



**Inquiry into the Crimes
Amendment (Strengthening the
Criminal Justice Response to
Sexual Violence) Bill 2024**

Senate Legal and Constitutional Affairs Committee

27 March 2024

Acknowledgements

We acknowledge the Traditional Owners of Country, recognise their continuing connection to land, water, and community, and pay respect to Elders past and present.

We acknowledge the victim-survivors of domestic, family, and sexual violence who we work with and their voices and experiences which inform our advocacy for justice, equality, and safety for women.

About Women's Legal Services Australia

Women's Legal Services Australia (**WLSA**) is the national peak body for 13 specialist Women's Legal Services in each state and territory across Australia, including two First Nations Women's Legal Services. We provide a national voice for Women's Legal Services to influence policy and law reform, and advocate to increase access to gender-specialist, integrated legal services for women.

About Women's Legal Services

Women's Legal Services provide high quality free legal services for women, including legal advice and representation, support services and financial counselling, community legal education, training for professionals, and engage in advocacy for policy and law reform. Some Women's Legal Services have operated for more than 40 years.

WLSA members include:

- Women's Legal Service Victoria
- Women's Legal Service Tasmania
- Women's Legal Service NSW
- Women's Legal Service WA
- Women's Legal Service SA
- Women's Legal Service Queensland
- North Queensland Women's Legal Service
- First Nations Women's Legal Service Queensland
- Women's Legal Centre ACT
- Wurringa Baiya Aboriginal Women's Legal Centre NSW
- Top End Women's Legal Service
- Central Australian Women's Legal Service
- Katherine Women's Information and Legal Service

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Executive Summary

1. We welcome the opportunity to provide feedback on the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 ('the Bill').
2. We are broadly supportive of this Bill which seeks to strengthen protections and justice outcomes for victim-survivors of sex offences and child sex offences. These reforms make sexual reputation evidence inadmissible, place greater restrictions on sexual experience evidence, introduce evidence recorded hearings, and clarify self-publication provisions.
3. We are pleased to see the Federal Government taking leadership on improving the criminal legal response to sexual violence, including these legislative reforms, initiating an Australian Law Reform Commission inquiry, and allocating \$8.4 million to establish sexual assault legal service pilots in three jurisdictions.
4. While these legislative reforms are welcome, it is important to **recognise the scope of the stronger protections are limited to proceedings relating to federal offences** under the *Crimes Act 1914* (Cth). Most sex offence proceedings relate to state and territory offences and therefore these reforms will not apply.
5. Improving responses to sexual violence is a national issue and **requires a commitment from all state and territory governments** to implement reforms and invest in fundamentally changing the criminal legal system within their jurisdictions. Consistent with the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022 – 2027, all state and territory governments must strengthen legal frameworks to ensure victim-survivors have improved justice outcomes and protections and engage in wide-spread systems reforms.
6. It is also important to recognise **legislative reform alone will not significantly improve outcomes for victim-survivors of sexual violence**. We need to see cultural change and systems reform towards having trauma-informed, culturally safe, and gendered violence-informed systems – with the purpose of both increasing conviction rates through the criminal legal system and improving other outcomes for victim-survivors.
7. We also need significant investment from Commonwealth, State and Territory Governments to **increase access to legal assistance for victim-survivors of sexual violence**. This must include legal assistance to navigate the criminal legal system and to assist with intersecting legal issues, from when a victim-survivor is considering whether to report through to the end of their legal matters.
8. Many of the reforms in this Bill **will not have the intended effect** if victim-survivors are not aware of legislative protections, provided with advice about their rights and entitlements and the options available, and do not have their own independent advocates throughout engagement with criminal legal processes to ensure these protections are applied appropriately, including inside the courtroom at pre-trial hearings and at trial.
9. We also need significant investment from Commonwealth, State and Territory Governments in frontline services and supports for victim-survivors of sexual violence across Australia, including specialist sexual assault services, and culturally safe and appropriate services for First Nations people and culturally and linguistically diverse people.

