages, asks, tells, forces or engages another person to do something that, if done by the respondent, would be domestic violence against the aggrieved.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The freedom of expression is subject to special duties and responsibilities including the rights of others. The limitations serve the purpose of decreasing domestic violence being committed against victims by private investigators or family and friends of respondents. On balance the limitation appropriately balances the human rights of victims and respondents and as such, the limitation is appropriate.

(f) any other relevant factors

Nil.

### **C. Amendments to the *Evidence Act 1977* and *Recording of Evidence Regulation 2018***

#### **Improper questions**

In my opinion, the human rights that are limited by these amendments are:

- Right to a fair hearing (section 31); and
- Rights in criminal proceedings (section 32), particularly the right to examine, or have examined, witnesses against the person (section 32(2)(g)).

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<sup>4</sup> WSJT Report 1(3), 739

(a) the nature of the right

The right to a fair hearing (section 31(1)) of the HR Act affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It guarantees that criminal (and civil) matters must be heard and decided by a competent, impartial and independent court or tribunal. What constitutes a ‘fair’ hearing will depend on the facts of the case and, in the context of a criminal proceeding, will involve a triangulation of the interests of the victim, the accused, and the community. The principle of ‘equality of arms’ is also an essential requirement for a fair hearing, meaning that each party must be given a reasonable opportunity to present their case.

Section 32(2) of the HR Act sets out the various rights in criminal proceedings, including the right of an accused to examine, or have examined, witnesses against the person (section 32(2)(g)). This guarantee is an application of the principle of ‘equality of arms’ and requires an accused to be given adequate opportunity in the proceedings to question a witness who will give evidence against him or her.

The amendment to section 21 of the Evidence Act may limit the right to a fair hearing. A judicial officer will be required to intervene where a question is improper, which may be seen as an encroachment on the independence of the courts. It may also give rise to a perception that judges are improperly favouring the interests of the complainant (infringing the impartiality of the courts).

The amendment will also limit the right to a fair hearing and rights in a criminal proceeding by preventing an accused or the legal representative from thoroughly cross-examining a witness. For example, where a question asked of a witness is disallowed by the judge, defence may not have a reasonable opportunity to present their case (the principle of ‘equality of arms’).

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The primary purpose of the limitations is to prevent improper questioning of witnesses to preserve their dignity and minimise the re-traumatisation of recounting distressing events when providing evidence and being cross-examined in court, particularly in the context of sexual offence proceedings. In turn, this is also intended to assist witnesses to give their best evidence and alleviate some of the trauma, stress and anxiety for complainants of sexual offences which frequently deters them from pursuing charges based on their fear of a negative court experience.

The secondary purpose of the amendments is to ensure that juries only hear relevant and admissible evidence.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

There is a rational connection between the limitations on the right to a fair hearing and rights in criminal proceedings and the identified purposes.

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. Imposing a positive duty on judges to disallow improper questions is likely to result in more questions being disallowed on the basis of being improper.

The amendments will result in less improper questions being put to a witness, or otherwise being answered by the witness, achieving the primary purpose of preserving the dignity and improving the court experience for victim-survivors. If the improper questions are disallowed before the witness responds, this will also prevent the jury from hearing irrelevant evidence which may prejudice their deliberations and decisions.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive, reasonably available alternatives to achieve the legitimate purposes of the amendments.

In determining whether a question is improper, the court will be required to take into account the context in which the question is put and any relevant characteristics of a witness before the judge intervenes. This will ensure that judges are not inappropriately intervening in cross-examination.

Amending the provision to include further examples of improper questions, without imposing a duty on the court to disallow such questions, may serve an educative function and discourage counsel from asking improper questions. However, if an improper question is asked, the Taskforce noted that the prosecution may fail to object, and judicial officers may not always intervene. As such, maintaining the judge's discretion is not expected to achieve the primary purpose of improving the experiences of witnesses giving evidence.

