The *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022:* what can we expect?

Judicial CPD series, Supreme and District Court of Queensland, Cairns

23 February 2023

Her Honour Judge Tracy Fantin[1]

Introduction

Welcome to the first Judicial CPD session in Cairns for 2023.

I acknowledge the Gimuy Walubara Yidinji People as the traditional owners of this land on which we gather. I acknowledge their survival, their living culture, their Elders, and their unique role in the life of this region.

My topic is about recent legislative changes in criminal law, and domestic and family violence.[2]

In October 2022, the *Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022* ('the Bill') was introduced.

The 90 page Bill contained a raft of proposed amendments, including to:

- amend the definition of unlawful stalking in the *Criminal Code Act 1899* (Qld) ('*Criminal Code*');
- broaden the definition of domestic and family violence to refer to a 'pattern of behaviour' in the *Domestic and Family Violence Protection Act 2012* (Qld) ('*DFVPA'*);
- lay the groundwork for the introduction of a new offence of coercive control by the end of 2023;
- amend *Penalties and Sentences Act 1992* (Qld) ('*Penalties and Sentences Act'*) and *Youth Justice Act 1992* (Qld) ('*Youth Justice Act'*) provisions for domestic violence;
- amend *Evidence Act 1977* (Qld) ('*Evidence Act'*) provisions for protected witnesses, s 132B evidence, expert evidence, jury directions, and protected counselling communications; and
- amend *Criminal Code* terminology for certain sexual offences.

The Bill was considered by the Parliament's Legal Affairs and Safety Committee, which received submissions and produced a report in November 2022.

Yesterday, 22 February 2023, at about 5pm, the Bill passed with amendment into law.

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[1] Judge of the District Court of Queensland, Planning and Environment Court of Queensland, and Childrens Court of Queensland.

[2] I am indebted to, and thank, my associate, Sarah Svehla, for her research and assistance with this presentation. This is an edited version of the speech given for this event.

I am going to give you an overview of the content of the main amendments, to the extent that they may be relevant to your work. There is a lot to cover, so my presentation will necessarily be general. What it may lack in excitement, I hope it makes up for in immediacy and relevance.

If you practise in criminal law, you will need to become familiar with these changes.

There were only a few amendments made to the Bill before it was passed and none are relevant to this talk. Certain sections of the Act will commence on a day fixed by proclamation. There is no further information available yet on a commencement date.[3]

The introduction of a stand-alone new offence of coercive control is not expected to take effect until later in 2023, and only after consultation with stakeholders including First Nations peoples, government agencies, domestic and family violence support services and legal professionals. If Taskforce recommendations are followed, it is intended that there will be a substantial period after enactment, but before that new law becomes operational, to ensure the community understands it.

Background

How did we get here?

In March 2021, the Queensland Government established the independent Women's Safety and Justice Taskforce ('the Taskforce'), chaired by the Hon Margaret McMurdo AC, to examine coercive control and review the need for a specific offence of domestic violence and the experience of women across the criminal justice system.

On 2 December 2021 the Taskforce's first report, *Hear her voice – Report One – Addressing coercive control and domestic and family violence in Queensland* ('*Hear her voice 1*') was released.[4] The report made 89 recommendations for broad systemic reforms to Queensland's domestic and family violence service and justice systems.

On 1 July 2022 the Taskforce released a second report, *Hear her voice – Report Two – Women and girls' experiences across the criminal justice system.*[5]

A few months later in October 2022, the Bill was introduced.

Taskforce recommendations

Amongst other recommendations, the Taskforce recommended the creation of a new stand-alone offence of coercive control.

However, it also made it clear that prior to the introduction of a stand-alone offence, system-wide reform was needed to ensure sufficient services and supports were in place across the domestic and family violence service and justice systems, along with critical amendments to existing legislation to be implemented immediately. The reason for that was said to be that systems need to respond better to coercive control through a shift from focusing on responding to single incidents of violence to focusing on the pattern of abusive behaviour that occurs over time.

[3] The date of assent was 28 February 2023.
[4] Available on the Taskforce website: https://www.womenstaskforce.qld.gov.au/publications.
[5] Ibid.

Objectives of the Bill

In short, the Bill proposes to:

- give effect to legislative reform detailed in recommendations 52 to 60 and 63 to 66 of the Taskforce's *Report One*;
- modernise and update sexual offence terminology in the *Criminal Code*;
- amend operation of the sexual assault counselling privilege;
- amend the *Penalties and Sentences Act* and the *Youth Justice Act* to provide specific mitigatory circumstances relating to domestic violence; and
- clarify the definition of 'coercive control' as constituting a pattern of behaviours perpetrated against a person to create a climate of fear, isolation, intimidation and humiliation.

