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The National Family Violence Prevention Legal Services Forum submission to the Senate Legal and Constitutional Affairs Committee regarding the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024

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Executive summary

The National Family Violence Prevention and Legal Services Forum (the National Forum) welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Committee regarding the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024.

This submission focuses on the anticipated impacts of these amendments on those experiencing family violence, specifically where they relate to Aboriginal and Torres Strait Islander people.

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About the National Family Violence Prevention Legal Services Forum

The National Forum was established in May 2012 and is the National Peak Body for Family Violence Prevention Services (FVPLS) around Australia that provides culturally safe and holistic services to First Nations people affected by family violence – predominantly women and their children. The National Forum provides expert national advice in areas of policy, planning and law reform, and advocates for safety and justice for First Nations people affected by family violence.

The National Forum represents 13-member Family Violence Prevention Legal Services (FVPLS) across Australia that provide culturally safe and specialist legal and non-legal assistance and support to Aboriginal and Torres Strait Islander victim-survivors of family violence – predominately women and children. The national forum members are:

- Aboriginal Family Law Service Western Australia (Perth Head Office, Broome, Carnarvon, Kununnura, Geraldton, Kalgoorlie, Port Hedland)
- Aboriginal Family Legal Service Southern Queensland (Roma)
- Binaal Billa Family Violence Prevention Legal Service (Forbes)
- Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (Alice Springs Head Office, Tennant Creek)
- Djirra – formerly Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne Head Office, Mildura, Gippsland, Barwon South-West, Bendigo and shortly also Echuca-Shepparton, La Trobe Valley and Ballarat)

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- Family Violence Legal Service Aboriginal Corporation (Port Augusta Head Office, Ceduna, Pt Lincoln)
- Many Rivers Family Violence Prevention Legal Service (Kempsey)
- Marninwarnitkura Family Violence Prevention Unit WA (Fitzroy Crossing)
- Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service (Alice Springs, NPY Tri-state Region)
- Queensland Indigenous Family Violence Legal Service (Cairns Head Office, Townsville, Rockhampton, Mount Isa, Brisbane)
- Thiyama-li Family Violence Service Inc. NSW (Moree Head Office, Bourke, Walgett)
- Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
- North Australian Aboriginal Family Legal Service (Darwin Head Office, Katherine)

The National Forum works with its members, communities, governments, and other partners to raise awareness about family violence effecting First Nations people, and it also advocates for culturally safe legal and holistic responses to this issue. The National Forum provides a unified voice for its FVPLS members in areas of national policy, planning and law reform, and being a member of the national Coalition of Peaks. The National Forum is committed to the national Closing the Gap targets.

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Our work is informed by evidence, and we aim to influence government policy, to advocate for First Nations people affected by family violence, and to advance the goals of the FVPLS sector.

The National Family Violence Prevention Legal Services Forum submission

The National Forum thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to provide this submission in response to the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024.

The prevalence of sexual and family violence within Aboriginal and Torres Strait Islander communities in Australia is significantly high, reflecting deep-rooted societal and systemic issues. According to data, two-thirds (67%) of First Nations people aged 15 and over who experienced physical harm in the last 12 months reported the perpetrator was an intimate partner or family member. Furthermore, almost three-quarters (74%) of assault hospitalizations involving First Nations people were attributed to family violence. These statistics underscore the overrepresentation of Aboriginal and Torres Strait Islander individuals as both victims and perpetrators of family and domestic violence, a term which within First Nations communities encompasses violence occurring within extended families, kinship networks, and community relationships.

From 2002 National Aboriginal and Torres Strait Islander Social Survey data, about one in four Indigenous Australians aged 15 years or over reported being a victim of

physical or threatened violence in the twelve months prior to the survey. Factors associated with higher rates of violence included being young, having been removed from their natural families, having a disability, experiencing a high number of stressors, living in low-income households, and unemployment. Indigenous Australians were more than twice as likely to be victims of physical or threatened violence compared to the non-Indigenous population. Additionally, while rates of experiencing violence were similar in major cities and remote areas, individuals in remote areas were significantly more likely to report family violence as a neighbourhood problem.