Consideration was given to limiting the duty to disallow improper questions put to a vulnerable witness, rather than a general duty for all witnesses. However, this alternative is not expected to achieve the purpose to the same extent, as it would only improve the experience of giving evidence for a smaller cohort of witnesses. Further, there are no circumstances in which misleading, harassing, offensive or confusing questions are appropriate for any witness. Imposing a positive duty on judges to disallow improper questions put to all witnesses is most consistent with promoting the right to equality before the law (section 15) and the right to protection from cruel, inhuman or degrading treatment (section 17).

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the benefits of improving the experiences of witnesses giving evidence in court and protecting them from cruel, inhuman or degrading treatment outweigh the limits on identified human rights. This is particularly so in the context of the triangulation of the interests of the victim, the accused, and the community. The proposed amendments are expected to reduce a witness's trauma and may encourage victims to pursue charges, increasing the broader community's confidence in the justice system and having a person brought to justice.

The amendments will not completely restrict the accused person's right to question a witness against them and the defence will still be able to challenge the evidence of the witness. Rather, the amendments will only limit the rights to the extent that the questions asked are improper, noting that there are no circumstances in which misleading, harassing, offensive or confusing questions are appropriate.

Therefore, any limitations are justified, and the amendments are compatible with human rights.

(f) any other relevant factors

Nil.

**Exclusion of the public and evidence of a complainant's sexual reputation and sexual activities**

In my opinion, the human rights that are limited by these amendments are:

- Right to a fair hearing (section 31); and
- Rights in criminal proceedings (section 32).

(a) the nature of the right

The right to a fair hearing (section 31) ensures that proceedings before a court are heard and decided in accordance with the rules of procedural fairness. An essential requirement of this is ensuring a party has a reasonable opportunity to present their case, which ordinarily includes being informed of the case to be advanced by the opposing party and having an opportunity to respond. It also requires that a party should have a reasonable opportunity to put forward their case in conditions that do not place them at a substantial disadvantage compared to the other party.

The right to a fair hearing also includes the right to have a charge decided after a 'fair and public hearing'. This reflects the common law principle of open justice and is an indispensable element of the rule of law in a democratic society. Public hearings support the reality and appearance of independence and impartiality and assist in maintaining accountability and public confidence in the courts.

Rights in criminal proceedings (section 32) protect a range of rights applicable to persons charged with a criminal offence, including a number of minimum guarantees. The rights set out in this section expressly guarantee many of the same protections as a right to a fair hearing. Section 32(2)(g) provides an express guarantee to examine, or have examined, witnesses against the person. This is an aspect of the principle of equality of arms and requires an accused to be given adequate opportunity in the proceedings to question a witness who will give evidence against them.

The right to a fair hearing and rights in criminal proceedings will be limited by the amendments prohibiting or restricting parties from admitting evidence or cross-examining the complainant on the complainant's sexual reputation or sexual activities, without leave of the court. The provisions requiring advance notice of an application for leave to admit evidence or cross-examine may also limit the accused person's right to a fair hearing by placing them at a substantial disadvantage where defence counsel is briefed in a matter shortly before a trial.

The amendment regarding the exclusion of the public will further limit the right to a fair hearing by requiring the court to be closed while a complainant is giving evidence, irrespective of the form in which the complainant gives evidence.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitations is to preserve the privacy, reputation and dignity of the complainant in sexual offence proceedings and to protect them from irrelevant, degrading and humiliating cross-examination about their sexual history which is not relevant to proceedings and is based on outdated misconceptions. This is intended to protect the complainant's right to privacy and reputation (section 25), the right to protection from torture and cruel, inhuman or degrading treatment (section 17), and to promote the interests of victim-survivors by minimising the trauma of recounting sexual violence and improving their experience of the criminal justice system.

More broadly, the amendments may also play a role in addressing the community's lack of confidence in the justice system and the underreporting and prosecution of sexual violence 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.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

The amendments regarding evidence of a complainant's sexual reputation and sexual activities will ensure that the law regarding this evidence is clearly articulated and victim-survivors are not subject to inappropriate questioning. Requiring advance notice and legislating the contents of applications for leave to admit evidence or cross-examine will also require both the prosecution and defence to consider in advance whether they intend to ask questions about the complainant's sexual activities and the proper basis for doing so.

