

# *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024.*

**Full Stop Australia Submission, March 2024**



Full Stop Australia acknowledges the Traditional Custodians of Country throughout Australia, and their continuing connection to land, sea, and community. We pay our respects to them and their cultures, and to Elders both past and present.

## About Full Stop Australia

Full Stop Australia thanks the Attorney-General's Department for the opportunity to provide input on the *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024* (the **Bill**). Full Stop Australia is a nationally focused not-for-profit organisation which has been working in the field of sexual, domestic, and family violence since 1971. We perform the following functions:

- Provide 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;
- Conduct best practice training and professional services to support frontline workers, government, the corporate and not-for-profit sector; and
- Advocate to governments and in the media, for laws and systems better equipped to respond to, and ultimately prevent, gender-based violence.

Our advocacy is guided by the lived expertise of over 600 survivor-advocates in our National Survivor Advocate Program (**NSAP**). The NSAP gives victim-survivors of gender-based violence a platform to share their experiences to drive positive change—by accessing opportunities to tell their stories in the media, weigh in on Full Stop Australia's submissions to Government, and engage directly with Government. We are committed to centring the voices of victim-survivors in our work and advocating for laws and systems that genuinely meet their needs.

## About this submission

This submission has been prepared by Emily Dale, Head of Advocacy, and Taran Buckby, Legal Policy Officer. If you have any questions in relation to this submission, please do not hesitate to contact Emily Dale at [emilyd@fullstop.org.au](mailto:emilyd@fullstop.org.au).

Full Stop Australia welcomes the proposed changes in the Bill. While the changes in the Bill will be limited in application as the majority of sexual violence matters are heard in State and Territory Courts, Full Stop Australia welcomes all victim-centric reforms. As such, we warmly welcome measures in the Bill that create better support in Commonwealth criminal proceedings for witnesses and complainants who are children, 'vulnerable'<sup>1</sup> adults, and 'special witnesses.'<sup>2</sup> We commend the Commonwealth's leadership in passing the Bill, which creates a positive benchmark for States and Territories that have not yet adopted equivalent reforms to follow.

Our feedback on specific changes made by the Bill are set out below.

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<sup>1</sup> As that term is defined in section 15YAA of the *Crimes Act 1914* (Cth).

<sup>2</sup> As that term is defined in section 15YAB of the *Crimes Act 1914* (Cth).

## Expansion of offences to which protections apply

The Bill expands the list of offences in section 15Y of the *Crimes Act 1914* (**Crimes Act**), to which special rules for proceedings involving children and ‘vulnerable’ adults apply. The expanded offences include sexual offences, intimate image abuse, female genital mutilation and sexual servitude, where the offence was committed at sea or on an aircraft. They also include federal offences which don’t necessarily involve sexual violence, but which might be likely to involve sexual violence—such as crimes against humanity and war crimes.

Full Stop Australia supports these changes, insofar as they increase protection to victim-survivors of sexual violence who may be complainants or witnesses in a wider range of Commonwealth offences.

## Changes to the admissibility of ‘sexual reputation’ and ‘sexual experience’ evidence

### Making ‘sexual reputation’ evidence inadmissible

We strongly support the Bill’s addition of proposed section 15YCA, and its amendments to section 15YB, of the Crimes Act—which would make ‘sexual reputation’ evidence inadmissible for child witnesses and complainants, and ‘vulnerable adult complainants.’ This change is welcome, as allowing ‘sexual reputation’ evidence to be admitted fuels victim blaming, and is extremely retraumatizing to victim-survivors. Such evidence is also of limited evidentiary value. This change contributes to a more victim-centric justice system.

### Increasing restrictions on the admissibility of ‘sexual experience’ evidence

The Bill increases restrictions on the admissibility of evidence of the ‘experience with respect to sexual activities’ of child witnesses and complainants (through amendments to section 15YC of the Crimes Act) and ‘vulnerable adult’ complainants (through the addition of proposed section 15YCB to the Crimes Act).

Full Stop Australia strongly supports restricting the admissibility of ‘sexual experience’ evidence. This kind of evidence can be highly retraumatizing and invasive for witnesses and complainants in criminal proceedings. Allowing witnesses and complainants to be questioned about these matters can contribute to the sense that they are the ones on trial. Such evidence can also reinforce harmful myths about sexual violence—for example, the incorrect idea that a complainant who consented to sexual activity with a defendant in the past is likely to have consented to further sexual activity with them. ‘Sexual experience’ evidence is also often of limited evidentiary value. For example, it is

common for a victim to have consented to some sexual activity with the accused prior to sexual assault, or to have consented to participating in a different sexual activity with the accused at the time of the alleged assault.<sup>3</sup> This has nothing to do with whether the victim consented to the sexual activity in question.