In 2003-04, there were 4,500 hospitalizations due to assault among Indigenous Australians in certain regions, with Indigenous females and males being 35 and 22 times more likely, respectively, to be hospitalized due to family violence-related assaults compared to their non-Indigenous counterparts. For Indigenous females, half of the hospitalizations for assault were related to family violence, predominantly due to spouse or partner violence.

Taken together, the impact of sexual assault on Aboriginal and Torres Strait Islander individuals, their families, and communities can be profoundly detrimental, with effects that accumulate and persist over time. We note that the proposed Bill seeks to enhance safeguards for individuals at risk in legal processes by:

- Broadening the categories of offences where specific protocols apply to proceedings involving children and vulnerable adults under Part IAD of the Crimes Act, aiming for a more thorough protection. This extension covers

crimes against humanity, war crimes, and offenses involving drugs and children;

- Prohibiting the use of evidence related to the sexual reputation of a vulnerable adult in legal proceedings concerning them;
- Limiting the use of evidence regarding the sexual history of vulnerable adult complainants, requiring judicial permission based on its significant relevance to the case and assessing if its informative value justifies the potential discomfort it may cause to the vulnerable individual;
- Authorizing courts, upon determining it serves justice, to command a session to record a vulnerable individual's testimony, with guidelines on conducting such a session;
- Mandating the recording of all testimonies from vulnerable individuals, whether during cross-examination or initial testimony, outside of a recording session, to allow for its use in subsequent legal actions, aiming to reduce the distress from repeated testimonies on the same issue; and
- Explaining that existing restrictions against publishing information that could identify a child witness, child complainant, or vulnerable adult complainant do not hinder a vulnerable individual from sharing their identity or allows others to do so with their informed consent, simplifying the process for publishing such identifying details.

We note further that the Bill supports Target 13 of the National Agreement on Closing the Gap, and acts on recommendations 52, 53, 56, and 61 from the 2017 Royal Commission's Final Report on Institutional Responses to Child Sexual Abuse. It also

contributes to the objectives of the Aboriginal and Torres Strait Islander First Action Plan 2023-2026, the National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030, specifically under Theme 2 of the First National Action Plan, which aims to provide support and empowerment to victims and survivors, acknowledging the profound, multifaceted, and enduring impact of child sexual abuse. In line with the National Strategy, it bolsters the current legal protections for victims, survivors, and witnesses in cases related to child sexual abuse within the realm of Commonwealth offences. Furthermore, the legislation aligns with the objectives set out in the Standing Council of Attorneys-General's Work Plan for 2022-2027 to enhance criminal justice responses to sexual assault, thereby improving the legal framework to ensure better justice outcomes and protection for victims and survivors.

We note further that the focus of the amendments rightly considers sexual violence and prescribes legislative mechanisms in consideration of this. Whilst this is a commendable direction and principled approach to ensuring a just and equitable criminal law system that supports the safety of women, children who experience sexual violence, we note that amendments must the circumstances and experience of violence encountered by Aboriginal and Torres Strait Islander communities is unique, and amendments must reflect this. Our submission focuses on specific revisions, and where appropriate, articulate further considerations as they relate to Aboriginal and Torres Strait Islander people.

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AMENDMENTS TO ENHANCING PROTECTIONS FOR VULNERABLE PERSONS

15Y(1)(cad)

We note this provision modifies section 15Y(1) to broaden the scope of special rules that safeguard vulnerable individuals participating in legal processes, and that it does so by incorporating offenses related to the torture of children as outlined in Division 274 of the Criminal Code (section 15Y(1)(cae)) and drug-related offenses involving children as per Division 309 of the Criminal Code (section 15Y(1)(caf)). We agree with this amendment and consider that this revision enhances the protection of vulnerable parties by acknowledging a wider array of crimes within the Criminal Code that could implicate children and other vulnerable individuals.

15Y(1)(cba)

We note that this provision revises section 15(1) to extend the conditions under which the specific regulations for proceedings involving children, as set out in Part IIIA of the Act, are applicable. We consider that this amendment enhances the protection of vulnerable individuals by acknowledging the wider variety of offences within other Commonwealth legislation that could involve children and vulnerable persons.