Recommendations

- Remove the language of 'vulnerable person' and 'vulnerable adult complainant' from the Bill and the *Crimes Act 1914* (Cth).
- Under proposed section 15YDE of the Bill, the court should be required to take into account the availability of child or adult complainant so their entitlements in the process are equivalent to those listed at section 15YDE(2)(b).
- Consider whether the Bill should apply the evidence recorded hearing provisions to 'special relationship witnesses' as defined in the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).
- Remove the word 'physical' from proposed new section 15YOA of the Bill to be more inclusive of people with disabilities.
- The Commonwealth Government should commit to establishing a witness intermediary scheme and make further amendments to the *Crimes Act 1914* (Cth) to provide for ground rules hearings.
- Consider further reforms to strengthen protections against improper, inappropriate, or aggressive cross-examination in the *Crimes Act 1914* (Cth) and the *Evidence Act 1995* (Cth).
- Amend the *Crimes Act 1914* (Cth) to completely ban personal cross-examination of a victim-survivor by the accused.
- The Commonwealth Government should provide an additional \$4.6 million per year (plus indexation) to Women's Legal Services to establish pilot sites in every jurisdiction across Australia for trauma-informed legal assistance for victim-survivors of sexual assault.

Stronger protections for victim-survivors in Commonwealth criminal proceedings

10. The key measures in this Bill include:
- a) **Expanding the circumstances where enhanced protections apply:** expanding the list of proceedings for federal offences in section 15Y of the *Crimes Act 1914* (Cth) where special rules can apply for children, adult complainants and 'special witnesses'.
 - b) **Making evidence about sexual reputation inadmissible:** amending section 15YB in the *Crimes Act 1914* (Cth) to make evidence about sexual reputation of a child witness or child complainant inadmissible; and inserting new section 15YCA in the *Crimes Act 1914* (Cth) to make evidence about sexual reputation of a 'vulnerable adult complainant' in a 'vulnerable adult proceeding' inadmissible.
 - c) **Increasing restrictions on evidence relating to a person's sexual experience:** amending section 15YC of the *Crimes Act 1914* (Cth) to place greater restrictions on when the court may give leave to allow evidence of a child witness or child complainant's experience with respect to sexual activities; and inserting new section 15YCB in the *Crimes Act 1914* (Cth) to make evidence of a 'vulnerable adult' complainant's experience with respect to sexual activities inadmissible in a 'vulnerable adult proceeding' unless the court gives leave.
 - d) **Introducing evidence recording hearings:** inserting new Division 2A to allow for evidence recorded hearings for child witnesses in child proceedings, 'vulnerable adult complainants' in

'vulnerable adult proceedings', and 'special witnesses' where the court has made an order under section 15YAB(3) in 'special witness proceedings', in relation to evidence in chief, cross-examination or re-examination.

- e) **Clarifying self-publication provisions:** amendment section 15YR in the *Crimes Act 1914* (Cth) to clarify when child witnesses or child complainants, 'vulnerable adult complainants' or 'special witnesses' may publish self-identifying information, or give their informed consent to a third party, such as a media organisation, to publish that information.
- f) **Providing the right to an interpreter:** inserting new section 15YOA in the *Crimes Act 1914* (Cth) to provide the right to an interpreter for child witnesses in child proceedings, 'vulnerable adult complainants' in 'vulnerable adult proceedings', and 'special witnesses' where the court has made an order under section 15YAB(3) in 'special witness proceedings', where the court is satisfied that they are unable because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in that language.

Use of the term 'vulnerable'

- 11. We note the terms 'vulnerable person' and 'vulnerable adult complainant' are used in the Bill and similar language already exists in the *Crimes Act 1914* (Cth) and in some state/territory jurisdictions. We understand the intent is to provide legal protections for particular cohorts of people giving evidence in criminal proceedings.
- 12. It is important that language is strengths-based, focuses on accountability and is language with which a victim-survivor identifies. People are not vulnerable simply because, for example, their age, a cognitive impairment, or a traumatic experience; it is systems, structures, discrimination, and other barriers to equality, justice and safety that must be challenged.
- 13. We recommend removing the language of 'vulnerable person' and 'vulnerable adult complainant' from the Bill and the *Crimes Act 1914* (Cth). We believe all complainants in sexual violence proceedings should be able to access protections that seek to ensure they can give their best possible evidence and are not subjected to further trauma and harmful or distressing experiences, and this is in the public interest.
- 14. For the purposes of this submission, we refer to 'victim-survivor' instead of 'vulnerable person' or 'vulnerable adult complainant'.