Provisions that specify the matters the court is to have regard to when considering an application for leave will further protect the victim-survivor by requiring the court to be satisfied that the evidence has substantial relevance to a fact in issue or is a proper matter for cross-examination and that it is in the interests of justice to allow the cross-examination or admit the evidence.

When determining this, the test will require the court to have regard to whether the probative value of the evidence outweighs the distress, humiliation, embarrassment or other prejudice that the complainant may experience as a result of the cross-examination or the admission of the evidence. This is to be viewed in light of the age of the complainant and the number and nature of questions likely to be asked, recognising the additional vulnerabilities of child complainants and the sensitive nature of sexual offences. The test will also require the court to have regard to the need to respect the complainant's personal dignity and privacy.

Further, the amendments clarifying that the court is to be closed regardless of the form in which a complainant gives evidence will protect the victim's right to privacy and minimise the trauma and embarrassment which may be experienced by the victim when recounting the highly personal nature of sexual violence offences.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive, reasonably available alternatives to achieve the identified purposes as effectively. However, several safeguards have been included to ameliorate the impact of the limitations on the identified human rights.

In relation to the amendments regarding evidence of the complainant's sexual reputation and sexual activities, the court will retain an overriding discretion to admit the evidence or allow cross-examination where the evidence is of substantial relevance to a fact in issue or a proper matter for cross-examination and it is in the interests of justice. Further, the amendments outlining the matters the court is to have regard to when granting leave requires the court to balance the interests of the complainant with the right of the accused to fully answer and defend the charge.

The court also has discretion to hear and determine an application for leave out of time and waive the requirement for the application to be in writing if it is in the interests of justice to do so. This ensures that the defence is not unfairly prejudiced or at a substantial disadvantage by reason of being briefed after the expiry of the relevant time limit.

In relation to the amendments providing for the exclusion of the public, section 31(2) of the HR Act contemplates that a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice. Consideration was given to amending the law to give the court a discretion to close the court while the complainant is giving evidence when it is in the public interest or interests of justice to do so. However, this does not achieve the purpose to the same extent, noting that it is conceivable that the court will not exercise its discretion in some cases, and this will not protect the complainant in those cases from the trauma, distress and embarrassment of publicly giving evidence that may be of a highly personal, sensitive and traumatic nature. Rather than imposing a discretionary test to be applied on a case-by-case basis, the broader public interest discussed above justifies the court being closed while the complainant is giving evidence in all proceedings relating wholly, or partly, to a charge for a sexual offence.

The extent of the limitation arising from the amendments to close the court is also noted. While the provision excludes the public from part of the hearing, the defendant and the defendant's counsel and solicitor are not excluded (other than if by the power of the court under any other provision or rule of law to exclude any person). This acts as a safeguard to ensure procedural fairness. The jury direction that the judge is required to give to the jury (if any) in relation to the exclusion of the public also promotes a fair hearing.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The need to preserve the complainant's right to privacy and reputation and to protect the complainant from humiliating and degrading treatment in sexual offence proceedings is proportionate with the limitations on the defendant's right to a fair trial. The amendments will ensure that victim-survivors are not unnecessarily traumatised by the criminal justice process, improving their experiences of the court process and assisting them to give their best evidence, while still ensuring that the defendant is given an opportunity to put their case forward and question the witness about relevant matters.

(f) any other relevant factors

Nil.

### **Jury directions – sexual offences**

(a) the nature of the right

While the amendments promote the right to a fair hearing (section 31), the amendments arguably also limit this right.

The right to a fair hearing reflects the fundamental notion of the rule of law that a hearing should be conducted by an independent and impartial court or tribunal. The concept of impartiality is concerned with the judge's approach to the hearing and the determination of matters in dispute. The requirements of independence and impartiality also reflect the common law bias rule which requires courts to maintain the reality and appearance of impartiality.