In light of these concerns, the following changes would strengthen the Bill by further restricting the admissibility of ‘sexual experience’ evidence:

- Proposed subsection 15YCB(2) should be amended to provide that leave of the Court to admit ‘sexual experience’ evidence may only be granted where the evidence is ‘substantially relevant to facts in issue in the proceedings; *and the evidence has substantial probative value*’ (changes italicised). Equivalent changes should be made in relation to the admissibility of ‘sexual experience’ evidence of child witnesses and complainants under section 15YC(2) of the Crimes Act. These changes create a higher bar for the admissibility of ‘sexual experience’ evidence across the board—recognising the issues with this evidence outlined above, including that it has limited evidentiary value. It also removes reference to complainants’ credibility, which can reinforce harmful stereotypes about victims of sexual violence.
- Proposed subsection 15YCB(4)(a) should be removed. There is no need for this provision, and it reinforces the harmful rape myth that false complaints about sexual violence are common—when in reality, the rate of false allegations of sexual offences is very low.<sup>4</sup> Relatedly, section 15YC(4)(a) of the Crimes Act (which is in the same terms as proposed 15YCB(4)(a), and relates to the admissibility of ‘sexual experience’ evidence of child witnesses and complainants) should be repealed.
- The Bill should require witnesses and complainants to be given notice of applications by the defence to admit ‘sexual experience’ evidence and legal standing to challenge such applications. This would promote victims having greater agency and awareness of matters that affect them in sexual violence proceedings. Being less ‘passive’ and having more visibility of Court processes that affect them, could help reduce the sense of disempowerment and retraumatisation so many victims feel in Court.

Currently, complainants and witnesses don’t have their own legal representatives in criminal proceedings—whereas the accused has defence counsel, and the prosecution’s interests may not always align with a victim-survivor’s. Giving complainants and witnesses standing to challenge the

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<sup>3</sup> Harrison Lee et al, ‘The Effects of Victim Testimony Order and Judicial Education on Juror Decision-Making in Trials for Rape’ (2022) *Psychology, Crime and Law* 1, 4.

<sup>4</sup> Meta-analysis of seven studies in Western countries showed that approximately 5% of rape allegations are proven false. See Ferguson, C. E., & Malouff, J. M. (2016). Assessing police classifications of sexual assault reports: A meta-analysis of false reporting rates. *Archives of Sexual Behaviour*, 45(5), 1185–1193.

admissibility of 'sexual experience' evidence would give them a means of challenging dangerous and outdated rape myths and victim-blaming narratives, which such evidence can reinforce. As set out above, this continues to retraumatise victims and deny them justice.

## Evidence recording hearings

### Enabling evidence recording hearings

Full Stop Australia supports provisions of the Bill allowing 'child witnesses,' 'vulnerable adult' complainants and 'special witnesses' to give evidence remotely via an 'evidence recording hearing,' providing that evidence given in person must be recorded so that it can be used in subsequent proceedings and enabling the tendering of recorded evidence in subsequent proceedings.

Enabling victim-survivors to give evidence remotely can assist to reduce the trauma associated with the criminal justice process and assist complainants and witnesses to give their best evidence, which is in the interests of justice. Meanwhile, allowing recorded evidence to be tendered in subsequent proceedings reduces the retraumatising impacts of providing evidence multiple times in relation to the same matter.

We think the Bill could be further strengthened through the following amendments:

- Proposed section 15YDB provides that an 'evidence recording hearing' may only be ordered if the Court 'is satisfied that it is in the interests of justice to do so,' considering 'whether each party has sufficient time to prepare for the evidence recording hearing,' 'the availability of Court and other facilities to enable the video or audio recording,' 'the availability of the prosecutor and the defendant's legal representative,'<sup>5</sup> and 'the circumstances and wishes of the vulnerable person.' We strongly support the requirement for the Court to consider the circumstances and wishes of the witness or complainant who would be giving evidence. However, we think the other considerations in proposed subsections 15YDB(2)(a), (b) and (d) should be removed.