15Y(2)(a)

We note this item inserts new ss 15Y(2)(aa) and 15Y(2)(ab) which set out additional offences to which special rules for adult complainants involved in proceedings as set out in s 15Y(2) apply. We agree with this amendment as it expands the circumstances in which special rules protecting vulnerable adult complainants apply, therefore protecting vulnerable adults.

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15Y(2)(b)

We note that this item introduces new sections 15Y(2)(ba) to 15Y(2)(bl), outlining additional offences that trigger the application of special rules for adult complainants engaged in legal proceedings as delineated in section 15Y(2) of the Act. These further offences encompass: child sex offences committed abroad as specified in Division 272 of the Criminal Code. We agree with this amendment and consider that it enhances the protection of vulnerable individuals more thoroughly by broadening the condition under which special regulations safeguarding vulnerable adult complainants are applied.

15YA

We note that the revisions set out in this section updates the glossary in section 15YA by replacing the current definition of 'child complainant'. The modification broadens the term as defined in section 15YA of the Act to encompass any individual purported to be a victim of a crime who was a minor at the moment the crime was supposedly committed, regardless of whether the individual is still a minor at the time of the legal proceedings. In addition, we note that this change updates the glossary in section 15YA by altering the definition of 'child witness'. The adjustment extends the definition to cover a witness in the legal proceedings who was a minor at the time the alleged offence took place.

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We agree with these revisions and consider that these revisions bolster the safeguards for vulnerable individuals serving as complainants and/or witnesses in criminal cases by extending the protections under the Crimes Act to those who were minors at the time the alleged crime occurred.

Further, we note that these revisions introduces a new term, 'evidence recording hearing,' into the glossary under section 15YA, that allows vulnerable individuals to submit their testimony in recorded form. We agree with this approach, and consider that it will diminish the likelihood of re-traumatisation by avoiding the need for vulnerable persons to give their evidence repeatedly.

15YB

We note that section 15YB modifies the title of section 15YB to append "child proceedings" at its conclusion. It delineates that section 15YB of the Crimes Act pertains to the evidence of sexual reputation in cases involving children, thus enhancing the clarity of the section's application. In addition, we note further that the revision to subsection 15YB(1) omit the words ‘unless the court gives leave’. Further, this revision also abolishes sections 15YB(2), 15YB(3), 15YB(4), and 15YB(5), which outlined the conditions under which the court was authorised to consider evidence of a child witness or child complainant's sexual reputation. We agree with these revisions as these revisions restrict the acceptance of evidence regarding sexual reputation in child proceedings, aiding in the effort to minimise re-traumatisation of witnesses in such cases. We further believe that because the court is no longer afforded the discretion to permit evidence concerning a child witness or child complainant’s sexual reputation, these subsections have become redundant.

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15YC

We note that the revisions amend section 15YC(1)(a) implies that both criteria of section 15YC(1) must be fulfilled to decide the admissibility of evidence regarding a child's sexual experience. In practice, this will mean that a party is required to obtain the court's permission for such evidence to be presented, and the evidence must be connected to sexual activities involving the child witness or child complainant and the defendant in the case. In addition, we note that revisions modify section 15YC(1) by incorporating a new section 15YC(1)(c), mandating that, for the court to consider the admissibility of evidence pertaining to sexual experience in a case involving a child, it must be convinced that the sexual activity with the defendant in the case was ongoing or had recently occurred at the time the alleged offence was committed.

Collectively, we consider that these modifications fortify the criteria applied by the court in evaluating the admissibility of evidence concerning a child's sexual history. The incorporation of extra factors and the elevation of the threshold for the admissibility of such evidence diminish the likelihood of re-traumatising the vulnerable individual by guaranteeing that such evidence is only permissible when there is a substantial connection to the issue at hand, affording greater protections to the child. Specifically, in relation to Aboriginal and Torres Strait Islander children, we believe these revisions will provide a safer environment for Aboriginal and Torres Strait Islander children to give evidence, encouraging their participation in the legal process.