The amendments limit this right by potentially giving rise to the perception that the judge is partial to the complainant by giving jury directions which may result in the jury considering the complainant's evidence through a more favourable lens. As the jury directions must be provided in certain circumstances, the amendments also limit the right to a fair hearing by encroaching on the independence of the court.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The amendments are intended to address common myths and misconceptions about sexual violence in order to assist juries to better assess the evidence, apply the law and reach a verdict in complex criminal trials. The need to better direct the jury was reflected in the Taskforce findings which noted that community members struggled to apply the correct principles about sexual consent to real-life scenarios and that there was evidence of common rape myths influencing their understanding. The Taskforce also heard that myths about sexual violence are continuing to influence criminal justice processes, including trials, and are being used to invoke common misconceptions in the minds of jurors and cast doubt on the testimony of the complainant.

In turn, the purpose of the limitation on the right to a fair hearing is also to *promote* the right to a fair hearing by recognising and seeking to address juror bias, which has been found to constitute a violation of the right to a fair hearing.<sup>5</sup>

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

The jury directions are based on those in other jurisdictions, namely New South Wales and Victoria, and reflect extensive social science research which discredits common misconceptions about sexual offences. The limitations will achieve the purpose by providing jurors with an appropriate lens through which to assess the evidence and guarding them from making incorrect assumptions on relevant issues.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

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<sup>5</sup> See for example, *Sander v United Kingdom* (2001) 31 EHRR 44; [2000] ECHR 194.

There are no less restrictive or reasonably available alternatives to achieve the purpose of the limitation. While a community education campaign may help to dispel misconceptions about sexual offences, there is no guarantee that the jurors in a particular case will have been exposed to the campaign or will apply that information to their assessment of the evidence. Providing the jury directions before the jury hears the evidence, or at the earliest time that the judge considers appropriate, is the most effective and direct way to ensure that the jury considers the evidence in the proper context.

The alternative of providing the court with discretion to provide the directions will not achieve the purpose to the same extent, as it will result in an inconsistent application of the amendments and cases where the directions are not given, despite there being good reasons for doing so.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Case law has determined that what is ‘fair’ in the context of a criminal proceeding will involve a triangulation of the interests of the victim, the accused, and the community. Having regard to the purpose of the limitation to promote the right to a fair trial and assist the jury to make informed and unbiased assessments of the evidence, any limitation on the right to a fair trial is justified.

(f) any other relevant factors

Nil.

### **Expansion of preliminary complaint evidence**

In my opinion the right limited by these amendments is the right to fair hearing (section 31).

(a) the nature of the right

The right to a fair hearing (section 31) addresses procedural fairness and encompasses the right to a fair and public hearing. This right may be considered to have been limited where there is a reversal of the onus of proof, where there are changes or regulation for how evidence may be adduced, or where there is regulation of media reporting on proceedings.

This amendment may limit a person’s right to a fair hearing due to the risk that preliminary complaint evidence will be misused by a jury as proof of what occurred, despite judicial directions noting that preliminary complaint evidence does not independently prove anything. However, by establishing clear guidelines for the collection and use of such evidence, ensuring an accused person has access to legal representation, and by maintaining judicial discretion to exclude such evidence, the limits on the rights of an accused are minimised.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to strengthen the credibility of the complainant who may be giving evidence about a domestic violence offence or offences that occurred over a protracted period. It is intended that the limitation will enable to a jury to have a complete understanding of the history of a victim’s account of the perpetrator’s behaviour. A secondary purpose is to bring proceedings

for domestic and family violence in line with the evidentiary rules in proceedings for sexual offences.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

The limitation on the right to a fair hearing will achieve its purpose by allowing victims to give evidence about what they disclosed to individuals before making their first formal witness statement. The purpose of the limitation will also be achieved by enabling witnesses to give evidence about those conversations with victims. Further, any associated records that contain preliminary complaint evidence, such as text messages or medical records, may be tendered.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive and reasonably available ways of achieving this purpose. Under existing evidence law in Queensland, this evidence would generally not be admissible, despite offering appropriate context and understanding of a domestically violent relationship.

