

23 February 2022

Criminal Law Section
The Attorney-General's Department
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3-5 National Circuit
BARTON ACT 2600
Via email: CriminalLaw@ag.gov.au

Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures)

Bill 2022.

Introduction

1. Full Stop Australia warmly welcomes the opportunity to provide feedback on the Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022 (**Bill**). We note that there is a second schedule of the bill that is being consulted on separately. We have not seen a copy of schedule 2 but would be more than willing to provide feedback on this schedule, if requested.
2. We warmly welcome the Commonwealth's leadership in relation to the reforms outlined in the Bill, as not all of them are currently implemented at a State and Territory Level. Full Stop Australia is firmly of the belief that the implementation of sexual violence law reform at a Commonwealth level provides a critical benchmark for State and Territory Governments to follow.
3. In this regard, while we are broadly supportive of the reforms proposed as a first step, we submit that the Government should consider implementing further reforms as much as is possible and in the interests of justice. While there is no doubt that the accused has a right to a fair trial, in our respectful submission, victim-survivors' experiences of the justice system also matter, not just because the justice system should be capable of delivering justice for all, but also because the system relies upon the participation of the victim-survivor to succeed. As such, in our view, it is crucial that victim-survivors have voice and agency in the trial process to not only secure their continued participation, but also to ensure that they are not unduly traumatised by the process itself.
4. We strongly encourage the Commonwealth Government to continue discussing the criminal justice reforms referred to in this paper at a State and Territory level with a view to introducing a nationally consistent approach to criminal justice responses to sexual violence across the country.

About Full Stop Australia

5. Full Stop Australia is an accredited, nationally focused, not-for-profit organisation which has been working in the field of sexual, domestic and family violence since 1971. We offer expert and confidential telephone, online and face to face counselling to people of all genders who have experienced sexual, domestic or family violence, and specialist help for their supporters and those experiencing vicarious trauma. We also provide best practice training and professional services to support frontline workers, government, the corporate and not for profit sector. Finally, Full Stop Australia advocates with governments, the media and the community to prevent and put a full stop to sexual, domestic and family violence.
6. Our counselling services include the NSW Sexual Violence Helpline (formally NSW Rape Crisis) for those impacted by sexual assault (including friends, families and supporters), the Sexual Abuse and Redress Support Service line for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse and the Rainbow Sexual, Domestic and Family Violence Helpline. In the 2020/21 financial year, Full Stop Australia provided 16,195 occasions of service to 3,984 clients nationally. 84% of callers identified as female and 90% identified as someone who had experienced sexual, domestic and/or family violence.

Expanding the vulnerable witness classification

7. Full Stop Australia warmly welcomes the proposed amendments that:
 - a. Ensure adult complainants in child sex abuse offences are automatically deemed vulnerable witnesses and are able to access existing and proposed vulnerable witness protections;
 - b. Expand existing protections to a larger range of criminal proceedings to include crimes against humanity, war crimes, additional child sexual abuse crimes and drug offences involving children; and
 - c. Allowing adult victim-survivors access to the same protection as child complaints.
8. We have some minor, suggested changes to the proposed reforms. In respect of the proposed insertion after paragraph 15Y(1)(b), we suggest that it be amended to encapsulate the crime of genocide:
 - (ba) an offence against Division 268 of the *Criminal Code* that is **genocide (within the meaning of that Code)** a crime against humanity (within the meaning of that Code) or a war crime (within the meaning of that Code)
9. In respect of the proposed insertion before paragraph 15Y(2)(1), we suggest that it be amended slightly, so that it is abundantly clear that the provision applies to aggravated forms of that offence:
 - (aa) an offence against section 71.8 of the Criminal Code (sexual assault of United Nations and associated personnel **and any aggravated offence under section 71.13**)
10. We would also recommend including Division 274 (Torture) in Part IAD.

