Law Council
OF AUSTRALIA

Office of the President

19 April 2024

Senator Nita Green
Chair, Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator Green

Response to questions on notice: Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024

The Law Council appreciated the opportunity to appear before the Senate Legal and Constitutional Affairs Committee on 12 April 2024, to give evidence about the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (**the Bill**). The purpose of this supplementary submission is to address the following three matters that the Law Council took on notice at the public hearing:

1. the prospect of legal standing and/or representation for a complainant in proceedings listed in Part IAD of the *Crimes Act 1914* (Cth), especially in relation to questions of leave to adduce evidence of sexual experience;
2. suggested amendments to address concerns about audio-only evidence being adduced as evidence-in-chief; and
3. the availability of empirical evidence as to how often evidence of sexual experience is adduced by prosecutors as opposed to the defendant in proceedings under Part IAD.

Question 1: Standing/representation for complainants in criminal proceedings

The Deputy Chair of the Committee, Senator Scarr, asked the following question of the Law Council's representative, Mr Phillip Boulten SC:

> ***Senator Scarr****: How do you respond to the argument that the court needs to consider not just the question of the evidence that is provided, but in this particular context it goes to the heart of the issue as to the impact on the victim-survivor themselves? Putting the argument for the benefit of your response, how can the victim-survivor be appropriately heard unless they have a representative, noting that the Crown is representing the state not the victim-survivor? How can their voice be appropriately heard unless they have a legal representative who is actually going to tender evidence as to the impact of a process on the victim-survivor themselves? How do you respond to that argument?*
>
> ***Mr Boulten****: I have two responses. The first is, at the moment, that sort of evidence is adduced by the prosecutor on these applications. In New South Wales there is a need for the judge to consider the humiliation, embarrassment and trauma that the evidence might cause to the victim. Prosecutors are quite proactive in putting that sort of material before the courts at the moment. The second thing that I would say is that if there was to be some sort of amendments to the normal laws about these issues, then you could craft it so as to allow the victim to be*

Telephone +61 2 6246 3788 • *Email* mail@lawcouncil.au
PO Box 5350, Braddon ACT 2612 • Level 1, MODE3, 24 Lonsdale Street, Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

able to introduce material that goes to those issues, but leave it up to the parties to argue about how that impacts on an assessment about admissibility.

***Senator Scarr**: So, there's potentially a halfway house?*

***Mr Boulten**: There might be.*

***Senator Scarr**: Mr Boulten, would you mind taking that on notice?*

***Mr Boulten**: I certainly will. We haven't got a concluded view on this at the Law Council at the moment.*

A similar question was also directed to the Law Council by Senator Ghosh later in the public hearing,[1] and was a key area of focus for many submitters to the inquiry.

The Law Council supports consideration of measures that provide vulnerable witnesses, including victims and survivors of sexual assault, with full and supported access to the justice system, including through specialist and trauma informed legal assistance.

As was noted in the hearing, the issue of legal standing and representation for complainants in substantive criminal proceedings would be a significant shift in the Australian criminal justice system. It is not without precedent, since complainants are routinely represented in New South Wales on applications for the issuing of subpoenas, and about access to and the admissibility of materials the subject of sexual assault communications privilege.[2] The Law Council supports consideration of reforms to permit representation of complainants at procedural hearings, in the absence of the jury, in relation to the admissibility of certain types of evidence about the complainant. However, attention should be paid to the impact of such reforms on all parties to proceedings, especially in relation to the roles and functions of the prosecution and judiciary in such matters, and the broader administration of justice—especially if representation is to go beyond that context.

The Law Council is aware of calls for reforms that will allow complainants to have a more active role in the criminal justice system, including through standalone legal representation in all or part of proceedings.[3] Importantly, the Terms of Reference for the current Australian Law Reform Commission (**ALRC**) inquiry into justice responses to sexual violence includes consideration of laws and frameworks about evidence and court procedures, as well as supports available to people who have experienced sexual violence right, through to the conclusion of formal justice system processes.

The Law Council will consider these issues in the context of the ALRC review. We remain of the view that this is the most appropriate forum (rather than in the narrow context of the Bill) in which to engage with holistic structural questions that have potentially significant implications for proceedings at the Commonwealth, State and Territory levels.

Question 2: Audio-only recordings

Audi-only recordings at evidence-recording hearings

The Law Council supports reasonable and proportionate adjustments to court processes to enable complainants to give their best evidence. To this end, measures directed towards promoting the rights of victim-survivors are welcome. However, these must be carefully balanced with the right of an accused to a fair trial.

