

CRIMINAL LAW (COERCIVE CONTROL AND AFFIRMATIVE CONSENT) AND OTHER LEGISLATION AMENDMENT BILL 2023

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27 October 2023

Mr Peter Russo MP
Chair
Legal Affairs and Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Via email: LASC@parliament.qld.gov.au

Dear Mr Russo,

Submission on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Thank you for the opportunity to make a submission to the Legal Affairs and Safety Committee on the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Bill).

As a community legal centre for victims and survivors of child sexual abuse, our comments are limited to those aspects of the Bill that are most relevant to our client group.

For the most part, we support those provisions in the Bill that give effect to recommendations from the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) and the Women's Safety and Justice Taskforce (Taskforce) in relation to:

- jury directions (see further comments on page 2)¹

¹ See Recommendations 65, 66 and 70 in Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission), *Criminal justice report: parts VII–X and appendices*, 2017, pp 193–194, <www.childabuseroyalcommission.gov.au/criminal-justice>.

- improper questions (page 3)²
- the exclusion of the public from the courtroom while a complainant gives evidence (page 4)³
- the admissibility of evidence about a complainant's sexual activities (page 4)⁴
- sentencing considerations (page 5)⁵
- publishing a complainant's identifying information (page 5).⁶

We do not support the Bill's provisions in relation to publishing the identifying information of a complainant who is deceased, as explained on page 6 below.

Provisions knowmore supports

Jury directions (clauses 18, 59 and 65)

We strongly support the provisions in the Bill that will implement outstanding Royal Commission recommendations in relation to jury directions about:

- uncorroborated evidence [clause 18, new paragraph 632(2)(b) of the Criminal Code]
- delay and credibility [clause 59, new paragraph 103ZZ(2)(c) of the *Evidence Act 1977*]
- the reliability of children's evidence [clause 65, new section 132BAA of the Evidence Act]
- Markuleski directions [clause 65, new section 132B of the Evidence Act].

These reforms are long overdue, and we are pleased to see these provisions in the Bill. More detailed information about our support for these reforms and their importance to victims and survivors is included in our submission to the Taskforce.⁷

² See Recommendation 56 in Women's Safety and Justice Taskforce, *Hear her voice: report two, volume one*, WSJT, Brisbane, 2022, p 272, <www.womenstaskforce.qld.gov.au/publications>.

³ See Recommendations 58 and 59 in Women's Safety and Justice Taskforce, *Hear her voice: report two, volume one*, p 272.

⁴ See Recommendations 58 and 59 in Women's Safety and Justice Taskforce, *Hear her voice: report two, volume one*, p 272.

⁵ See Recommendation 126 in Women's Safety and Justice Taskforce, *Hear her voice: report two, volume two*, WSJT, Brisbane, 2022, p 563, <www.womenstaskforce.qld.gov.au/publications>.

⁶ See Recommendation 81 in Women's Safety and Justice Taskforce, *Hear her voice: report two, volume one*, p 364.

⁷ knowmore, *Submission on women's and girls' experiences across the criminal justice system as victims and survivors of child sexual abuse*, 2022, pp 22–24, <knowmore.org.au/wp-content/uploads/2022/06/submission-womens-and-girls-experiences-across-the-criminal-justice-system-as-victims-and-survivors-of-child-sexual-abuse-qld.pdf>.

We also strongly support the provisions in the Bill that will introduce jury directions in relation to:

- differences in the complainant's account [clause 59, new section 103ZY of the Evidence Act]
- a lack of complaint or delay in making a complaint [clause 59, new section 103ZZ of the Evidence Act].

Such directions are essential for actively countering misconceptions about the nature and impacts of child sexual abuse and the behaviour of victims, and are consistent with Recommendation 70 from the Royal Commission's Criminal Justice Report.⁸

Where the above jury directions are required to be given, we strongly support judges:

- being required to give the direction at the earliest time in the proceeding that the judge determines is appropriate [clause 59, new subsection 103ZQ(2) of the Evidence Act]
- being empowered to give a direction at any time during the proceeding, including before any evidence is adduced in the proceeding [clause 59, new subsection 103ZQ(3) of the Evidence Act]
- being empowered to repeat a direction at any time in the proceeding [clause 59, new subsection 103ZQ(4) of the Evidence Act].