Restricting the admissibility of sexual reputation/experience in certain vulnerable adult proceedings

11. Full Stop Australia strongly supports restricting the admissibility of sexual reputation/experience evidence in all cases of sexual violence involving defendants of all ages. Not only is this kind of evidence re-traumatising (as pointed out in the explanatory note) but in our view, it is also often of limited evidentiary value and merely reinforces harmful stereotypes about sexual violence.
12. Full Stop Australia strongly supports the extension of the current Commonwealth restrictions on the use of sexual reputation/experience evidence involving children in any children proceedings to adults in any adult proceedings *as a first step*. However, we submit that the provisions themselves should be stronger and ideally be modelled on the NSW provision - s.293 of the *Criminal Procedure Act 1986* (NSW).
13. We note that the NSW provision sets out a specific set of circumstances in which this kind of evidence may be admitted. Any evidence proposed to be admitted, is also subject to an additional consideration of whether the probative value of the evidence outweighs any distress, humiliation or embarrassment to the complainant. In our respectful submission, this is a stronger protection than the current Commonwealth provision which states that this evidence may be admitted if “the evidence is substantially relevant to facts in issue in the proceedings”.
14. We also strongly recommend (as suggested by the Victorian Law Reform Commission (VLRC) in its ground-breaking report *Improving the Justice System Response to Sexual Offences*¹) (VLRC Report) that victim-survivors should:
 - a. be given notice that evidence of sexual reputation/experience is being introduced. We note that as ground rules hearings are being introduced, the notice requirement might form part of the ground rules hearing process as discussed in more detail below; and
 - b. Victim-survivors be given legislative standing to participate in any decisions made about this evidence and also be provided with access to legal representation (which could also be incorporated as part of the ground rules hearing process below).

Pre-recording of evidence

15. We strongly support the amendments in the Bill that:
 - a. Allow for pre-trial hearings for the recording of evidence (including cross-examination and re-examination) and allow for these recordings to be tendered and relied upon as the person’s evidence in any subsequent trial or re-trial; and
 - b. Require all vulnerable person’s evidence to be audio-visually recorded, and allow for these recordings to be tendered and relied on as the witness’ evidence in any subsequent trial or retrial. We also strongly support that these provisions will be extended to adult complainants in child sexual offence proceedings and special witnesses.

¹ Victorian Law Reform Commission, *Improving the justice system response to sexual offences* (Report, September 2021), 479, 88.

Introducing ground rules hearings

16. We strongly support any amendments in the Bill that introduce flexibility to the trial process and facilitate the needs of victim-survivors to be considered on a case-by-case basis. In our experience, victim-survivors come from a wide variety of backgrounds and have different needs. We submit that ground rules hearings are a good way of ensuring that diversity of experience is respected and accommodated in the trial process as much as is possible. We understand from the VLRC Report that they have been successful in Victoria.
17. However, we also note that the VLRC Report did also recommended the following:
- a. The Victorian Government should fund legal advice and, where necessary, representation until the point of trial and in related hearings, to ensure victim-survivors can exercise their rights and protect their interests, including (relevantly):
 - i. Their rights and privileges in relation to evidence (for example, their confidential communications privilege, alternative arrangements and special protections, access to intermediaries).
 - ii. Their rights to privacy in relation to disclosures of confidential information (for example, information about their sexual history, the nature of cross examination, or suppression orders).
 - b. [We note that this recommendation was made in addition to ground rules hearings] To ensure complainants are respected when giving evidence, and are able to provide the best quality evidence, the *Victorian Criminal Procedure Act 2009* (Vic) should be amended, to require, in the absence of the jury and before the complaint is called to give evidence, that the judicial officer, prosecution and defence counsel discuss and agree to:
 - i. The style and parameters of questioning so that questioning is not improper or irrelevant
 - ii. The scope of questioning including questioning on sensitive topics and evidence to reduce re-traumatisation
 - iii. The preferences and needs of complainants
 - c. The treatment of complainants and their questioning should be in line with what the judicial officer determines following the discussion. The process can be repeated until the conclusion of the complainant's evidence².
18. Therefore, we strongly support the introduction of ground rules hearings modelled on the current Victorian example *as a first step*. However, we strongly encourage the Commonwealth to consider and consult on the additional reforms proposed by the VLRC above to give victim-survivors additional voice and agency throughout the criminal justice process. We are more than happy to work with you to consult on these reforms as necessary. We note also that we have recently established the National Survivor Advocate Program, the aim of which is to provide survivors with a formal avenue to contribute to legal and policy reform undertaken by Full Stop

² VLRC (n 1), 268, 46.

Australia. In this regard, we are aiming to ensure that our advice and recommendations are grounded in the lived expertise of survivors.