- (e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the aim of increasing conviction rates for domestic violence offences through the admission of this type of evidence is thought to outweigh any potential limitation on an accused's rights to a fair trial.

By ensuring a judge retains a discretion to exclude prejudicial evidence, and by giving the defence broad ambit to cross-examine preliminary complaint witnesses, an accused's rights remain adequately protected. Protection is also assured through the warnings and directions that a judge may give the jury about how the evidence may be used. The benefits to victims of domestic violence, and society more generally, of securing the conviction of persons who commits domestic violence offences is such that the proposed limitation is justified in a free and democratic society based on human dignity, equality and freedom.

- (f) any other relevant factors

Nil.

### **Release of transcript for research purposes**

- (a) the nature of the right

The amendments limit the right to privacy (section 25) by allowing the chief executive to release of transcripts for approved research purposes and allowing 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, and details of the allegations, as revealed in the transcript.

- (b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendment is to promote better quality research and evidence based future reform regarding the prosecution of sexual offences.

- (c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitation achieves the purpose by ensuring researchers can access transcripts of sexual offence matters, and giving the chief executive discretion to provide these at reduced or no cost.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive and reasonably available ways of achieving this purpose.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The amendments are proportionate and justified to ensure researchers are able to access information required to undertake research regarding how sexual offence trials are being conducted and to evaluate the effectiveness of sexual violence and consent reforms. While the amendment will give researchers approved by the chief executive access to private information about a complainant, defendant or other witness, the amendment preserves the confidentiality of information obtained by the researcher, imposing upon the researcher an obligation to preserve the confidential nature of the nature and the anonymity of the persons to whom the transcript relates.

- (f) any other relevant factors

Nil.

### **Limits on publishing information in relation to sexual offence**

In my opinion, the human rights that are limited by these amendments are:

- freedom of expression (section 21);
- right to a fair trial (section 31); and
- rights in criminal proceedings (section 32)

- (a) the nature of the right

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 Bill also moves the recently amended provisions of CLSO Act (amended by the *Justice and Other Legislation Amendment Act 2023* (JOLAA)) to new Part 6C of the Evidence Act. Those provisions removed the prohibition on identifying an adult defendant charged with a prescribed sexual offence prior to the matter being committed.

JOLAA makes it an offence to identify (or publish information that may identify) a complainant for a sexual offence. The amendments also provide ‘defences’ to this 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, which is part of the right to a fair trial (section 31), and freedom of expression (section 21).

An accused’s right to a fair hearing (section 31), which includes the right to a fair and public hearing, the right to procedural fairness when coming before a court, and right to independent judiciary may be limited under the proposed amendments.

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial, and independent court or tribunal after a fair and public hearing, and that all judgements or decisions are publicly available. It ensures that judicial officers are free from external influences that could compromise their ability to make impartial and fair decisions.

The amendments may also limit the accused’s rights in criminal proceedings (section 32) which includes the fundamental right to be presumed innocent until proved guilty according to law and to the right to be tried without unreasonable delay.

Increased publication of a complainant’s ‘story’ prior to trial may prejudice the accused’s right to a fair trial as it may influence public opinion and make it difficult to select an impartial jury. This will be the case if potential jurors have formed an opinion about what they have heard or read which may impact their ability to make an impartial decision. Should media (or a victim-survivor, particularly one with a large social media following) publish information that is prejudicial to an accused it may bias potential jurors, particularly where that information is inaccurate or contains information that is not admissible in the trial.

The right to freedom of expression (section 21) includes the right to hold and express an opinion and to seek out and receive the expression of others’ opinions. Ideas and opinions can be expressed orally, in writing, in print, by way of art or in another way chosen by the person. The right to freedom of expression is limited by the publication provisions, as they restrict the ability for others to identify the victim of sexual violence without their consent in the absence of a court order; they also create an offence where there is publication.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments is to empower victim-survivors of sexual violence to tell their story, whether that is by self-publishing or by providing consent to someone else, like a media

organisation. This can help someone's healing process. The sharing of information regarding sexual violence more generally has been found to increase reporting rates and promote positive social change to address and prevent sexual violence. The provision is drafted to ensure there can be identification of a victim-survivor in the circumstances prescribed, while ensuring the law continues to protect the privacy and reputation (section 25) of a victim-survivor, which in turn promotes their right to be protected from degrading treatment (section 17). The provision promotes freedom of expression by allowing publication of a victim-survivor's story, while also limiting freedom of expression but requiring the consent of a victim-survivor or court order, as a defence to a publication offence.

