CRIMINAL JUSTICE LEGISLATION (SEXUAL VIOLENCE AND OTHER MATTERS) AMENDMENT BILL 2024

July 2024

University of the Sunshine Coast submission

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Contents

Introduction

The University of the Sunshine Coast (UniSC) welcomes the Queensland Government's response to recommendations made by the Women's Safety and Justice Taskforce and is pleased to provide a submission on the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024.[1]

UniSC would welcome the opportunity to elaborate on any aspect of our submission. If this is of interest, please contact Mr Jason Mills, Head of Government Relations on jmills3@usc.edu.au.

About UniSC

UniSC was founded by its community in 1996 after Sunshine Coast residents campaigned for locally provided tertiary education opportunities. Consistent with our mission to improve access to higher education in underserved locations, we have strategically expanded our footprint, encompassing campuses and facilities from Moreton Bay to the Fraser Coast. We also collaborate closely with all levels of government, regional leaders, industry, and other partners to ensure our programs, research and support services align to create greater opportunities for all.

On the world stage, UniSC is recognised by The Higher Education (THE) Impact Rankings as a global leader in climate action, clean water sanitation, life on land, and life below water. This ranking comes alongside the Australian Research Council's recognition of UniSC as a producer of world-class research in 26 specialty areas, including environmental science, medical and health sciences, neuroscience, technology, and psychology.

Our Expertise

Dr Dominique Moritz is Associate Dean (Learning and Teaching) of the School of Law and Society, a Senior Lecturer in Law, and Adjunct Member of the *Sexual Violence Research and Prevention Unit* at UniSC. She is a leading researcher into children's decision-making and law. Dominique's work is inter-disciplinary and reflects a collaborative approach drawing upon law, criminology, psychology and medicine. Dominique has 19 peer reviewed research publications and has contributed to collaborative research projects attracting almost $1 million in external grant funding. She holds a PhD, Master of Laws, Graduate Diploma of Legal Practice, Bachelor of Laws/Bachelor of Justice (Criminology) and a Postgraduate Certificate in Higher Education. Dr Moritz has been admitted as a lawyer in the Supreme Court of Queensland. Prior to commencing research and teaching at UniSC, Dr Moritz served as a police officer with the Queensland Police Service.

Dr Dale Mitchell is a Lecturer in Law at the *University of the Sunshine Coast* and an Adjunct Member of the *Sexual Violence Research and Prevention Unit.* Dale's scholarship explores the intersection between law and culture, drawing upon multidisciplinary approaches to explore emergent understandings of law and justice. In 2022, Dale was awarded the Julien Mezey Dissertation Prize from the US-based *Association for the Study of Law, Culture and Humanities*, who hailed his work as 'innovative and rigorous' and demonstrating a 'theoretical clarity that pushes legal analysis forward in creative and engaging ways'. Dale has been invited to present his work at national and international conferences, and has published in high-ranking journals and presses. Dale was admitted as a lawyer to the Supreme Court of Queensland in 2014.

Dr Ashley Pearson is the Law Program Coordinator, and Lecturer in Law at the *University of the Sunshine Coast* and an Adjunct Member of the *Sexual Violence Research and Prevention Unit*. Ashley holds a PhD in law and is an experienced interdisciplinary researcher. Her work engages with legal intersections of theory, culture, and practice with an emerging focus on child exploitation material and developing technologies. Ashley's work has been published in leading academic journals such as the *Australian Feminist Law Journal*, *Sexuality and Culture,* and *Law, Technology and Humans.*

Bricklyn Priebe is a PhD candidate with the *Sexual Violence Research and Prevention Unit*, and an Associate Lecturer in Criminology and Justice at the University of the Sunshine Coast (UniSC). Her research explores tertiary-level responses to women in the criminal justice system, with a particular focus on the rehabilitation

[1] https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=165&id=4420

of females who have perpetrated child sexual abuse. Her other research areas of interest include ethics, accountability, and misconduct in the public sector; she has co-authored and published a book chapter on this topic.