Allowing victim-survivors to publish identifying material

19. We strongly support the amendment in the bill which is aimed at supporting victim-survivors to speak about their experiences, should they choose. Full Stop Australia is of the view that victim-survivors should be given the option of speaking out so long as they are supported to speak out and are fully informed as to their options.
20. We recognise and acknowledge the empowerment that comes from victim-survivors telling their stories. We know from our experience that speaking out about sexual, family and domestic violence can be important to individual recovery. We also know that the ability to speak out can address barriers to justice and foster community understanding about the nature and extent of sexual violence.
21. However, it should also be mentioned here that speaking out can come at great personal cost. In high-profile matters, victim-survivors might be under great public and media pressure, and this can be re-traumatising. Therefore, if consent is to be granted, it must be (as the explanatory note has flagged) informed consent. We therefore welcome the insertion of the proposed subsection 15YR(2)(2)(c)(iii).
22. However, in addition to any legislative reforms, victim-survivors also need to be provided with wrap around services to help them to safely disclose and these services should include (but not be limited to) counselling and legal advice. Funding legal representation for complainants in sexual assault matters would go some way to achieving this where proceedings are ongoing.

Suggestion for further reforms

23. We take this opportunity to recommend that the Commonwealth Government continue its important work in reforming the criminal justice system relating to sexual offences and consider investigating and consulting on further reforms to build on this work. The below reforms are being suggested based on substantial work already conducted in the Victorian and ACT contexts.³
24. We do appreciate however that each jurisdiction is different, and we would be more than happy to provide further advice and assistance in relation to any of the proposed, additional reforms from the perspective of crimes punishable by Commonwealth law.
25. We recommend that the Commonwealth:
 - a. introduce sexual assault communication privilege into Part 3.10 of the *Evidence Act 1995* (Cth).
 - b. Following on from the Australian Law Reform Commission inquiry into consent conducted as part of its wider review into family violence in 2010⁴, the Australian Law Reform Commission consider conducting a review into the

³ VLRC (n1) and The Sexual Assault Prevention and Response Steering Committee (ACT), *Listen. Take action to prevent, believe and heal* (Report, December 2021).

⁴ Australian Law Reform Commission, *Family violence – a national legal response* (Report, October 2010).

introduction of uniform, national definitions of consent across all Australian jurisdictions (national, state and territories).

26. Additional recommendations based on the VLRC Report:

- a. Introduce jury directions to address misconceptions about sexual violence.⁵
- b. When sexual assault communications privilege is being introduced (as per our recommendation above), complainants should be able to participate in these decisions and require access to legal representation.⁶

27. Recommendations based on the ACT Steering Committee report:⁷

- a. Review of legislative maxima for sexual assault offences to ensure they are aligned with current practice in other Australian jurisdictions.
- b. For certain identified serious sexual offences, a rebuttable presumption be introduced that a custodial sentence should be imposed unless exceptional circumstances apply.
- c. Introduce a legislative presumption that Intensive Correction Orders and suspended sentences not be imposed for serious sexual offences.
- d. Evidence of family violence should be made relevant and admissible in sexual assault, slavery and trafficking cases (where relevant), provided that the evidence is not prejudicial to the defendant.
- e. The Commonwealth should consider introducing legislative reforms to introduce a rebuttable presumption in sentencing for sexual offences that the offending caused certain harms for the victim survivor.
- f. Introduce a presumption that the courtroom be mandatorily closed when a victim-survivor witness is giving evidence in a sexual assault, trafficking or slavery matter, either live or by recording. Subject to the proviso that victim-survivors have the option to open the courtroom subject to free and voluntary consent.

28. Lastly, we would also like to emphasise the importance of ensuring that every actor in the system (whether it be police, prosecutors, the judiciary or frontline workers) have the appropriate skills, experience and attributes to properly identify and respond to sexual violence, slavery and trafficking. Proper investment into recruitment, training and professional development is crucial to ensuring that survivors aren't falling through the cracks and that the system is responding appropriately. Furthermore, systematic monitoring and review processes are an integral part of an ever-changing system to ensure that the Government remains publicly accountable for its performance.

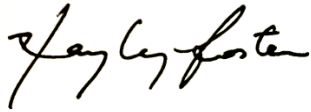
29. We thank you again for the opportunity to provide feedback in relation to the Bill. If you have any further questions, please do not hesitate to contact me or Laura Henschke on laurah@fullstop.org.au

⁵ VLRC (n1), 433.

⁶ VLRC (n1), 475, 87.

⁷ ACT Steering Committee (n3), 80, 23.

Yours faithfully,

A handwritten signature in black ink that reads "Hayley Foster". The signature is written in a cursive, flowing style.

Hayley Foster
Chief Executive Officer
Full Stop Australia