A secondary purpose of the amendments is to promote open justice in relation to sexual offences.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation help achieve the purpose

The proposed amendments ensure a complainant's privacy is protected by providing a general prohibition on publishing a complainant's identifying information while still ensuring a victim is free to share their story on their own terms. A consequence of the complainant being able to tell their story publicly is that this may limit the defendant's right to a fair trial and rights in criminal proceedings.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive means of achieving this purpose.

An alternative way to ensure victims could share their story would be to require an application to court before publication could occur. This would require a victim to obtain legal representation, which would be costly and potentially prohibitive, and which would unjustifiably restrict freedom of expression. Another option would be to restrict publication until finalisation of any police investigation and court proceedings. However, this would not give effect to the purpose of victim empowerment.

(e) the balance between the importance of the purpose of the Bill, which if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

While rights to a fair hearing and rights in criminal proceedings are limited by the laws by making public information which may prejudice a fair trial, this is a necessary and proportionate consequence of empowering victims to share their story. The amendments promote freedom of expression, while still protection a sexual offence complainant's privacy, and promote a fair trial by allowing media to report on criminal proceedings.

The amendments will not remove a party's ability to make an application for a suppression order, an application for a temporary or permanent stay of proceedings, an application to adjourn the trial for a period of time to address any unfairness, an application for a judge alone trial, or a change of venue application (where prejudice may be more localised). These remedial orders will help ensure that the defendant's right to a fair trial and rights in criminal proceedings are preserved.

As part of normal trial procedure, jurors are informed by the judge about the importance of impartiality and are excused where they cannot be impartial. A trial judge may excuse a person selected to sit on a jury where there is reason to doubt the impartiality of a person (section 46 Jury Act). Section 47 of the Jury Act provides the process for ‘special inquiry’ of jury members, and challenge for cause, in special circumstances, specifically noting this may arise where there is prejudicial pre-trial publicity. Additionally, directions are given to juries regarding their obligation to consider only the evidence before them and not rely on, or give consideration, to any media reporting.

The 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, for a person 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.

(f) any other relevant factors

Nil.

#### **D. Amendments to the *Penalties and Sentences Act 1992***

##### **New aggravating factors and domestic violence averments (including related amendments to the Criminal Code, Youth Justice Act and Justices Act)**

In my opinion the human rights that are relevant to this amendment are the:

- right to privacy and reputation (section 25); and
- right to liberty (section 29).

(a) the nature of the right

The right to privacy and reputation (section 25) protects individuals from unlawful attacks on their reputation.

The right to liberty and security (section 29) protects the liberty of all persons, including protection from arbitrary arrest or detention, and the deprivation of liberty only on grounds, and in accordance with procedures, established by law.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality, and freedom

The purpose of the limitation to the right to privacy and reputation (section 25) is to ensure that future courts, police, lawyers, and corrective services officers may readily identify the nature of a person’s criminal history and their patterns of behaviour. A person’s right to reputation may conceivably be limited by a requirement that additional information, about the nature of their offending, is recorded on their criminal history. It is noted, however, that a person’s criminal history is not published at-large and is used for particular purposes in the context of law enforcement. Therefore, it is unlikely that the publication of this information on a perpetrator’s

criminal history will amount to an unlawful attack on their reputation, and is therefore consistent with a free and democratic society.