The Sexual Violence Research and Prevention Unit (SVRPU) is based at UniSC, and aims to understand, prevent, and respond to sexual violence and abuse at a local, national and international level. The SVRPU brings together a community of academics, government and non-government industry partners, and students with a shared interest in sexual violence and abuse prevention practice and research. Collectively, the work of the SVRPU aims to reduce victimisation and address perpetration through innovative and evidence-based knowledge and practice. By disseminating research to industry professionals and to the broader community, the SVRPU bridges the gap between research and practice.

University of the Sunshine Coast submission

Thank you for the opportunity to comment on the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024. Our submission specifically addresses the proposed amendments to Queensland's *Corrective Services Act 2006* and *Criminal Code 1899*.

We make the following recommendations:

1. Amendment to the Corrective Services Act 2006

Recommendation 1: Admissions as an entry criterion to therapeutic interventions should be removed for meaningful rehabilitation.

Recommendation 2: Expanding access to programs for sentenced individuals should be a priority.

Recommendation 3: Administrative delays to the timing and scheduling of programs should be minimised or removed.

Recommendation 4: Programs provided to remanded individuals must be continued after sentencing.

Recommendation 5: Clarification is needed as to whether high risk/impact admissions are protected.

Recommendation 6: Admissions made about offences for which the individual has not been charged should be included within the protections of this provision.

2. Amendment to the Criminal Code 1899

Recommendation 7: Reconsider whether the section 210A(1) penalty for the new aggravated position of authority offence is appropriate.

Recommendation 8: The section 210(3) parameters for position of authority relationships need expanding.

A. Expanded parameters of 'spouse' are needed.
B. Expanded parameters of 'approved carer' are needed.
C. Expanded parameters of school staff are needed.
D. Clearer and broader scope for 'health practitioner' is needed.

Recommendation 9: The position of authority defence for a 3 year age gap between the child and adult should be removed.

Each of the above amendments, and our recommendations, are considered in more detail below.

1. Amendment of the Corrective Services Act 2006

We provide in principle support for the proposed changes to the *Corrective Services Act 2006* (Qld) regarding the inadmissibility of admissions made by remanded prisoners during rehabilitation programs. We recognise the need to ensure that correctional facilities are assisting in the rehabilitation of those incarcerated, and that adjustments are needed to expand access to such programs for all correctional clients. With acknowledgment that those remanded in custody should be presumed innocent until proven guilty, the need for rehabilitative supports, wherever desired by remanded individuals, should be permitted. This is in the best interest of the individual, and the broader community, upon their release from custody. To maximise the impact of the proposed change, we provide the following points for consideration:

1.1 Admissions as an entry criterion to therapeutic interventions should be removed for meaningful rehabilitation

Permitting access to programs for those remanded in custody is reasonable, particularly for those who have been convicted but who are still awaiting sentencing. However, there are potential accessibility barriers for remanded prisoners who have not acknowledged guilt, as this may restrict their access to certain offence-specific programs based on eligibility criteria requiring admissions (Ferguson, 2023). Individuals without a conviction are seemingly protected by this provision, yet, even with this amendment, they may still be barred access from programs if they deny their offences. These program restrictions may require review to increase the impact of the proposed amendment. Program exclusions for those who do not make admissions is a missed opportunity, and the benefits of rehabilitation may still extend to these individuals without their admissions (Ferguson, 2023). Nevertheless, we acknowledge the complexity of this area, and that involvement of those who deny their offences may also undermine the impact and therapeutic potential of group-based programs for other participants (Blagden et al., 2013).