Recommendation 1

Remove the language of 'vulnerable person' and 'vulnerable adult complainant' from the Bill and the *Crimes Act 1914* (Cth).

Expanding the circumstances where enhanced protections apply

- 15. We support the expansion of the list of proceedings for federal offences in section 15Y of the *Crimes Act 1914* (Cth) where special rules can apply for children, adult complainants, and special witnesses.
- 16. These changes increase the protections available to victim-survivors engaged in the criminal legal system for sexual violence relating proceedings, particularly women and children. For example, protections for complainants and witnesses will now apply to victim-survivors of a range of criminal offences in the *Crimes Act 1900* (ACT), including sexual offences, intimate

image abuse, female genital mutilation, or sexual servitude, where the offence was committed at sea or on an aircraft.

17. We note some of the federal offences to which the protections in Part IAD of the *Crimes Act 1914* (Cth) are extended do not necessarily involve sexual violence, although they may be crimes likely to involve sexual violence, such as war crimes and torture. For example, in 2008 the United Nations Security Council adopted resolution 1820 which noted that “rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide”.
18. In our view, the protections in Part IAD of the *Crimes Act 1914* (Cth) should apply to as many proceedings as possible to reduce the trauma and harm that is often caused to victim-survivors through engagement with criminal legal processes.

Making evidence about sexual reputation inadmissible

19. We strongly support evidence of sexual reputation being inadmissible in all circumstances.
20. We agree with the Explanatory Memorandum, which draws on comments made by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General in 1999, that evidence of this nature is too far removed from actual events or relevant facts for its admission to be in the interests of justice in any circumstances.

Increasing restrictions on evidence relating to a person’s sexual experience

21. It is our strong view that evidence of sexual experience should only be admissible in very limited circumstances. As noted by the Australian Law Reform Commission, the admission of sexual experience evidence can have the effect of re-traumatisation through humiliation and ‘victim-blaming’.
22. Evidence of a complainant’s sexual history is more likely to be admitted in proceedings concerned sexual offences perpetrated in a domestic and family violence or intimate partner context. The intersection between sexual assault and domestic and family violence is well established. Sexual assault is frequently an element of a broader pattern of coercive control, relationship dependence, power imbalance, and violence. Domestic and family violence can create a climate of entrenched fear which makes it difficult to facilitate or negotiate consensual sexual activity.
23. Whether a person has engaged in sexual activity over a long period of time in an intimate partner relationship, or whether it has been consented to previously, should not be relevant to whether sexual assault has occurred. Many of the women assisted by Women’s Legal Services have experienced sexual assault in the context of family violence. Allowing this evidence to be admitted reinforces misunderstandings or ‘rape myths’ that sexual assault is less likely to occur within a relationship context.
24. Sexual experience evidence being admissible also reinforces prejudices that jury members may hold about women who engage in sexual activity – that they be more likely to have consented because they have a certain reputation, disposition, or previous experience.
25. Evidence of sexual experience should not be admissible simply because it relates to sexual experience or activity (or lack thereof) that occurred between a complainant and a defendant.
26. The court should be required to give leave for a complainant’s experience with respect to sexual activities to be admitted, and the ability of the court to give leave should be limited to evidence that relates to sexual activity with a defendant that occurred or was recent at the time of the commission of the alleged offence and is substantially relevant to facts in issue in the

proceeding. We are concerned about the references to 'credibility' and 'false representation' in the Bill which can reinforce harmful stereotypes about victim-survivors of sexual violence.

27. The circumstances where the court may grant leave to admit evidence of sexual experience in proceedings for federal offences listed at section 15Y of the *Crimes Act 1914* (Cth) should not be broader than those that exist in section 294CB of the *Criminal Procedure Act 1986* (NSW).