We note this is consistent with the approaches in New South Wales and Victoria.⁹ We think the first point is particularly important for increasing the likelihood of jury directions effectively challenging the myths and misconceptions about sexual abuse that can adversely affect jury decision-making.¹⁰

Improper questions (clause 56)

We support the provisions in clause 56 of the Bill, particularly new subsection 21(1) of the Evidence Act, which provides that the court *must* disallow a question put to a witness in

⁸ 'Each state and territory government should lead a process to consult the prosecution, defence, judiciary and academics with relevant expertise in relation to judicial directions containing educative information about children and the impact of child sexual abuse, with a view to settling standard directions and introducing legislation as soon as possible to authorise and require the directions to be given...' Royal Commission, *Criminal justice report: parts VII–X and appendices*, p 200.

⁹ *Criminal Procedure Act 1986* (NSW), sections 293A and 294; *Jury Directions Act 2015* (Vic), section 52 and part 5, division 3.

¹⁰ See Victorian Law Reform Commission, *Improving the justice system response to sexual offences: report*, VLRC, Melbourne, 2021, pp 441–442, <www.lawreform.vic.gov.au/project/improving-the-response-of-the-justice-system-to-sexual-offences/>.

cross-examination, or inform a witness that a question need not be answered, if the court considers that the question is an improper one. These are important provisions given the traumatising experiences endured by so many victims and survivors during cross-examination.

Exclusion of public from the courtroom while a complainant gives evidence (clause 59)

We support the provisions in clause 59 of the Bill that clarify that the court must exclude members of the public from the courtroom while a complainant is giving evidence in a sexual offence proceeding, regardless of the way in which the complainant gives evidence (including, for example, via audio visual link or as pre-recorded evidence) [new section 103ZE of the Evidence Act].

We note an apparent drafting error in new subsection 103ZE(3), which refers to subsection (1) instead of subsection (2).

Admissibility of evidence about a complainant's sexual activities (clause 59)

We note the provisions in clause 59 of the Bill that will insert new section 103ZM into the Evidence Act. This provides that the court must not grant leave for a complainant to be cross-examined, or for any evidence to be admitted, about the complainant's sexual activities unless the court is satisfied:

- that the evidence has substantial probative value or is a proper matter for cross-examination as to credit and
- that it is in the interests of justice to allow the cross-examination or to admit the evidence,

having regard to (among other things) whether the probative value of the evidence outweighs the distress, humiliation and embarrassment the complainant may experience as a result of the cross-examination or admission of the evidence, in view of the complainant's age and the number and nature of the questions the complainant is likely to be asked.

These provisions do not go as far as the Taskforce recommended, as they do not specifically require the court to be satisfied that the probative value of the evidence outweighs any distress, humiliation or embarrassment that the complainant may suffer as a result of its admission.¹¹ We are nevertheless content to support these provisions to the extent that they represent a considerable improvement on the current provisions in section 4 of the *Criminal Law (Sexual Offences) Act 1978*.

¹¹ See also our further comments in knowmore, *Submission on women's and girls' experiences across the criminal justice system as victims and survivors of child sexual abuse*, pp 16–17.

Sentencing considerations (clauses 83, 84, 100 and 101)

We strongly support the provisions in clauses 83 and 100 of the Bill that:

- require the court, when sentencing an Aboriginal and/or Torres Strait Islander person, to have regard to cultural considerations, and clarify that cultural considerations include the effect of systemic disadvantage and intergenerational trauma on the offender [subclauses 83(3)–(4) and 100(3)–(4)]
- require the court to consider the offender’s history of being abused or victimised [subclauses 83(2) and 100(2)]. For offenders who were sexually abused as children, this is an important recognition of the impacts that abuse can have on their criminal behaviour.¹²

We support the above amendments:

- being reflected in both the *Penalties and Sentences Act 1992* and the *Youth Justice Act 1992* [as per clauses 83 and 100]
- applying to all sentencing decisions after commencement, whether the conviction happened before or after commencement [as per clauses 84 and 101].