We believe further that by granting courts the discretion to determine the admissibility of sensitive evidence, judges are empowered to act in the best interests of vulnerable witnesses, including Aboriginal and Torres Strait Islander children.

Division 2 of Part IAD

We note that a new Division 2A will be introduced, named 'Evidence recording hearings' following Division 2 Part IAD. We note further that this change enacts a crucial aspect of Theme 2 of the National Strategy and responds to recommendations 52, 53, 56, and 61 from the Royal Commission's Report.

15YDB

We note that the revisions introduce section 15YDB, entitled 'Evidence recording hearings', grants the court the authority to mandate evidence recording sessions wherein a vulnerable individual may document their testimony. We note further that a court may issue such an order at any stage during proceedings involving a vulnerable person. We agree with these revisions and consider that these will minimise the frequency with which a vulnerable person might need to testify, protecting them against re-traumatisation. Critically however, we note that the court is not compelled to proceed with the order should there be a lack of available equipment or any other factor leading the court to conclude that such a session would not serve the interests of justice. We consider the potential lack of available equipment to be a barrier for Aboriginal and Torres Strait Islander individuals who live in rural, remote, and very remote areas, and that this barrier to access must be balanced with experiences of re-traumatisation. Specifically we consider that:

- if there is no easy access to the necessary technology, it could prevent the use of evidence recording sessions, thus requiring vulnerable individuals to give live testimony, possibly leading to increased stress and trauma.
- remote and rural areas often face challenges related to infrastructure, including reliable internet connectivity, which is essential for digital recordings or live video links. These technical limitations could be deemed a valid reason by the court for not ordering evidence recording session, leaving vulnerable witnesses with no choice but to attend court in person.
- if evidence recording is not available locally due to equipment or infrastructure constraints, individuals from remote areas might have to travel to urban centres to record their evidence or attend court proceedings. This can impose significant logistical challenges, financial costs, and emotional strain on vulnerable persons and their families.
- the lack of an obligation for the court to order evidence recording sessions, combined with the potential unavailability of equipment, could lead to delays in the legal process. This might prolong the period of uncertainty and stress for the individuals involved, exacerbating the impacts of their vulnerability.

15YDC

We note that the revisions insert a new section15YDC titled 'Arrangements for persons at the hearing', which sets out the requirements for how evidence recording hearings are to be conducted. We consider that subsection 15YDC(2) maintains procedural fairness by ensuring the defendant has the chance to observe the evidence recording

hearing, similar to their rights in a standard hearing. We note that this change aims to fulfil recommendation 61 from the Royal Commission's Report, which advocates for the capacity of vulnerable individuals to present evidence through CCTV. Beyond this, we note that the court has the autonomy to decide who is permitted to be present at the evidence recording session. For instance, the court may judge that the presence of a support individual, or a mental health specialist is necessary. While we note that this measure aims to fulfil recommendation 61 from the Royal Commission's Report, advocating for vulnerable individuals to receive support while providing testimony during evidence recording hearing, we also believe that in deciding who is permitted to be present at the evidence recording session of an Aboriginal and Torres Strait Islander individual, the court should prioritise cultural safety and have regard for cultural considerations.

15YDD

We note that section 15YDD(1) mandates that recorded evidence should be either audio or audio-visual. We consider that this empowers vulnerable individuals by providing them with choice: vulnerable individuals can choose not to be captured on video during evidence recording hearing, and can instead choose to be recorded through audio. Indeed, given that the trauma experienced by some vulnerable individuals is specifically linked to being video recorded, we consider that broadening the range of admissible recordings in an evidence recording hearing, accommodates the diverse needs of victims and survivors protecting them against re-traumatisation.

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15YDG

We note that section 15YDG(1) states that if a vulnerable individual provides testimony in an evidence recording hearing, they are not be required to offer additional evidence unless the court deems it necessary for the purposes of clarifying or thoroughly evaluating the evidence, or if it serves the interests of justice. We note further that this includes any further testimony that could otherwise be presented during examination-in-chief, cross-examination, or re-examination. We agree with this revision and consider that it will prevent vulnerable individuals from having to give evidence beyond what was provided in an evidence recording hearing, unless specific conditions justify the need for further testimony, and the court is convinced that such conditions exist.