Introducing evidence recording hearings

28. We support provisions to allow the evidence of children and adult complainants in sexual offence proceedings to be recorded, and to allow this evidence to be tendered in subsequent trials or retrials. Enabling victim-survivors to give evidence remotely is important to reduce trauma and enable a complainant to give the best possible evidence they can give, which is in the interests of justice.
29. In particular, we support the requirement at proposed section 15YDB(2)(c) that the court must take into account the circumstances and wishes of the victim-survivor when deciding whether to order an 'evidence recorded hearing' for the victim-survivor to give evidence.
30. Under proposed section 15YDE(2)(b), the court is required to take into account the availability of the prosecutor, the defendant and the defendant's legal representation, however the availability of the victim-survivor is not explicitly mentioned. We recommend that the court should also be required to take into account the availability of the victim-survivor so that their entitlements in the process are equivalent to those listed at section 15YDE(2)(b).
31. We support proposed section 15YDG which provides that if evidence given at an evidence recorded hearing is admitted in the proceeding, they do not need to give any further evidence unless the court orders this is necessary to clarify, give proper consideration of newly available information or material, or it is in the interests of justice. Given the trauma and harm associated with giving evidence, it is beneficial to limit the number of times victim-survivors are required to give evidence as much as possible.
32. We also note the clarification at proposed section 15YDB that evidence in chief may also include a recording of an earlier interview. In addition to evidence recorded hearings, victim-survivors should be able to rely on their police interview as their evidence in chief to reduce the trauma and harm associated with giving evidence in court. This is already provided for under section 15YM of the *Crimes Act 1914* (Cth).
33. We note there may be circumstances where a witness would prefer to participate in an evidence recorded hearing for their evidence in chief instead of relying on a recording of an earlier interview such as a police interview, and it is appropriate that the court considers these wishes when making an order.

Recommendation 2

Under proposed section 15YDE of the Bill, the court should be required to take into account the availability of child or adult complainant so their entitlements in the process are equivalent to those listed at section 15YDE(2)(b).

Special relationship witnesses

34. The *Evidence (Miscellaneous Provisions) Act 1991* (ACT) recognises a specific category of witness ("special relationship witness") that is entitled to have their police interview audio-

visually recorded and relied on as evidence in chief at trial – they are also entitled to give evidence at a pre-trial hearing.

35. A special relationship witness in a sexual offence proceeding involving a child complainant is defined as a witness who is a close family member of the complainant; or the court considers has a beneficial supporting relationship with the complainant in the proceeding; and will be able to provide emotional support for the complainant after the proceeding; or in a serious violent offence proceeding involving the death of a person—a witness who is a close friend or family member of the person. This category of person was introduced as a direct response to the Royal Commission into Institutional Responses to Child Sexual Abuse.
36. The benefit of these ACT provisions is the witness can give evidence at the same time as the child complainant, before the trial, and can then openly and fully support them in the lead up to the trial without the concern and complications of having their evidence outstanding.
37. We recommend consideration of whether the Bill should apply the evidence recorded hearing provisions to special relationship witnesses. Consideration should also be given to extending this to section 15YM, so that the special relationship witness can have their police interview audio-visually recorded and played as their evidence in chief.
38. It is arguable that a special relationship witness could classify as a 'special witness' under section 15YAB – that is, they are unlikely to be able to satisfactorily give evidence in the ordinary manner because of emotional trauma arising from 'some other relevant factor' – their relationship to the child complainant. However, for consistency in approach, specific provision for special relationship witnesses may be more appropriate.

Recommendation 3

Consider whether the Bill should apply the evidence recorded hearing provisions to 'special relationship witnesses' as defined in the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).

Clarifying self-publication provisions

39. We support provisions to allow victim-survivors to speak about their experiences if they choose to do so.
40. A balance must be struck between empowering victim-survivors to share their stories, and the need to protect the privacy of victim-survivors where they do not wish for their experiences to be made public. There is a real risk that being identified by name or image, or having family members or others identified, acts as a disincentive to engage with the criminal legal system or participate in legal proceedings.