[1] Senate Legal and Constitutional Affairs Committee, Inquiry into the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, (Hansard, 12 April 2024) 26-27.
[2] See Ch 6 Pt 5 Div 2 *Criminal Procedure Act 1986* (NSW).
[3] See, for example, Mary Iliadis & Kerstin Braun, 'Sexual assault victims can easily be re-traumatised going to court — here's one way to stop this', *The Conversation* (online), March 25, 2021 <https://theconversation.com/sexual-assault-victims-can-easily-be-re-traumatised-going-to-court-heres-one-way-to-stop-this-157428>.

Proposed Division 2A of the Bill would allow for a court to order an evidence-recording hearing if it is satisfied that it is in the interests of justice to do so. While the Law Council does not object to the pre-recording of evidence-in-chief for vulnerable witnesses as a means of reducing the risk of re-traumatisation, we remain concerned by the Bill's permitted use of audio-only recordings without the inclusion of a legislative threshold for such recordings.

In justifying the inclusion of audio-only recordings at an evidence-recording hearing (which did not feature in the earlier exposure drafts of the Bill), the Explanatory Memorandum states that some vulnerable persons' trauma relates specifically to video recording, and a requirement to be recorded again may cause re-traumatisation.[4]

In our view, the Bill should make it clear that the default position is for evidence-recording hearings to use video, while making an exception for circumstances where there is a significant risk of re-traumatisation. To achieve this, a subsection could be inserted after proposed subsection 15YDD(1) along the following lines:

15YDD(1A) For the purposes of subsection (1), an audio-only recording may only be permitted at an evidence-recording hearing if:

a) the use of a video-recording poses an unacceptable risk of re-traumatisation for the vulnerable person; and
b) the use of the audio-only recording is necessary in the interests of justice.

It is acknowledged that Division 2A seeks to implement recommendations 52, 53, 56 and 61 of the Royal Commission into Institutional Responses to Child Sexual Abuse. However, these recommendations refer exclusively to audiovisual recordings, and do not appear to envisage audio-only evidence. In our view, it is appropriate for the Committee to recommend that statutory limitations are placed on the circumstances in which this option can be made available under Part IAD of the Crimes Act.

Audio-only statements to police as evidence-in-chief

Proposed amendments to Division 5 of Part IAD seek to expand the current admissibility of prior video recordings by police as evidence-in-chief by expressly adding reference to audio-only recordings of past interviews.

Consistent with the views outlined above, the Law Council has concerns that there are no limitations placed on the use of audio-only recordings as evidence-in-chief. Given the ready availability of video recording equipment (including on nearly every mobile telephone and the use of body worn cameras by police) there are few circumstances in which it would not be reasonably possible to video record an interview with a witness where it was intended that the interview would become that witness' evidence-in-chief.

While there may be some rare circumstances where it is appropriate for an audio-only recording to be relied upon for this purpose (e.g., technical difficulties in obtaining video at the time, or audio-only being the only means to capture a contemporaneous statement), the reforms should make it clear that these remain the exception. One way this could be achieved is by inserting the following after subsection 15YM(1):

15YM(1AA) For the purposes of subsection (1):

a) The admission of an audio-only recording as evidence in chief may only occur in exceptional circumstances, where it is in the interests of justice to do so.
b) Exceptional circumstances include where the use of video-recording equipment poses an unacceptable risk of re-traumatisation for the vulnerable person.

[4] Explanatory Memorandum, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, 16.

c) *A practical difficulty with making a video recording cannot amount to exceptional circumstances unless:*
   (i) *it was not reasonably possible to make a video recording at the time the audio-only recording was made; and*
   (ii) *there are compelling reasons why the interview could not be conducted at a later time.*

Question 3: Research into the use of sexual experience evidence

In the brief time available in which to provide a response to questions on notice, the Law Council has been unable to locate independent research into the extent to which evidence of sexual experience is adduced by prosecutors as opposed to the defence in proceedings under Part IAD.

However, as was observed by our representatives at the public hearing, anecdotal feedback from legal practitioners is that such evidence is more often sought to be adduced by the accused, however it is not uncommon for prosecutors to also seek to rely on evidence of past sexual activity (or lack thereof).

Due to the diverse factual circumstances that may exist across offences listed in Part IAD of the Crimes Act, there is the potential (albeit uncommon) situation where sexual experience may be highly probative for prosecutors and/or defendants. For this reason, the Law Council maintains the view that it is appropriate for items 23 and 26 of the Bill to be amended, to allow a court the opportunity to consider applications for leave to adduce such evidence beyond what is currently envisaged, provided that the substantial probative value of the evidence outweighs any distress, humiliation, or embarrassment to the vulnerable adult or child complainant.

Contact

If you wish to discuss these matters further, in the first instance please contact Nathan MacDonald, Deputy General Manager of Policy,

Yours sincerely

Greg McIntyre SC
President