Whilst we recognise and endorse the aim of evidence recording hearings to mitigate the risk of re-traumatisation for vulnerable adults and children, we consider that further clarity is needed regarding how the proposed subsection 15YDG(1) might influence the rights of the accused to thoroughly challenge the evidence and material presented against them at trial, which is fundamental for addressing the case made against them. The potential impact of proposed subsection 15YDG(1) on the rights of the accused to fully challenge evidence at trial raises particular concerns for Aboriginal and Torres Strait Islander individuals due to several factors:

- Aboriginal and Torres Strait Islander individuals often face cultural and linguistic barriers in legal settings. Restrictions on the ability to challenge evidence could exacerbate these challenges, particularly if the nuances of their testimony or the testimony against them are not fully understood or explored due to limited cross-examination opportunities.

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- Aboriginal and Torres Strait Islander people are significantly overrepresented in the criminal justice system. Measures that could potentially limit the accused's ability to challenge evidence might disproportionately impact these communities, contributing to further disparities in legal outcomes.
- Given the complex interplay of cultural, socio-economic, and historical factors that affect Aboriginal and Torres Strait Islander individuals in the legal system, there is a heightened risk of miscarriages of justice. Any impediment to thoroughly testing the evidence could increase this risk.

15YLA

We note that this revision introduces section 15YLA, entitled 'Recording of evidence given in person', at the conclusion of Division 4 of Part IAD. We note further that the articulated aim of section 15YLA is to delineate the scenarios in which testimony provided by any individual to whom this section is applicable, as detailed in subsection 2, must be documented. We consider that section 15YLA responds to recommendation 56 of the Royal Commission's Report, which suggested that jurisdictions permit the documentation of evidence, regardless of the method of delivery, and for the employment of this recorded evidence in later proceedings. We consider further that this will decrease the occasions on which a vulnerable individual is required to relay potentially distressing details.

Further to this, we note that subsection 15YLA(1) specifies the conditions under which a court is obliged to dictate that testimony given in person by a pertinent individual be recorded, and we note that one such condition is that the individual offering the testimony consents to be recorded. Given the communication and literacy complexities

experienced by Aboriginal and Torres Strait Islander communities, we consider it imperative that the provision of informed consent is supported through the use of clear, accessible language and the avoidance legal jargon. We consider further that it may be necessary to provide information both verbally and in written form, ensuring that the individual fully understands what recording their testimony entails, and how it will be used.

Subsection 15YO(1)

We note that this revision modifies section 15YO(1) by adding 'or at an evidence recording hearing' following 'proceeding'. This revision broadens the scenarios in which an adult may accompany a vulnerable individual, extending this provision to encompass evidence recording hearings. We agree with this amendment and consider that it will minimise the adverse psychological effects associated with giving testimony about past trauma. We note further that this development supports Theme 2 of the National Action Plan and responds to recommendation 61 of the Royal Commission's Report, which calls for the provision of support to vulnerable individuals during evidence recording hearings. Critically, we once again note that where an adult accompanies a vulnerable individual, there should be regard for cultural safety and cultural considerations.

15YO

We note that the amendments introduce a new section 15YOA, titled 'Right to interpreter'. We consider that this will enable vulnerable individuals to access the necessary support to comprehend and actively participate in legal proceedings, thus enhancing the equity of the legal process by aiding all involved parties in

understanding and engaging with the court procedures. We note further that subsection 15YO(1) mandates that the court must provide an interpreter for proceedings involving a vulnerable person to facilitate their comprehension and involvement in the process. Subsection 15YOA(2) defines the range of individuals entitled to an interpreter, including child witnesses (in child-related proceedings), vulnerable adult complainants (in proceedings concerning vulnerable adults), and special witnesses. Once again, we reiterate the communication and literacy complexities experienced by Aboriginal and Torres Strait Islander communities, and consider that interpretation supports should be provided to Aboriginal and Torres Strait Islander individuals even if they are not considered by the court to be child witnesses, vulnerable adult complainants, and special witnesses. In addition, we consider that interpreter supports should be culturally safe and have regard for cultural considerations, and language nuances.