The next part of this presentation provides an overview of the main amendments to each of the *Criminal Code, DFVPA, Evidence Act, Penalties and Sentences Act* and *Youth Justice Act*.

Amendments to the *Criminal Code*

Unlawful stalking

Chapter 33A of the *Criminal Code* has been amended to broaden the type of offending captured by this offence. One purpose behind this amendment was to encourage greater use of the offence by police and prosecutors.

In s 359B, the name of the offence "unlawful stalking" has been expanded to "unlawful stalking, intimidation, harassment or abuse".

Additional conduct captured by that offence will now include:

- contacting a person in any way using any technology and over any distance (e.g. telephone, mail, fax, SMS message, email, an app on a computer or smart phone or other electronic device, or an online social network);
- monitoring, tracking or surveilling a person's movements, activities or interpersonal associations without the person's consent, including through the use of technology (e.g. reading a person's SMS messages, using a tracking device or drone to track a person's movements, monitoring a person's account with a social media platform or online social network);
- publishing offensive material on a website, social media platform or online social network in a way that will be found by, or brought to the attention of, a person;
- giving offensive material either directly or indirectly to a person, including by using a website, social media platform or online social network; and
- a threatening, humiliating or abusive act against a person whether or not involving violence or the threat of violence (e.g. publishing a person's personal information such as home address or phone number on a website).

Other elements of unlawful stalking are unchanged by the Bill.

Additional amendments include the introduction of a new circumstance of aggravation with a maximum penalty of 7 years imprisonment for the offence of unlawful stalking, intimidation, harassment or abuse, if a domestic relationship exists between the offender and the stalked

person. Additionally, the Bill will increase the maximum penalty for the offence of contravening a restraining order to 120 penalty units or 3 years imprisonment.

Disclosure of domestic violence history

Section 590AH (Disclosure that must always be made) has been amended to require that for a relevant proceeding, for an accused person charged with a domestic violence offence, the prosecution must give the accused person a copy of the person's domestic violence history, which is in the possession of the prosecution.

This amendment requiring the prosecution's disclosure of an accused's domestic violence history is not intended to limit the material upon which the prosecution or defence might seek to rely (e.g. the prosecution might, in a relevant case, seek to rely upon the existence of restraining orders made under s 359F of the *Criminal Code*, or orders made in another jurisdiction).

Definitions of sexual offences

The titles of certain sexual offences have changed to modernise the language used. The purpose of these amendments is only to update the terminology, not to change any aspect of the substantive law.

The expression "carnal knowledge" has been changed to "penile intercourse". This amendment brings Queensland into closer alignment with all other states and territories as none use the expression "carnal knowledge".

The expression "maintaining a sexual relationship with a child" has been changed to "repeated sexual conduct with a child". This amendment will create greater consistency with other states and territories (namely New South Wales, Victoria, Western Australia and Tasmania) that have adopted an offence title in relation to repeated sexual conduct with a child that does not reference "maintaining" or "relationship" with a child. The amendment is not intended to change the nature or scope of the offence.

Amendments to the *DFVPA*

Definitions of certain offences

The *DFVPA* presently defines "domestic violence" as inclusive of coercive and controlling behaviours. However, it does not define what these behaviours are.

The amendments proposed under the Bill include a reference to a "pattern of behaviour" in definitions of "domestic violence" (s 8), "emotional or psychological abuse" (s 11) and 'economic abuse' (s 12) in the *DFVPA*. The amendments are intended to make clear that domestic violence includes behaviour that may occur over a period of time, and includes individual acts that, when considered cumulatively, are abusive, threatening, coercive or cause fear, and must be considered in the context of the relationship as a whole.

The amendments include the revision of s 4 (Principles for administering Act) and insertion of a new s 22A, to introduce the concept of identifying the "person most in need of protection" in a relevant relationship.

Practical implications

In submissions made in response to the Bill, Legal Aid Queensland ('LAQ') supported the amendments but noted they may: increase the complexity of considerations for the court in domestic violence applications; lead to an increase in orders made and an increase in conditions; and consequentially increase demand for grants of aid. The Queensland Police Union raised concerns that broadening the definition of domestic violence would increase the complexity in investigating incidents, putting additional resourcing pressure on police, courts and lawyers. The Aboriginal and Torres Strait Islander Legal Service ('ATSILS') raised concern that the amendments may compound existing disadvantage and discrimination of Aboriginal and Torres Strait Islander peoples. They raised the need for training for judicial officers, magistrates, police officers, lawyers and support services on what a "pattern of behaviour" may constitute, within the complex and nuanced family dynamics of Aboriginal and Torres Strait Islander families. They also submitted that the creation of a criminal offence for coercive control would compound the existing disadvantage and discrimination that Aboriginal and Torres Strait Islander peoples experience and may increase a reluctance to report domestic and family violence.

