

## Final Terms of Reference

### A review of Criminal Code provisions that concern the transmission of serious disease

#### Background

In March 2021, the Palaszczuk Government established the independent Women's Safety and Justice Taskforce (the Taskforce), chaired by the Honourable Margaret McMurdo AC. In its report, *Hear her voice – Report Two – Women and girls' experiences across the criminal justice system* (Report Two), the Taskforce examined consent laws in Queensland, amongst other matters.

The Taskforce recommended that section 348 (Meaning of consent) and section 348A (Mistake of fact in relation to consent) of the Criminal Code be amended (Recommendation 43, Report Two). Specifically, the Taskforce recommended that consent must be freely and voluntarily 'agreed' rather than 'given', and that the non-exhaustive list of circumstances in which consent cannot be freely and voluntarily agreed (at section 348(2)) be expanded to reflect the circumstances set out in section 61HJ of the *Crimes Act 1900* (NSW) (NSW Crimes Act).

On 6 March 2024, the *Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024* (Qld) (CCAC Amendment Act) was passed in Queensland, implementing a second major tranche of reforms in response to recommendations made by the Taskforce, including Recommendation 43 of Report Two.

Section 13 of the CCAC Amendment Act inserts section 348AA (Circumstances in which where there is no consent) into the Criminal Code. Section 348AA(1)(m) provides that a person does not consent to an act if:

- the person participates in the act with another person because of a false or fraudulent representation by the other person about whether the other person has a serious disease; and
- the other person transmits the serious disease.

The provision relies upon the existing definition of 'serious disease' in the Criminal Code, which means:

*a disease that would, if left untreated, be of such a nature as to:*

*(a) cause or be likely to cause any loss of a distinct part or organ of the body, or*

*(b) cause or be likely to cause serious disfigurement; or*

*(c) endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health;*

*whether or not treatment is or could have been available.*

The Taskforce did not specifically contemplate an explicit serious disease provision as included in the CCAC Amendment Act. In relation to section 348AA(1)(m), the Explanatory Notes to the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (CCAC Bill) provide:

*HIV and STI transmission are primarily a public health issue. However, fraudulent misrepresentations about serious sexually transmitted diseases strike at the heart of a person's right to make a free and informed decision about whether to participate in a sexual activity with another person. The provision does not mandate disclosure of disease status.*

In its report on the CCAC Bill, the Legal Affairs and Safety Committee (Committee) recommended:

*That the Queensland Government reviews the operation of the Criminal Code Act 1899 provisions relating to consent and the transmission of serious diseases to ensure they capture an appropriate range of diseases, and consider amending the Bill to remove the provision relating to the transmission of a serious disease pending the outcome of that review.*

The Government response to the Committee recommendation, tabled on 5 March 2024, acknowledged the concerns raised by stakeholders and the Committee, and committed to review section 348AA(1)(m).

The CCAC Amendment Act was passed on 6 March 2024. On 8 August 2024, Her Excellency the Governor approved a Proclamation to set commencement dates for all remaining provisions in the CCAC Act, other than section 13 to the extent that it inserts section 348AA(1)(m) into the Criminal Code. Other provisions which amend the consent and mistake of fact framework to introduce an affirmative model of consent will commence on 23 September 2024.

## **Existing provisions in the Criminal Code**

The Criminal Code contains offence provisions which criminalise the transmission of serious disease to another person. For example, it is an offence against section 317 of the Criminal Code to intentionally transmit a serious disease to another person. Where the specific intent to transmit serious disease cannot be made out, a person may be convicted of unlawfully causing grievous bodily harm pursuant to section 320 of the Criminal Code.

In cases involving the transmission of serious disease, the Queensland offences, and equivalent offences in other Australian jurisdictions, have been used to prosecute the transmission of the human immunodeficiency virus (HIV) to another person.

Recent stakeholder advocacy has highlighted concerns that the criminalisation of the transmission of serious disease is inconsistent with, and undermines, public health commitments aimed at containing the spread of the disease. Concerns have also been raised that a criminal response contributes to further stigma and discrimination experienced by people living with HIV. Stakeholders have highlighted developments in medicine and treatment, including antiretroviral medications for people at risk of acquiring HIV, and emphasised an evidence-based public health approach rather than criminal responses to the transmission of HIV.

The Queensland Government considers that it would be appropriate to examine, as part of the review, existing provisions in the Criminal Code that relate to the transmission of, or exposure to, serious disease to ensure Queensland's criminal law reflects contemporary community standards and relevant, contemporary medical, scientific, and other research.

## **Terms of Reference**

I, YVETTE MAREE D'ATH, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence (Attorney-General), refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the *Law Reform Commission Act 1968* for review and investigation, provisions in the Criminal Code that concern the transmission of serious disease.