Providing the right to an interpreter

41. We support proposed new section 15YOA in the *Crimes Act 1914* (Cth) to provide the right to an interpreter for child witnesses in child proceedings, 'vulnerable adult complainants' in 'vulnerable adult proceedings', and 'special witnesses' where the court has made an order under section 15YAB(3) in 'special witness proceedings', where the court is satisfied that they are unable because of inadequate knowledge of the English language or a physical disability, to communicate orally with reasonable fluency in that language.

42. Each year Women's Legal Services nationally assist thousands of women from culturally and linguistically diverse backgrounds who have been sexually assaulted or raped, often by an intimate partner or former partner. Migrant women who experience violence face additional barriers to reporting violence to police and engaging with the criminal legal system, including their temporary visa status, lack of access to services and supports, and language barriers.
43. This reform is an important step towards reducing the barriers for culturally and linguistically diverse people who engage with the criminal legal system.
44. We note this protection explicitly refers to 'physical' disability and therefore does not cover a range of other types of disability. We recommend removing the word 'physical' from proposed new section 15YOA to be more inclusive of people with disabilities who should have access to an interpreter.

Recommendation 4

Remove the word 'physical' from proposed new section 15YOA of the Bill to be more inclusive of people with disabilities.

Additional reforms to improve criminal legal responses to sexual violence

45. There are a range of additional reforms needed to improve criminal legal responses to sexual violence across Australia. This submission is not intended to be an exhaustive list of these reforms noting the current Australian Law Reform Commission's inquiry into justice responses to sexual violence, however we make recommendations in relation to a few key reforms below.
46. For further reforms to improve responses to sexual violence please see Women's Legal Services Australia's submissions to the Attorney-General's Department's consultation on 'specialised and trauma-informed legal services pilot for victims and survivors of sexual assault; and the Senate Constitutional and Legal Affairs Committee inquiry into 'current and proposed sexual consent laws in Australia'.

Ground rules hearings and intermediaries

47. In the process of consulting on these reforms, the Attorney-General's Department has sought feedback on ground rules hearings and witness intermediaries. This Bill does not include reforms to allow for ground rules hearings. We understand this decision was made on the basis that a witness intermediary scheme is needed to support victim-survivors engaged in those processes, and the department is engaging in a scoping study early this year to inform the consideration of a Commonwealth witness intermediary scheme.
48. We note additional funding would be needed to establish a new Commonwealth witness intermediary scheme.
49. In our experience, there is often a conflict between the interests of the prosecutor and the victim-survivor, and there is a need for a victim-survivor to have their own independent advocate who can act on their behalf in ground rules hearings. Intermediary schemes lead to better outcomes

for victim-survivors, for example the Victorian Law Reform Commission noted the benefits of the Victorian intermediaries pilot in their report on improving the response to sexual offences.

50. We recommend the Commonwealth Government commit to establishing a witness intermediary scheme following completion of the scoping study.
51. We recommend making independent legal representation available to the victim-survivor as an alternative to an intermediary, or in addition to an intermediary, to ensure their legal rights and entitlements are pursued appropriately.

Recommendation 5

The Commonwealth Government should commit to establishing a witness intermediary scheme and make further amendments to the *Crimes Act 1914* (Cth) to provide for ground rules hearings.

Improper, inappropriate, or aggressive questioning

52. Despite the court's power to disallow inappropriate or aggressive cross-examination under section 15YE of the *Crimes Act 1914* (Cth) and improper questions under section 41 of the *Evidence Act 1995* (Cth), it is our experience that improper questions are regularly asked of complainants and are not always challenged by lawyers and judges.
53. We recommend consideration of further reforms to address issues and strengthen provisions in the *Crimes Act 1914* (Cth) and the *Evidence Act 1995* (Cth) in relation to victim-survivors of domestic, family, or sexual violence being subjected to improper, inappropriate, or aggressive questioning.

Recommendation 6

Consider further reforms to strengthen protections against improper, inappropriate, or aggressive cross-examination in the *Crimes Act 1914* (Cth) and the *Evidence Act 1995* (Cth).