The purpose of the limitation to the right to liberty and security (section 29) is to recognise the particularly serious nature of domestic violence that is committed against a child, that exposes a child to domestic violence or that is in contravention of a court order. A person's right to liberty may be impacted by amendments that create new, aggravating factors, that will tend to increase a perpetrator's sentence where the relevant circumstances apply. This may lead to an increase in sentences of imprisonment that require the perpetrator to serve actual time in custody. This would directly deprive a perpetrator of their liberty.

It is relevant, however, that these features could previously be considered by a sentencing court despite not being explicitly identified in section 9 of the PSA. Further, the amendments do not displace section 9(1)(a) of the PSA which provides that one of only purposes for which a sentence may be imposed on an offender is 'to punish the offender to an extent or in a way that is just in all the circumstances'. Therefore, the amendment does not significantly alter the state of a perpetrator's human rights.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Any limitation on the right to reputation (section 25) achieves its purpose by requiring that where a perpetrator is convicted of a domestic violence offence that is committed against a child, that exposes a child to domestic violence or that is in contravention of an order or injunction, that the offence must be entered in the offender's criminal history to reflect those specific circumstances.

The limitation on the right to liberty (section 29) achieves its purpose by providing an explicit requirement that a court treat the fact that a domestic violence offence was committed against a child, or exposed a child to domestic violence, or was in contravention of an order, as being aggravating on sentence.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purposes of the Bill.

There is no less restrictive and reasonably available way of achieving the purpose of the amendments.

(e) The balance between the importance of the purpose of the Bill, which, if enacted would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Having regard to the limited impact to the rights to reputation and liberty, the importance of achieving the purpose of the limitation outweighs the detriment to the rights.

(f) any other relevant factors

Nil.

## **E. Amendments to the *Security Providers Act 1993***

In my opinion, the human right that is relevant to the amendments to the Security Providers Act (Part 11 of the Bill) is privacy and reputation (section 25).

(a) the nature of the right

The right to privacy and reputation (section 25) provides that a person has the right not to have their privacy, family, home, or correspondence unlawfully or arbitrarily interfered with, and not to have their reputation unlawfully attacked. The scope of the right to privacy is broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. The right to privacy is subject to an internal limitation in that a person has the right not to have their privacy, family, home, or correspondence unlawfully or arbitrarily interfered with. Arbitrariness can be defined in a human rights context as meaning capricious, unpredictable, unjust, or unreasonable.

Clauses 93 and 94 of the Bill could potentially limit the person's right to privacy and reputation as their criminal history will be considered in determining whether they are suitable and eligible to hold a licence under the Security Providers Act.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality, and freedom

The purpose of the potential limitation on privacy rights contained in clauses 93 and 94 is to ensure that only persons who meet prescribed probity standards (in terms of their criminal history) are licensed to undertake functions and activities as part of the private security industry.

Criminal history checking is a long-standing feature of the Security Providers Act. Moreover, undertaking appropriate criminal history checks is a typical and necessary feature of many occupational licensing frameworks, particularly in industries or professions that perform sensitive and high-risk functions and activities. Protecting the public interest and safety through criminal history checks, as part of occupational licensing, is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The potential limitation on the right to privacy arising due to Clauses 93 and 94 is directly linked to the purpose of ensuring only persons who meet prescribed probity standards (in terms of their criminal history) are licensed to undertake functions and activities as part of the private security industry. Checking and considering a licensee's (or prospective licensee's) criminal history as part of determining licence eligibility is the only practical way to achieve the purpose.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

There are no less restrictive and reasonably available ways to achieve the purpose of the Bill, relating to private security industry licensing.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the potential limitations on privacy rights imposed by clauses 93 and 94 and the direct and rational connection the limitations have to promoting public safety and the right to life, by ensuring persons in the private security industry meet required probity standards, the limitations on privacy rights for licensees and prospective licensees are outweighed by the protections for the community that will result from ensuring persons in the private security industry have not been convicted of a specified domestic-violence related offence.

- (f) Any other relevant factors

Nil.

## Conclusion

In my opinion, the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

**YVETTE D'ATH MP**  
Attorney-General and Minister for Justice  
Minister for the Prevention of Domestic and Family Violence

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