22 March 2024
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

Dear Senate Committee,

Re: Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024

Thank you for the opportunity to provide feedback on the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, specifically in relation to the proposal to tighten restrictions on the admissibility of sexual experience evidence.

This submission is being made on behalf of: Sarah Rosenberg, Executive Director of With You We Can; Associate Professor Mary Iliadis, co-convenor of the Deakin Network Against Gendered Violence, Deakin University; and Nina Funnell, journalist and survivor advocate.

With You We Can is a national online resource demystifying the police and legal processes while working to improve them. Uniquely informed by lived and sector expertise, With You We Can wants victims for whom it is safe to report to be empowered to do so, and for all victims to be informed of their options.

The Deakin Network Against Gendered Violence (DNAGV) comprises a University-wide, interdisciplinary group of researchers and practitioners with expertise in gendered violence, including violence against women and children, intimate partner violence, sexual violence, family violence, same-sex violence, the role of intersectionality and legal and non-legal regulation of violence.

We acknowledge the traditional owners of the land on which we live and work, the Gadigal people of the Eora Nation and the Wadawurrung and Wurundjeri peoples. We have deep appreciation for the knowledge and experiences of First Nations victim-survivors, who are disproportionately affected by gendered, sexual and institutional violence, and understand that their voices must be centred in our fight for justice. We pay our respects to any First Nations persons reading this paper, and acknowledge that sovereignty was never ceded.

Tightening Restrictions on the Admissibility of Sexual Experience Evidence

"We have strengthened the sexual experience evidence provisions for adult and child vulnerable witnesses. This type of evidence will be inadmissible unless the court grants leave. In order to grant leave, the evidence must relate to sexual activity that was existing or recent at the time of the commission of the alleged offence, and the court must be satisfied that the probative value of the evidence outweighs any distress, humiliation or embarrassment to the vulnerable adult or child complainant." (Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024).

Background

All Australian states have legislative protections in place to prevent defence counsel from compelling a complainant's counselling records, and in some states medical records, without the leave of the court. This is due to clear issues of privacy and sensitivity, and the distress and humiliation that would be caused to complainants as a result of their counselling records being subpoenaed. Counselling communications feature highly personal and sensitive information relating to the complainant's private life, including in relation to diagnoses of disease, chronic illness or mental illness, unwanted pregnancy, and other information they have yet to disclose or chosen not to disclose with witnesses or family.

While a complainant's counselling communications could potentially be seen to corroborate evidence (Smith, 2018; Rumney & McPhee, 2020), access to the information is most typically used to undermine and discredit complainants based on outdated rape myths (McGlynn, 2017; Burgin, 2019; Dowds, 2019; Iliadis, 2020). For example, records of Complainant X's diagnosis of post-traumatic stress disorder following their assault could be used to suggest that they are 'mentally unstable' and 'imagined the crime', or, records of Complainant Y's abortion years prior, their substance abuse, or rebellious childhood could be used to paint them as someone of bad character who is therefore not a credible or reliable witness.

Counselling communications also include information relating to a complainant's sexual experiences. All states have further legislative protections safeguarding a complainant's prior sexual history. This is aimed at preventing the suggestion of consent based on stereotypes (Kirchengast, 2023). Sexual history includes any information about a complainant's previous sexual acts, and general sexual behaviours, such as flirting or provocative and sexual messages. It also includes sexual activity that occurred after an alleged assault. Such information is known to be used by defence counsel to imply that the victim is 'promiscuous', less worthy of belief or responsible for the crime committed against them.

However, complainants' entitlements to these legislative protections, known as 'rape shield' laws, are rarely upheld.

Despite the compelling justifications for restrictions on the use of sexual history evidence (McGlynn, 2017), the defence can apply for leave to question the complainant. Leave has been found to be consistently granted (Kelly et al., 2006; Smith, 2018; Iliadis, 2020), particularly when the accused is known to the complainant. Not only does this fail to recognise that sexual violence often occurs within intimate relationships, the question of why or how any sexual experiences of the complainant are considered probative highlights how little has been achieved by way of dispelling the rape myths and stereotypes that pervade courtrooms (Iliadis, 2019).