## **Scope**

1. The Commission is asked to examine:

- (a) proposed section 348AA(1)(m) of the Criminal Code, to be inserted by the CCAC Amendment Act (not yet commenced), and the appropriateness of the provision in the context of the affirmative consent framework provided in CCAC Amendment Act;
- (b) existing provisions in the Criminal Code which apply to transmission of, or exposure to, serious disease, specifically:
  - (i) offences which rely upon the definition of 'serious disease' in the Criminal Code, including section 317;
  - (ii) offences which indirectly capture serious disease transmission through the definition of 'grievous bodily harm' in the Criminal Code, including section 320;
  - (iii) any other provisions in the Criminal Code which may apply to serious disease transmission or exposure.

2. In examining these provisions, the Commission is asked to consider:
  - (a) the range of diseases captured by the provisions, including the extent to which the provisions capture blood-borne viruses including the human immunodeficiency virus (HIV);
  - (b) the frequency of use of the provisions to prosecute people for transmitting or exposing another person to serious disease, including HIV;
  - (c) the implications of the provisions for public health outcomes, including the extent to which provisions undermine efforts to eliminate HIV transmission;
  - (d) the implications of the provisions for members of the community including victims of violence, including sexual violence;
  - (e) the impact of the provisions on human rights under the *Human Rights Act 2019*, including specifically:
    - (i) the right to recognition and equality before the law;
    - (ii) the right to privacy and reputation; and
    - (iii) the right to life.
  - (f) any other implications of the provisions.
3. The Commission is asked to make recommendations on:
  - (a) whether proposed section 348AA(1)(m) of the Criminal Code should be commenced, amended or repealed;
  - (b) whether there is a need for reform of existing provisions in the Criminal Code which apply to the transmission of, or exposure to, serious disease, and if so in what way; and
  - (c) any other matters the Commission considers relevant having regard to the issues relating to the referral, including whether there is a need for amendment to relevant offence or other provisions in the *Public Health Act 2005* (and if so, the specific nature of the amendments).
4. In making its recommendations, the Commission should have regard to:
  - (a) the findings and recommendations of the Taskforce with respect to amendments to establish an affirmative model of consent in Queensland;
  - (b) the nature and impacts of the transmission of serious diseases (including transmission through sexual activity or sexual violence) on the community, victims and survivors, and their families;
  - (c) the views and research of relevant experts, including those with specialist expertise in relation to criminal law, clinical, public health and epidemiological science, and the transmission of serious diseases (including with respect to transmission of serious disease through sexual activity or sexual violence);
  - (d) the need to ensure Queensland's criminal law reflects contemporary community standards and relevant, contemporary medical, scientific, and other research on the transmission of serious diseases (including transmission through sexual activity or sexual violence);

- (e) other relevant Queensland and federal legislation, guidelines and strategies to address and respond to serious diseases, including existing powers and offences under the *Public Health Act 2005* and the Queensland Health *Guideline for the management of people with HIV whose behaviours may place others at risk of HIV*;
- (f) recent developments, legislative reform, and research in other Australian and international jurisdictions, including the findings in the 2023 Australian Government *HIV Taskforce Report*;
- (g) the compatibility of the recommendations with the *Human Rights Act 2019*; and
- (h) any other matters that the Commission considers relevant having regard to the issues relating to the referral.

## Consultation

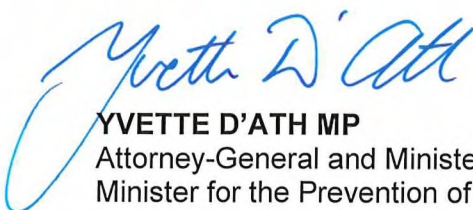
The Commission shall consult with:

- (a) legal stakeholders;
- (b) people who live with serious disease, specifically HIV, and relevant bodies that work with or represent these people or their families;
- (c) people with specialist expertise in the study and transmission of serious diseases, including the transmission of serious diseases through sexual activity or sexual violence, and public health stakeholders;
- (d) relevant sexual violence stakeholders including experts, services and peak bodies, and people with lived experience of sexual violence;
- (e) people who are lesbian, gay, bisexual, transgender, queer, intersex, asexual, brotherboy, sistergirl, or who have other genders and sexualities (LGBTQIA+), and relevant bodies that work with or represent these people or their families;
- (f) Aboriginal and Torres Strait Islander stakeholders;
- (g) relevant government departments and other public sector entities;
- (h) the public generally; and
- (i) any group or individual, in or outside Queensland, the Commission considers relevant having regard to the issues relating to the referral.

## Timeframe

The Commission is to commence its review from 1 July 2025 and provide its final report on the outcomes of the review to the Attorney-General no later than 31 August 2026.

Dated the <sup>25<sup>th</sup></sup> day of September 2024.



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