1.2 Expanding access to programs for sentenced individuals should be a priority

At present, there are barriers to accessing programs for those who are sentenced (**Priebe et al.,** 2024a; Australian Law Reform Commission (ALRC), 2017; Day 2020). Accessibility barriers result from issues such as staffing shortages, lockdowns, overcrowding, and geographical challenges (**Rayment McHugh et al.,** 2022; Brosens et al., 2019; Kaiser et al., 2020). It has also been reported that there are currently insufficient programs within custodial settings for some groups including women (**Priebe et al.,** 2024a; Women's Safety and Justice Taskforce, 2022; Kaiser et al., 2020). These challenges need to be addressed to ensure that adequate, relevant programs are available for clients to engage (whether remanded in custody or sentenced).

1.3 Administrative delays to the timing and scheduling of programs should be minimised or removed

If this amendment is successful, the timing/scheduling of programs may continue to serve as a barrier to program participation (ALRC, 2017). For example, many justice-involved women have indicated delays with accessing relevant programs in the early stages of their incarceration; it takes time before they are assessed for treatment needs and then eligible to start a program (**Priebe et al.,** 2024b; ALRC, 2017). Earlier access to programs would likely benefit those on shorter sentences. However, the impact of the proposed change will be minimal if those remanded in custody are unable to access programs in the early stages of their imprisonment due to administrative delays. Arguably, shortening the length of time a person is remanded in custody should be the priority, rather than expanding the entry-level criteria.

1.4 Programs provided for remanded individuals must be continued after sentencing

Those remanded in custody, especially women, would benefit from earlier access to rehabilitative programs, particularly as many serve shorter sentences (ALRC, 2017). However, it is important to ensure that there is continuity in the services and programs (Day, 2020) provided for remanded prisoners if/when they commence their sentence. Program completion is essential to client outcomes (Cale et al., 2019); incompletion has been found to increase risks of recidivism (e.g., Brunner et al., 2019). Providing opportunities for remanded individuals to complete programs after sentencing (in the community or custody) is therefore necessary to facilitate the likelihood of improved outcomes for clients (Day, 2020).

1.5 Clarification is needed as to whether high risk/impact admissions are protected

The Statement of Compatibility report notes that some programs may be excluded from the protections of the amendment if they involve individuals involved in particularly harmful or high impact crimes. It specifies that 'specific programs' may be excluded, but this does not extend to 'groups of offenders' (page 3). Further clarification is needed as to the involvement of high-risk prisoners in more generalised approved programs (i.e., education courses, healthy relationship programs, substance abuse programs), and whether there is protection of their disclosures within these contexts. We recommend that consideration be given to extending admissions protections to high-risk individuals attending generalised approved programs.

1.6 Admissions made about offences for which the individual has not been charged should be included within the protections of this provision

The new provision does not extend to admissions made by remanded individuals about an offence for which they have not been charged. While we acknowledge the importance of justice for victims and the community, we foresee this exclusion as a limitation to openness in rehabilitation, which may undermine its impact. Confusion may result from the number of exclusions from the exemption, such as excluding certain programs and types of disclosures. Given a well-established culture of distrust between prisoners and correctional authorities (**Rayment McHugh et al.,** 2022, Day 2020; Meyer et al. 2014), this may then dissuade client involvement in programs, which is counterproductive to the intention of this amendment. Further clarity on how these exclusions will be communicated (and reinforced) to prospective program participants is warranted.

2. Amendment of the Criminal Code 1899

We welcome the addition of the position of authority offence and the protection function for children over the age of consent.

UniSC's Sexual Violence Research and Prevention Unit recently conducted research into community views on rape and sexual assault sentencing (**Moritz, Pearson and Mitchell** 2024) which is pending publication. Our research, informed by focus groups attended by a diverse cross-section of the Queensland community, shows that the context of offending significantly impacts how the public perceive the seriousness of sexual assault and rape crimes. While focused on questions of sentencing and the seriousness of offences, the perspectives captured during our study show an alignment between the views of the Queensland community and this proposed amendment to the Criminal Code.