Publishing a complainant’s identifying information (clause 69)

We strongly support the provisions in clause 69 of the Bill that:

- enable complainants to generally publish identifying information (‘identifying matter’) about themselves and to consent to having their identifying information published [new sections 103ZZO to 103ZZS of the Evidence Act]
- enable children to consent to having their identifying information being published, so long as a medical practitioner, registered psychologist or other person of a prescribed class has provided a supporting statement affirming that the child has capacity to consent and understands the consequences of being identified and losing anonymity [new section 103ZZS of the Evidence Act]
- require a complainant’s identifying information to be published in accordance with any limits sets by the complainant [new paragraphs 103ZZP(b) and 103ZZS(1)(c) of the Evidence Act]
- require the court to have regard to any views and wishes of the complainant when deciding whether to make an order, upon application by the defendant or offender, that the general prohibition against publishing a complainant’s identifying information does not apply [new sections 103ZZT and 103ZZU of the Evidence Act].

¹² See Royal Commission, *Final report: volume 3, impacts*, pp 143–146, <www.childabuseroyalcommission.gov.au/impacts>.

We consider that laws in this area need to strike an appropriate place between protecting the privacy of victims and survivors and empowering victims and survivors to speak out publicly about their experiences. These provisions place the views and wishes of complainants at the forefront of such considerations.

Provisions knowmore does not support

Publishing a deceased complainant's identifying information (clause 69)

We do not support the provisions in clause 69 of the Bill that end the general prohibition against publishing a complainant's identifying information upon the complainant's death [new subsection 103ZZN(3) of the Evidence Act]. In our view, these provisions undermine the protection of survivors' anonymity and the respect for survivors' wishes that, as noted above, is so prominent elsewhere in the Bill.

In the worst-case scenario, the provisions in the Bill would allow a person to freely publish identifying information about a complainant who is deceased even where the complainant was known to hold a very firm view about their experience of childhood sexual abuse never being made public. The complainant privacy order provisions [new part 6C, division 4 of the Evidence Act] are a completely inadequate safeguard against this, with nothing to stop a person from publishing information about the complainant before an interested party can apply for an order.

We consider that the complainant privacy order provisions are also needlessly complex (we note that the provisions extend over 12 pages), and burdensome. We are particularly concerned that the provisions unfairly place the onus for protecting a complainant's anonymity on their surviving relatives and loved ones (if any). Applying to the court for a complainant privacy order will be too onerous, time consuming, complicated, and expensive for many.

We believe the starting point for provisions about complainants who are deceased should be the protection of a complainant's anonymity, just as it is for complainants who are alive. Rather than the approach adopted in the Bill, we consider that it is more appropriate for the general prohibition against publishing a complainant's identifying information to persist beyond the complainant's death, and for parties who wish to publish identifying information — who will not infrequently be corporate media entities — to bear the burden of any application to the court.

Where a complainant had provided written consent before their death, the provisions in new sections 103ZZP to 103ZZS would be sufficient to permit publication in accordance with their wishes. Where a complainant had not provided written consent before their death, interested parties should be able to apply to the court for an order allowing the publication of the complainant's identifying information. When considering whether to make such an order, the court should be required to consider any known views and wishes of the

complainant. Further information about our position on protections for complainants who are deceased is included in our submission to the Taskforce.¹³

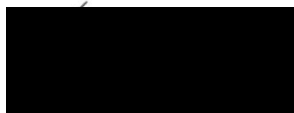
This was the approach adopted in a consultation draft Bill circulated to stakeholders in July 2023 [clause 64, new subsection 129AC(3) and section 129AJ of the Evidence Act]. We recommend that it be reinstated.

Other comments

We were disappointed to see that the Bill does not include any amendments to expand the admissibility of preliminary complaint evidence so that it may be used as evidence of the facts in issue in sexual offence proceedings, in contrast to the consultation draft Bill circulated in July 2023 (see clause 58 of the draft Bill). We acknowledge some stakeholders previously expressed concerns about the likely impact that expanding the admissibility of preliminary complaint evidence would have on support services for victims and survivors, and these are important to consider and resolve. Ultimately, however, we would like to see Queensland's laws in this area more closely aligned with those in the Uniform Evidence Law jurisdictions. We hope that the Queensland Government will re-consider these reforms in the future.

Thank you again for the opportunity to provide these comments on the Bill. We have no concerns about this letter being published.

Yours sincerely,

A black rectangular box redacting the signature of Nick Hudson.

NICK HUDSON

Acting Chief Executive Officer

¹³ knowmore, *Submission on women's and girls' experiences across the criminal justice system as victims and survivors of child sexual abuse*, pp 13–14.