We note the retraumatising experience of victim-survivors giving evidence in criminal proceedings, and the importance of such evidence in securing the conviction of offenders (which is in the interests of justice). We also note that, as found by the Royal Commission into Institutional Responses to Child Sexual Abuse, allowing witnesses and complainants to pre-record evidence enhances their capacity to give their best evidence, which is critical to the successful

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<sup>5</sup> Or the defendant personally, if the defendant is unrepresented.

prosecution of sexual offending.<sup>6</sup> Accordingly, we don't think factors like the availability of audio or video facilities, the schedules of parties to proceedings, or the sufficiency of preparation time, should be a barrier to the Court ordering an 'evidence recording hearing' when this is in the interests of justice and accords with the wishes of the witness or complainant. Parties' availability and preparation time can be addressed through the Court setting a later date for pre-recorded evidence to be given—these matters should not be a bar to the availability of an evidence recording hearing.

- For similar reasons, proposed section 15YLA(1)(b) of the Bill should be removed. This would mean the Court would not need to consider whether 'the Court is equipped with the necessary facilities' to enable evidence to be recorded, in determining whether evidence given in person should be recorded. Making recording infrastructure universally available is needed to ensure the reforms in the Bill are meaningful and effective in practice—failure to invest in such infrastructure should not be a barrier or excuse.

### **Defendants should not be present at evidence recording hearings**

The Bill foresees that a defendant may be present when a witness or complainant gives prerecorded evidence. Proposed section 15YDC of the Bill provides that 'the vulnerable person must not be able to see the defendant during the evidence recording hearing'—however, 'if the vulnerable person and the defendant are in the same room, the defendant must be able to hear the vulnerable person giving evidence.'

We recommend amending the Bill to clarify that a defendant may not be present during evidence recording hearings. Many victim-survivors of sexual violence have spoken of the retraumatising impact of having to face their perpetrators again in legal proceedings—with some saying that this possibility deterred them from reporting. This not only impacts victim-survivors individually but can also impact the quality of their evidence—which has ramifications for the administration of justice more broadly. Creating a blanket ban on defendants' access to pre-recorded hearings would remove a significant source of stress and traumatisation, and create the conditions for high quality evidence collection.

We do not see this change giving rise to any issues with defendants being able to understand and respond to the case against them. In this regard, we note that:

- The defendant's interest in understanding the case against them is sufficiently protected by proposed section 15YDF in the Bill—which provides that a defendant must be given 'reasonable access' to recorded evidence, and that all

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<sup>6</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report, Parts VII to X and appendices, page 5.

parties to proceedings must be given access to, or a copy of, a transcript of recorded evidence.

- The defendant's legal representative could be present at evidence recording hearings to intervene, where necessary, on the defendant's behalf. There is no need for the defendant to personally be present. Relatedly, we support amendments to the Crimes Act to prevent unrepresented defendants from cross-examining victim-survivors of sexual violence in Court—see further below.

## Right to an interpreter

Full Stop Australia supports the provision requiring the Court to arrange an interpreter for complainants and witnesses who are unable to communicate with 'reasonable fluency' in English, because of 'inadequate knowledge of the English language or a physical disability.'

We think the Bill would be strengthened by expanding communication support to a broader cohort of witnesses. We recommend making the right to an interpreter available to all people with disability who require communication support, not only people with a physical disability.

We would also support broader communication support being provided to complainants and witnesses in cases involving sexual violence—noting the effects of trauma on the ability to communicate effectively. For example, trauma can impact survivors' ability to recall details<sup>7</sup> or recount events in a linear fashion, and may result in memory gaps or differences between accounts.<sup>8</sup> Broader communication support would extend beyond the right to an interpreter, to more holistic and comprehensive support with being understood. We understand the Government is currently considering a Commonwealth witness intermediary scheme, which would meet this need. We strongly support this initiative and recommend making this support available as early as possible to the cohort of witnesses and complainants covered by the Bill.

## Publications identifying victim-survivors

Full Stop Australia welcomes the Bill's clarification regarding self-publication of identifying information. We support victim-survivors being able to speak about their own experiences of sexual violence, should they choose.

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<sup>7</sup> Holmes, E. A., Grey, N. and Young, K. A. D. (2005). Intrusive images and "hotspots" of trauma memories in posttraumatic stress disorder: An exploratory investigation of emotions and cognitive themes. *Journal of Behaviour Therapy and Experimental Psychiatry*, 36(1), 3–17.