In addition to the Taskforce's reports, the proposed criminalisation of coercive control has been the subject of commentary elsewhere, and there are excellent papers available from the Chair of the Taskforce, the Hon Margaret McMurdo AC,[6] and Professor Heather Douglas AM,[7] which I commend to you.

Professor Douglas has noted that there is a continuing lack of understanding about the effects, and dangers, of coercive control when the reality is that non-physical abuse can be extremely harmful, and it is important to recognise the deep harms of coercive control. But she has also raised questions about how, and whether, to use criminal law to address violence against women, and whether criminal law interventions are effective to improve the longer-term safety of women and children. Professor Douglas referred to experiences in other jurisdictions. She acknowledged that the Queensland approach delayed the introduction of these laws until the public had been educated about them. On the other hand, she raised concern about their likely effectiveness, and the consequences for complainant women. Professor Douglas advocated for the need to do more to decouple criminalisation from incarceration, and to take the rehabilitation of offenders, their reintegration, and community safety, seriously.

[6] The Hon Margaret McMurdo AC, 'Reforming the Law of Domestic and Family Violence – An Offence of Coercive Control' (Speech, Current Legal Issues Seminar, Supreme Court of Queensland, Banco Court, 10 November 2022). Available at: https://law.uq.edu.au/files/89182/McMurdo%20Reforming%20the%20Law%20of%20Domestice%20and%20Family%20Violence.pdf.

[7] Professor Heather Douglas AM, 'Commentary and Response to the Remarks of The Hon Margaret McMurdo AC: The Criminalisation of Coercive Control' (Speech, Current Legal Issues Seminar, Supreme Court of Queensland, Banco Court, 10 November 2022). Available at: https://law.uq.edu.au/files/89192/Douglas%20Commentary%20on%20Coercive%20Control%20Current%20Legal%20Issues%202022.pdf.

Amendments to the *Evidence Act*

Protected witness scheme

Currently, sub-s 21M(1) of the *Evidence Act* defines a "protected witness" as:

> (a) a witness under 16 years;
>
> (b) a witness who is a person with an impairment of the mind;
>
> (c) for a proceeding for a prescribed special offence, an alleged victim of the offence;
>
> (d) for a proceeding for a prescribed offence, an alleged victim of the offence who the court considers would be likely to be disadvantaged as a witness, or to suffer severe emotional trauma, unless treated as a protected witness.

The Bill amends sub-s 21M(1) to create a new category of protected witness with respect to any domestic violence offence, including any offences in Part 7 of the *DFVPA* (which includes the offence of contravening a domestic violence order). It includes as a protected witness, for a proceeding for a "domestic violence order-related offence", a person who: is named as the aggrieved, or a relative or associate of the aggrieved, in the domestic violence order; and the court considers would be likely to be disadvantaged as a witness, or to suffer severe emotional trauma, unless treated as a protected witness.

The prohibition on direct cross examination by an unrepresented defendant is extended to this new category of protected witness.

In its submission, LAQ raised concerns over the financial implications this amendment may have, noting that it would require them to provide an entirely new service to a large number of defendants not previously entitled to be legally aided.

Admission of evidence

Section 132B of the *Evidence Act* currently provides that relevant evidence of the history of the domestic relationship between a defendant and complainant is admissible in evidence in a proceeding for an offence in Chapters 28 to 30 of the *Criminal Code*. For example, in the offences of unlawful killing, murder, manslaughter, offences endangering life or health, non-fatal strangulation or choking, grievous bodily harm, torture, wounding, dangerous operation of a motor vehicle, assault, and assault occasioning bodily harm.

The amendment removes this restriction by deleting s 132B and inserting a series of new provisions; allowing relevant evidence of domestic violence to be admissible as evidence in a criminal proceeding for all offences in the *Criminal Code*.

This is consistent with the equivalent legislation in Western Australia, which applies to all offences and provides for the admissibility of evidence of family violence where relevant to a fact in issue.