The public perceive a criminal act to be more serious if a relationship of trust and confidence existed between the person who committed the offence and victim-survivor. Participants justified this view by reference to both the increased responsibility of the person who committed the offence, where such a connection exists, and the ongoing harm and injury which may be suffered by a victim-survivor because of this breach of trust and confidence. For example, offending within a home environment breaches an individual's safety, where complex family dynamics means there is an ongoing relationship between a person who committed the offence and victim-survivor that cannot always be severed causing lifelong trauma. Social and family dynamics between perpetrators and victim-survivors known to each other causes complexities and harm.

Our study specifically considered positions of authority relationships. We asked participants to consider the seriousness of a scenario involving an adult teacher who sexually assaulted a 16-year-old student. Teachers are recognised as occupying a position of authority under the proposed amendment, and therefore the type of offending described in this scenario would be considered a position of authority offence. The results of our study suggest the public agrees that teachers hold a greater responsibility and duty towards their students by virtue of their role. Like the wording in the proposed amendment, participants viewed teachers as occupying a position of authority involving trust, control and/or power. The Queensland community believes sexual offences committed by a person in a position of authority to be serious in nature, and agrees with the need to protect children above the age of consent from these acts.

While the spirit of the amendments to the Criminal Code seem to align with the community views captured in our study, the consequences for its breach do not, and there is a need for more care in its composition. We offer the following suggestions to ensure the proposed authority offence effectively meets community expectations.

2.1 Reconsider whether the section 210A(1) penalty for the new aggravated position of authority offence is appropriate

UniSC's Sexual Violence Research and Prevention Unit's recent research (**Moritz, Pearson and Mitchell** 2024), outlined above, warrants further comment here. When community members considered a scenario involving an aggravated sexual assault committed by a teacher on a 16-year-old student, participants identified this scenario as a clear position of authority relationship. Notably, participants perceived that the teacher-student sexual assault was more serious than a sexual assault against an adult victim-survivor and was significantly more serious than a burglary.

Importantly, the maximum penalties should be noted here. Section 210A(1) proposes a maximum penalty of 10 – 14 years imprisonment for position of authority offences, depending on the circumstances; that is, a penetration offence has a 14 year maximum sentence while other indecent dealing has a 10 year maximum penalty. For comparison, a burglary offence has a 14 year maximum penalty.[2] To use a non-consensual oral intercourse as an example, where a female adult teacher placed a male 16 year old's penis in her mouth, the current drafting of section 210A(1) would not capture such as scenario, meaning the maximum penalty for this behaviour would be 10 years imprisonment.

Given the community, so significantly, identified a position of authority sexual assault against a 16 year old to be more serious than burglary, the maximum penalties should reflect that seriousness.

2.2 The section 210(3) parameters for position of authority relationships need expanding

We appreciate section 210(2) and (3) are not a 'closed category', non-exhaustive and do 'not preclude other categories of person being captured by the offences'. In this way, the intention of the provision is for prosecution to prove that 'care, supervision or authority' exists, with only one of the three dynamics needing to be established. Further, it is a question of fact for the court to determine if the child was under care, supervision or authority of the accused.

Our concern, in relation to the wording of this provision, is that the narrow parameters of the list provided in subsection (3) unduly limits the scope of persons captured within each category. If courts were to interpret each subsection using the syntactical presumption (*noscitur a sociis*) that the meaning of each word is derived from its context,[3] it could result in acquittals (or decisions not to prosecute) because a broader reading of the provision might not be permitted. We refer to examples, below, to highlight where we foresee limitations of the current clause wording. Extended parameters are needed for 'spouse', 'approved carer', school staff and 'health practitioner'.

We also note discrepancy in wording between the Amendment Bill and the Explanatory Notes. Section 210A(2) provides examples of persons who might have a child under their care, supervision or authority including sporting coaches, music teachers, employers and religious or spiritual leaders. Conversely, the Explanatory Notes (p.6) refer to these same examples and indicate "these people are not deemed to have a child under their care, supervision or authority'. This seems to be an error. Further clarification may be needed here to avoid confusion.

[2] *Criminal Code 1899* (Qld) s 419.
[3] See, eg, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; *Prior v Sherwood* (1906) 3 CLR 1054.