Ban on personal cross-examination by the accused

54. Under section 15YG of the *Crimes Act 1914* (Cth) the court can give leave for an unrepresented defendant to cross-examine a 'vulnerable person'.
55. The failure to provide adequate protections and safeguards for complainants and witnesses, particularly during cross-examination, is a significant barrier to victim-survivors reporting sexual, domestic, and family violence and abuse, and engaging in criminal legal processes.
56. In 2010, the Australian Law Reform Commission recommended that federal, state and territory legislation prohibit an unrepresented defendant from personally cross-examining any complainant, child witness or other 'vulnerable witness' in sexual assault proceedings; and provide that an unrepresented defendant be permitted to cross-examine the complainant through a person appointed by the court to ask questions on behalf of the defendant. Many state/territory jurisdictions have already implemented this reform.

57. 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.
58. We recommend reform to the *Crimes Act 1914* (Cth) to ban cross-examination of a victim-survivor by an accused by removing the power of the court to give leave.

Recommendation 7

Amend the *Crimes Act 1914* (Cth) to completely ban personal cross-examination of a victim-survivor by the accused.

Independent legal representation

59. Independent legal representation for sexual assault complainants in criminal trials would support better outcomes and contribute to ensuring that the stronger legislative protections for victim-survivors in this Bill are appropriately utilised and effective.
60. Independent legal representation can ensure that complainants are aware of their substantive legal entitlements in federal offence proceedings, such as opportunities to share their wishes with the court in relation to evidence recorded hearings, make a victim impact statement, rights to an interpreter, rights to not be subjected to inappropriate or aggressive cross-examination, and rights to not have evidence about their sexual reputation admitted. This will ultimately lead to better experiences for victim-survivors as they navigate the system and understand the options and protections available to them.
61. Women's Legal Services are well placed to provide specialist, gender-led legal assistance to victim-survivors of sexual violence as they navigate the criminal legal system and engage with the reforms in this Bill. Our services can assist victim-survivors to pursue their rights and entitlements under the *Crimes Act 1914* (Cth), identify and pursue alternative avenues such as financial compensation, and to address their intersecting legal problems in other areas such as family violence, family law or migration law.
62. We were pleased \$8.4 million over three years was allocated in the October 2022 Budget for a pilot to provide victim-survivors of sexual assault with greater access to dedicated legal services to support their recovery and engagement with the criminal legal system. Women's Legal Centre ACT and Women's Legal Service WA were the successful recipients of this pilot funding, and Women's Legal Service Victoria will be partnering on the pilot in Victoria.
63. We recommend the sexual assault legal services pilot is expanded across the country to test different models in each jurisdiction, allow all victim-survivors to have access to legal assistance, and enable all Women's Legal Services to provide services to victim-survivors of sexual violence to support their recovery and engagement with the criminal legal system and alternative avenues.

Recommendation 8

The Commonwealth Government should provide an additional \$4.6 million per year (plus indexation) to Women's Legal Services to establish pilot sites in every jurisdiction across Australia for trauma-informed legal assistance for victim-survivors of sexual assault.

Endorsements

This submission is endorsed by the following organisations:

- All 13 Women's Legal Services across Australia
- Aboriginal Family Legal Service WA
- Associate Professor Mary Iliadis, co-founder and co-convenor of the Deakin Network Against Gendered Violence, Deakin University
- Australian Women Against Violence Alliance
- Body Safety Australia
- Canberra Rape Crisis Centre
- Community Legal Centres Australia
- Community Legal Centres NSW
- Domestic Violence Crisis Service (ACT)
- Domestic Violence NSW
- Federation of Community Legal Centres Victoria
- Full Stop Australia
- Immigrant Women's SpeakOut
- InTouch Multicultural Centre Against Family Violence
- Melaleuca Australia
- National Aboriginal and Torres Strait Islander Women Alliance
- National Foundation for Australian Women
- National Rural Women's Coalition
- National Women's Safety Alliance
- No to Violence
- Older Women's Network NSW
- Ruah Legal Services (WA)
- Phoenix Support & Advocacy Service (WA)
- Senior Rights Service (NSW)
- Waratah
- WESNET
- Western NSW Community Legal Centre
- Western Women's Legal Support
- Women's Health NSW