New s 103CA provides a very lengthy, but non-exhaustive, list of what may constitute evidence of domestic violence. It includes evidence of:

- the history of the domestic relationship between a person and an intimate partner or family member of the person;
- the cumulative effect of domestic violence, including the psychological effect;

- social, cultural or economic factors that affect a person, or intimate partner or family member of the person, who has been affected by domestic violence;
- responses by relatives, the community or agencies to domestic violence;
- ways in which social, cultural or economic factors have affected any help-seeking behaviour undertaken by a person, or the safety options realistically available to the person, in response to domestic violence;
- ways in which domestic violence by an intimate partner or family member towards a person, or the lack of safety options, was exacerbated by inequities experienced by the person;
- the general nature and dynamics of relationships affected by domestic violence, including possible consequences of separation;
- the psychological effect of domestic violence; and
- social or economic factors that affect people who are, or have been, in a relationship affected by domestic violence.

New s 103CB also provides that the evidence of domestic violence may relate to the defendant, the complainant, or another person connected with the proceeding.

Practical implications

Although a purpose of the Bill was to reduce misidentification of the victim as a perpetrator and to better identify the person most in need of protection in the relationship, ATSILS, in its submission, raised concerns over this amendment leading to the misidentification of victims as respondents and, often because of their acute vulnerability, consent without admissions to orders.

Expert evidence on domestic violence

This amendment inserts a new s 103CC to facilitate the admission of expert evidence in a criminal proceeding about the nature and effects of domestic violence generally, and about the effect of domestic violence on a particular person who has been subjected to it. The section provides that an expert on the subject of domestic violence includes a person who can demonstrate specialised knowledge, gained by training, study or experience, of a matter that may constitute evidence of domestic violence.

This provision is in line with recommendation 64 of the *Hear her Voice 1* report and was modelled on an equivalent provision in the *Evidence Act 1906* (WA).

Significantly, the new s 103CD provides that "[e]vidence of an expert's opinion given under s 103CC is not inadmissible only because the opinion is about – (a) a fact in issue or an ultimate issue; or (b) a matter of common knowledge". In doing so, it abrogates the common law rules that opinion evidence is inadmissible if it answers the ultimate issue for the finder of fact's determination or relates to a matter of common knowledge.

The Taskforce noted that whilst expert evidence of coercive control is theoretically admissible at common law, and evidence of domestic violence has been led in some cases, submissions received indicated it is not often raised. The Department[8] have recognised that further work will be required amongst legal stakeholders, the domestic and family violence sector and

[8] The Department of Justice and Attorney-General (Queensland).

academic institutions to develop understanding of where such expertise lies within Queensland and Australia, and develop resources that will assist lawyers to find the expert evidence they need.

Section 590AB of the *Criminal Code* contains the prosecution disclosure obligations. Section 590B still requires an accused person who intends to adduce expert evidence to provide the other parties with the name of the expert and any finding or opinion which is proposed to be adduced, and the report of the expert upon which the opinion or finding is based. A judge may fix times by which this information is to be provided. These requirements for disclosure by an accused person provide an opportunity for the prosecution to be apprised of expert evidence intended to be relied upon by an accused ahead of a trial, and for the prosecution to rebut any expert opinion sought to be given in a trial. Issues around the admissibility of such evidence may be challenged ahead of, or during, a trial.

Jury directions about domestic violence

The purpose of this amendment is to provide the court in a criminal proceeding in which domestic violence is an issue with a discretion to give jury directions that address misconceptions and stereotypes about domestic violence, in line with the recommendations of the *Hear her voice 1* report.

This is based on the Taskforce's finding that community members did not always understand how domestic and family violence may impact the behaviour of alleged victims, for example, why an alleged victim of domestic and family violence may continue to remain in a relationship which is abusive. The amendment seeks to enable juries and judicial officers to be better informed, and able to consider evidence of domestic violence that has been raised during a trial.

The Bill inserts a new Part 6A Division 3 into the *Evidence Act*, setting out comprehensive jury directions that may be given.

Subdivision 2 (Content of jury directions about domestic violence) containing ss 103Z, 103ZA, 103ZB and 103ZC, provide detailed jury directions with respect to:

- domestic violence generally;
- self-defence in response to domestic violence;
- examples of behaviour, or patterns of behaviour, that may constitute domestic violence; and
- factors that my influence how a person addresses, responds to, or avoids domestic violence.

Judges may give a direction on their own initiative and in the interests of justice, or at the request of a party, noting that the judge may give the jury the requested direction unless there are good reasons for not doing so.

These amendments bring Queensland into alignment with other Australian states and territories, particularly, Western Australia, Victoria and South Australia, which presently have judicial directions on family violence. The provisions were modelled upon the relevant provisions in Western Australian legislation. Overseas jurisdictions, for example England and

Wales, also have directions aimed at countering assumptions that may arise in sexual and family violence cases.