15YR(1)(c)

We note that subsection 15YR(1) of the Crimes Act stipulates that it is an offence for anyone to disseminate any content that identifies, or is likely to identify, a vulnerable individual involved in a proceeding as a child witness, child complainant, or vulnerable adult complainant, without court permission, especially if the individual identified is not a defendant in the case. We note further that the amendments revise subsection 15YR(2) to introduce new specific defences to the offence detailed in subsection 15YR(1), stipulating that the offence does not apply if:

- the dissemination occurs within an official publication for the purposes of the proceeding;

- the content is part of a document created for use in specific legal proceedings;
- the vulnerable individual has passed away (as suggested in paragraph;
- for a vulnerable adult, they have provided informed consent for the dissemination in line with subsection 15YR(2A), the content is shared within the boundaries set by the vulnerable individual, and they were capable of giving consent at that time;
- for a vulnerable child, they have provided informed consent for the dissemination, the content is shared within the limits set by the vulnerable individual, and the consent was given along with a supportive statement as outlined in subsection (2B).

The amendments also clarify that the evidential burden of proof is reversed for these defences.

Traditionally, the prosecution is responsible for proving all elements of an offence, a fundamental part of the principle that one is presumed innocent until proven guilty. Reversing the burden of proof, requiring the defendant to disprove or provide evidence against one or more elements of the offence, challenges this foundational legal right. We echo the observation made by the Committee for the Scrutiny of Bills that the Guide to Framing Commonwealth Offences recommends that a matter should only form part of a specific defence to an offence (rather than an element of the offence itself) if:

- it is specifically within the defendant's knowledge; and

- disproving the matter would be considerably more challenging and expensive for the prosecution than for the defendant to prove the matter.

Concerning the defence in proposed paragraph 15YR(2)(a), it remains uncertain how the status of something as an official publication during the proceedings could uniquely fall within the defendant's knowledge, considering such publications ought to be public. Further, regarding the defence in proposed paragraph 15YR(2)(b), we again echo the observation made by the Committee for the Scrutiny of Bills that a document intended for legal proceedings should be accessible to the relevant court and involved parties, further mentioning that this defence is not exclusively applicable to documents under legal professional privilege. Therefore, it's ambiguous how such details would uniquely reside within a defendant's knowledge.

In addition, the defence outlined in proposed paragraph 15YR(2)(d) necessitates that the individual granting consent comprehends the implications of their consent. We consider that a defendant is not the most qualified to attest to someone else's cognitive process and mental state at a given time. Indeed, as articulated by the Committee for the Scrutiny of Bills, the obligation for a defendant to show that they received consent differs from proving another individual's mental state at a certain moment.

Finally, regarding the defence in proposed paragraph 15YR(2)(e), the determination of whether a child or vulnerable individual has provided informed consent is guided by criteria set out in proposed subsection 15YR(2A), which calls for written evidence from a medical or mental health professional. Such documentation should be readily accessible to the prosecution, and we consider that this is a more robust indication of

the child vulnerable person's mental state than any testimony a non-specialist defendant could offer.

Taken together, we consider that in its current articulation, the legal defences could have several adverse consequences on Aboriginal and Torres Strait Islander defendants, particularly in the context of evidential burden and the dynamics of proving consent or the deceased status of a person. These impacts include that:

- Aboriginal and Torres Strait Islander defendants may have limited access to legal and financial resources, making it challenging to obtain the necessary evidence to fulfill the evidential burden placed upon them. This includes securing documentation or expert testimony regarding someone's consent or deceased status.
- the requirement to prove specific mental states or conditions, such as understanding consent, can be particularly challenging for defendants facing cultural and linguistic barriers. This may hinder their ability to adequately convey or dispute nuances of consent.

End notes

The national forum thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to provide this submission. Please contact Priya Devendran, **Senior Policy Officer,** National **Family Violence Prevention and Legal Service Forum**