2.2.1 *Expanded parameters of 'spouse' are needed.*

Currently, the proposed amendments capture 'the spouse of the child's parent, grandparent, or guardian' in the position of authority offence. Spouse is not currently defined in the Criminal Code or *Acts Interpretation Act 1954* (Qld). The ordinary meaning of 'spouse' is a husband or wife, requiring a married relationship (Macquarie Dictionary, 2024). Even extending the meaning of 'spouse' to include the *Acts Interpretation Act's* (s 32DA) 'de facto' definition requires cohabitation and consideration of broader relationship factors. A child's parent, grandparent or guardian may have a domestic partner or romantic relationship who is not a spouse or de facto and still has regular and ongoing access to a child. The current wording of the provision does not extend to those circumstances, nor does it extend to a former spouse.

There are two options to expand the parameters of 'spouse' to appropriately capture the relevant parties. Other jurisdictions provide helpful alternatives here. We recommend expanding subsection (3)(b) to 'the spouse or other domestic partner of the child's parent, grandparent, or guardian including a former partner'.[4] 'A person who is or was in a significant relationship with a parent, grandparent or guardian' could also be suitable language.[5] Alternatively, we recommend adding a definition of 'spouse' into subsection (8) to include 'de facto or domestic partner including a former partner'.[6]

2.2.2 *Expanded parameters of school staff are needed.*

We note that the proposed subsection (3)(d) includes 'a teacher, principal or deputy principal at a school at which the child is a student'. The Explanatory Notes also indicate a teacher aide may be included 'depending on the facts of the particular case'.

We recommend expanding subsection (3)(d) to 'a person employed or providing services at a school at which the child is a student'. Such wording captures an expanded definition of school staff beyond the school teaching and leadership staff which the current provision encapsulates and incorporates other personnel who have a presumed authority, supervision and/or care such as contractors, administration, teachers' aides, groundskeepers, tradesmen and any other personnel with access to the school facilities and its students.

2.2.3 *Clearer and broader scope for 'health practitioner' is needed.*

The current proposed subsection (3)(e) captures 'a health practitioner if the child is their patient'. As such, the provision is narrowed to a current health practitioner – patient relationship. However, there may not be a clear end of relationship with health practitioners. It may be difficult for prosecution to establish a child being currently under the care of a health practitioner, given a child might not have visited that health practitioner, in a professional capacity, for a period of time, they may have attended other health practitioners in that time or the defendant may be able to raise, for some other reason, that the child is not their patient, despite being in their care in the past.

We recommend amending the provision to be 'a health practitioner if the child is or was their patient'. This broadens the scope to ensure that even if defence can establish a child is no longer under the health practitioner's immediate care, there is an ongoing position of authority retained.

We also recommend adding a definition for 'health practitioner' into the interpretation subsection (8) to ensure the scope of health practitioner incorporates someone providing a health service as a registered or unregistered health practitioner.

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[4] This proposed phrasing is similar to the drafting used in other Australian jurisdictions. The 'domestic partner' of the 'parent, step-parent, grandparent, foster carer or legal guardian of a young person' is captured within the similar provisions in the ACT: *Crimes Act 1900* (ACT), s55A(2)(b) and ss55A(2)(c).

[5] This proposed drafting mirrors the *Criminal Code Act 1924* (Tas), s 124A. In Tasmania, a 'significant relationship' is defined by the *Relationships Act 2003* (Tas). This includes persons who 'have a relationship as a couple' and are unmarried or related: s 4(1). To determine if a 'significant relationship' arises, courts look to its duration, cohabitation, sexual relationship, financial support and arrangements, ownership or property, mutual commitment, support and care of children, household duties and the reputation and public aspects of the relationship: s 4(3).

[6] This proposed drafting reflects, in part, the wording used in South Australian legislation, but extends the statute to capture former partners: see s 49(9), *Criminal Law Consolidation Act 1935* (SA).