Sexual assault counselling privilege

Division 2A of the *Evidence Act* creates a privilege for "protected counselling communications".

The provisions have been the subject of different interpretations, and District Court judges have expressed concern about the workability of the provisions. One issue that has arisen is whether the counselled person has a statutory right to appear or standing to be heard on s 14H issues (whether leave should be granted to produce to a court, adduce evidence of, or use, and disclose protected counselling communications) as opposed to only on whether a document is a protected counselling communication (s 14L).

This issue (and other problems with workability of the provisions) was comprehensively considered by Justice Applegarth in *TRKJ v Director of Public Prosecutions (Qld) & Ors*.[9] His Honour found (at [54]) that s 14L does not confer standing on a counselled person (or counsellor) to appear at all stages of an application for leave, although a court may grant leave to do so.

The Bill amends the *Evidence Act* to provide that counselled person has standing to appear at **all stages** of a sexual assault counselling privilege proceeding.

The legislature has accepted that the counsellor and counselled person are uniquely positioned to inform the court about any physical, emotional and psychological harm the counselled person is likely to suffer if the court were to admit a protected counselling communication into evidence. Granting them standing in the proceedings assists the court to decide, under s 14H, whether the public interest in admitting the communication substantially outweighs the public interest in preserving the confidentiality of the communication and protecting the counselled person from harm.

Amendments to the *Penalties and Sentences Act* and *Youth Justice Act*

Domestic violence as a mitigating factor

The Bill amends sub-s 9(2) (Sentencing guidelines) of the *Penalties and Sentences Act* to insert a new sub-para (gb) which requires a court to have regard to whether the offender "is a victim of domestic violence", and "whether the commission of the offence is wholly or partly attributable to the effect of the domestic violence on the offender".

The Bill also inserts into s 9 a new sub-s (10B) which provides:

> In determining the appropriate sentence for an offender who is a victim of domestic violence, **the court must treat as a mitigating factor** –
>
> (a) the effect of the domestic violence on the offender, unless the court considers it is not reasonable to do so because of exceptional circumstances of the case; and

[9] (2021) 9 QR 472.

(b) if the commission of the offence is **wholly or partly attributable to** the effect of the violence on the offender – **the extent to which** the commission of the offence is attributable to the effect of the violence.

(emphasis added)

New sub-s 9(12) adopts the definition of domestic violence in s 8 of the *DFVPA*. These provisions may pose difficulties in their application. In Queensland, sentencing submissions are usually made orally, and sentencing remarks delivered *ex tempore*. In the District Court, it is not uncommon for defence submissions for Aboriginal or Torres Strait Islander defendants (in particular) to refer to a history of being subjected to, or exposed to, domestic violence. One issue may be the making of a finding as to extent to which commission of the offence is wholly or partly attributable to the effect of the domestic violence.

The new provisions do not affect the operation of s 132C(2) of the *Evidence Act*, which deals with fact finding on sentencing. It provides that the sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged. If an allegation of fact is not admitted or is challenged, the sentencing judge or magistrate may act on the allegation if satisfied on the balance of probabilities that the allegation is true (s 132C(3) of the *Evidence Act*).

The Bill also proposes similar amendments to the *Youth Justice Act* to provide a mitigating factor for child offenders who are victims of domestic violence, or exposed to domestic violence (but there is no exclusion of the operation of mitigation in any circumstances, including exceptional circumstances).

In its submission on these provisions, LAQ raised concerns that the amendments to s 9 of the *Penalties and Sentences Act* would lead to delays in proceedings, a requirement for additional evidence, and further demands for aid, to enable a court to be satisfied of the "effect of the domestic violence" and "the extent to which the commission of the offence is attributable".

Offender's character

The Bill also amends s 11 (Matters to be considered in determining offender's character) of the *Penalties and Sentences Act* to provide that the history of domestic violence orders made or issued against an offender, other than orders made or issued when the offender was a child, may be considered by a sentencing court when determining an offender's character.

Section 11 is also amended to permit the sentencing judge or magistrate to close the court if oral submissions are to be made to, or evidence is to be brought before, the court about the history of domestic violence orders made or issued against the offender.

Conclusion

Clearly, this omnibus Bill goes well beyond merely amending the law with respect to coercive control. It effects significant amendments to many aspects of criminal procedure, including the conduct of trials, sentences, and pre-trial applications. It is incumbent on practitioners working in the areas of domestic and family violence and criminal law to be aware of the amendments so that they may assist the court with submissions about their application.