<sup>8</sup> Ibid. See also Conway, M. A., Meares, K., & Standart, S. (2004), Images and goals. *Memory*, 12, 525–431; McNally, R. J. (2003). *Remembering Trauma*. Cambridge, MA: Harvard University Press.

We also broadly support the Bill's amendments to section 15YR of the Crimes Act. Among other things, proposed section 15YR(2) provides that publications identifying a 'child witness, child complainant, vulnerable adult complainant or special witness' may only be published with the person's informed consent, and that the publication must be in accordance with limits set by the person. We support these requirements, which centre the agency and choice of people who have experienced sexual violence.

However, we do not think proposed section 15YR(2)(c) should create be a blanket exemption for 'vulnerable person[s] who [are] deceased.' Survivor-advocates Full Stop Australia has worked with, who are the surviving family members of domestic and family violence-related homicide, have told us about the significantly retraumatising impacts of media reporting on their deceased family members' deaths. Survivor-advocates told us they found the publication of information about and images of their family members, taken from social media and other sources, to be invasive and intrusive. To address this issue, we recommend amending the Bill to provide that a publication may only identify a vulnerable person who is deceased with the informed consent of their next of kin.

## Further reform suggestions

### Ground rules hearings and witness intermediaries

Full Stop Australia is disappointed that the Bill does not allow for ground rules hearings. A ground rules hearing is 'a pre-hearing process used to discuss and establish how vulnerable witnesses will be enabled to give their best evidence, by the Court setting ground rules for the questioning of the witness.'<sup>9</sup> Ground rules hearings have significant potential to address concerns about the questioning of victim-survivors of sexual violence in Court—ensuring that such questioning is respectful, trauma-informed, relevant and safe.

We understand that the decision not to enable ground rules hearings was made based on the Government's assessment that a witness intermediary scheme is needed to ensure ground rules hearings are effective. We also understand that the Government is currently undertaking a witness intermediary scoping study to inform consideration of a Commonwealth witness intermediary scheme.

Full Stop Australia strongly supports enabling ground rules hearings, and establishing a witness intermediary scheme, for the cohort of witnesses covered by the Bill. As set out above, we think witness intermediaries have the potential to support with a wide range of communication challenges, and generally ensure that victim-survivors of sexual violence feel supported and safe in the Court process. Witness intermediaries and

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<sup>9</sup> Supreme Court of Victoria, *Multijurisdictional Court Guide for the Intermediary Program: Intermediaries and Ground Rules Hearings*, 22 March 2021, available at: [https://www.supremecourt.vic.gov.au/sites/default/files/2022-02/Intermediary\\_guide\\_2021\\_SCV\\_update.docx#:~:text=A%20ground%20rules%20hearing%20is,the%20form%20of%20Court%20directions.](https://www.supremecourt.vic.gov.au/sites/default/files/2022-02/Intermediary_guide_2021_SCV_update.docx#:~:text=A%20ground%20rules%20hearing%20is,the%20form%20of%20Court%20directions.)



ground rules hearings are important mechanisms to address the retraumatising nature of giving evidence and the disempowerment of witnesses and complainants in the criminal justice system and ensuring that witnesses and complainants are supported to give their best evidence.

We recommend that the Commonwealth Government commit to establishing a witness intermediary scheme following the scoping study, and accompany its establishment with further legislative reform to enable ground rules hearings to occur.

### **Other mechanisms to reduce retraumatisation to victim-survivors of sexual violence in the Court process**

We have had the opportunity to review Women's Legal Services Australia (**WLSA**)'s submission on the Bill. In addition to the points above, we endorse WLSA's submissions on the need for further reforms needed to improve criminal legal responses to sexual violence. In particular, we echo WLSA's calls for:

- Further reforms to strengthen protections against improper, inappropriate, or aggressive cross-examination in the Crimes Act and the *Evidence Act 1995* (Cth).
- A complete ban on personal cross-examination of a victim-survivor by an unrepresented defendant. Currently, the Court may give leave for an unrepresented defendant to cross-examine a 'vulnerable person' under section 15YG of the Crimes Act. As noted in WLSA's submission, 'it is important that a legal practitioner be appointed to undertake the cross-examination on behalf of the defendant as they have duties to their client and the court and cannot be a mere mouthpiece for the accused. Additional funding for legal assistance is needed to ensure the defendant has a representative available to undertake the cross-examination.'
- Independent legal representation for sexual assault complainants in criminal trials, and the expansion of the Government's sexual assault legal services pilot across the country to make legal support more accessible.