2.3 The position of authority defence for a 3 year age gap between the child and adult should be removed.

Section 210A(4)(b)(ii) provides a defence from prosecution for an accused person, who is less than 3 years older than the child. While we appreciate the stakeholder views, referred to in the Briefing, that 'non-exploitative, consensual sexual relationships can exist between similarly aged, older adolescents', these amendments relate to relationships involving authority, power and/or trust. In our view, the age of the accused is irrelevant to a position of authority. If the accused is in a position of authority, even if they are only less than 3 years older than the child, there is a power imbalance, consent is not clear and there is 'constrained' decision-making (Jones, Milnes & Turner-Moore, 2024). As such, we recommend the position of authority defence for a less than 3 year age gap between the child and adult be removed from the Bill.

Concluding Statement

In conclusion, we welcome the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024 and its implementation of the Women's Safety and Justice Taskforce's recommendations. While the proposed provisions are encouraging, some further amendments could strengthen the Bill. As our submission has outlined, we have made recommendations in relation to amendments to the *Corrective Services Act 2006* and *Criminal Code 1899*.

Firstly, the *Corrective Services Act 2006* amendments proposing to make admissions by remanded prisoners during rehabilitation programs inadmissible are reasonable. We encourage the Committee to also consider expanding access, and reducing delays, to programs for incarcerated individuals, including after sentencing; ensure admissions made by high-risk/impact groups are protected and the protections afforded are clarified in the provision; and extend the provision's protection to admissions made about offences for which the individual has not been charged.

Secondly, the *Criminal Code 1899* amendments which prescribe a position of authority offence for children over the age of consent to sexual intercourse is a necessary addition to protect children from harm. We further recommend the maximum penalty for the new aggravated position of authority offence be reconsidered; expanding the parameters for the position of authority relationships including for 'spouse', school staff and 'health practitioner'; and the position of authority defence for a 3-year age gap be removed.

Relevant UniSC Resources

Moritz, Dominique., Ashley Pearson and Dale Mitchell, 'Community Views on Rape and Sexual Assault Sentencing: Final Report' (University of the Sunshine Coast, June 2024) (awaiting publication)

Priebe, Bricklyn., Larissa Christensen, Nadine McKillop and Susan Rayment-McHugh, '"We need help too": establishing client and practitioner demand for responsive programs for women sentenced for child sexual abuse in Australia' (2024a) *Journal of Offender Rehabilitation* (under review)

Priebe, Bricklyn., Susan Rayment-McHugh, Nadine McKillop and Larissa Christensen, 'What women want: program design for females sentenced for child sexual abuse' (2024b) *Journal of Sexual Aggression* (under review)

Rayment-McHugh, Susan., Emma Belton, **Nadine McKillop, Larissa S Christensen, Tim Prenzler** and Lorelei Hine, 'Beyond "what works": implementing sex offender treatment programs in the "real world"' (2022) 61(3) *Journal of Offender Rehabilitation* 148

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Meyer, Candace Reinsmith., June P Tangney, Jeffrey Stuewig and Kelly Moore, 'Why do some jail inmates not engage in treatment and services?' (2014) 58(8) *International Journal of Offender Therapy and Comparative Criminology* 914

Moritz, Dominique., Ashley Pearson and Dale Mitchell, 'Community Views on Rape and Sexual Assault Sentencing: Final Report' (University of the Sunshine Coast, June 2024) (awaiting publication)

Priebe, Bricklyn., Larissa Christensen, Nadine McKillop and Susan Rayment-McHugh, '"We need help too": establishing client and practitioner demand for responsive programs for women sentenced for child sexual abuse in Australia' (2024a) *Journal of Offender Rehabilitation* (under review)

Priebe, Bricklyn., Susan Rayment-McHugh, Nadine McKillop and Larissa Christensen, 'What women want: program design for females sentenced for child sexual abuse' (2024b) *Journal of Sexual Aggression* (under review)

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