Notably, no jurisdictions in Australia afford ILR to complainants in relation to the sexual history protection; they rely on the prosecution to intervene. Notice of intention to apply for leave often leaves insufficient time for prosecution to object to applications for leave by the defence. There is evidence of defence counsel passing on their notice of intention to apply for leave, without genuine intention, to intimidate and encourage attrition of the complainant (Bartley, 2001; Bacik et al., 2012 cited in Iliadis, 2020). Regardless, prosecutors may choose not to oppose applications due to fears of being perceived as hiding information (Brown et al., 1993; Donovan, 2022). Prosecution can apply for leave themselves in order to minimise the impact of evidence permitted under defence's successful application, but under-resourcing and the resultant lack of familiarity with the case poses challenges. There is no time limit on making applications, risking trial delays if the prosecution wishes to defend the complainant's protection once the trial has begun. And, improper questioning by the defence often still occurs even where leave has been denied by the court (Iliadis, 2020).

The failure to enforce protections relating to complainants' counselling/medical records and prior sexual experiences allows prejudices to shape the outcomes of trials, and the experience of complainants in relation to procedural justice. That is, complainants are denied fair processes by way of not having their rights to protections enforced, not receiving adequate or timely information, not having a voice or opportunity to contest or challenge the rationale underpinning defence counsel applications to adduce such evidence (Iliadis, 2019). Any legislation is only as strong as its enforcement mechanism (and associated regulatory and accountability processes for lack of enforcement), and requires commitment to cultural and judicial education alongside it in order for it to receive its intended consequences.

The Bill

We acknowledge that the Bill has now been extended to apply the 'vulnerability' status and associated protections to adult sexual offence complainants, in addition to child complainants. This is a positive step. However, additional concerns prevail, as outlined below.

The Bill proposal states that questions relating to complainants' prior sexual experiences will not be allowed in court unless the judge makes an exception. Exceptional circumstances include sexual experiences that occurred with the defendant and around the time of the alleged offence.
While the wording is unclear, if consensual sexual experiences the victim may have had with anyone outside of the alleged perpetrator will no longer enter the courtroom door, this is a promising step. If not, this makes no advancements on existing state and territory legislation. However, consensual sexual experiences the victim had with the alleged perpetrator themselves are admissible under the exception.

The reality is, most victims are assaulted by someone they know. Our concern with the current wording of the Bill is that it does not make any advancements in recognising that sexual violence often occurs within intimate relationships. The exception is itself a rape myth, suggesting that consent is a blanket agreement - if the victim said 'yes' previously, they must have said 'yes' to the assault in question. Particularly concerning is the potential for victims to be shamed for engaging in sexual activity with the alleged perpetrator following the assault. Doing so is common for a range of reasons; the victim might initiate sexual activity with the perpetrator to 'replace' the assault, or they might 'consent' to sexual activity post-assault to avoid the threat of physical violence, for example.

We also note that the phrasing used in the exception, "the evidence relates to sexual activity that occurred or was recent at the time of the commission of the alleged offence", is somewhat vague, and will therefore be at the discretion of the judge. Resilient rape myths are "often exploited through the practices of legal actors and the flexibility of current legislation" (Bluett-Boyd & Fileborn, 2014); defence barristers in state and territory proceedings apply for leave knowing there is great variance among judges as to how they exercise their discretion because "any evidence relating to a victim's prior sexual history can reduce the likelihood of successful conviction" (Iliadis, 2020).

Through the judge's ruling, the court can also make an exception to allow questioning of a complainant's prior sexual experiences if the probative value of the evidence outweighs any distress, humiliation or embarrassment to the complainant. That is, if the court feels that questioning a complainant on their sex lives will provide evidentiary value or 'proof' that the assault did not occur, then the distress and humiliation to a complainant, under this new Bill, is justified.

Understanding how often this is deemed the case, this exception is arguably an undermining of Article 17 of the ICCPR and article 16 of the CRC, which prohibit arbitrary interference with privacy and unlawful attacks on reputation, as well as article 2 of the CEDAW, which protects women from discrimination in all its forms, all of which the Bill claims to take steps toward protecting. Applications to circumvent legislation to obtain sensitive information are routinely used to intimidate complainants (Temkin & Krahé, 2008; Powell et al., 2013; McGlynn, 2017; Burgin, 2019; Dowds, 2019; Iliadis, 2020). The Bill repeats the current issue in existing legislation that problematically allows for such exceptions, and reveals that the 'fact finding' nature of our legal system still trumps any efforts to prevent the re-traumatisation of complainants.

Importantly, the question as to *why* or *how* any prior sexual experiences of complainants are considered 'probative' means that this Bill risks upholding the current rape myths and stereotypes that still exist in courtrooms. Further to this, the 'experience' of a complainant cannot be viewed in isolation to their 'reputation', evidence of which has been deemed inadmissible, as reputational damage inevitably occurs in the courtroom because defence counsel can and do use complainants' prior sexual experiences to damage their character and credibility at trial.

Ultimately, we feel that any questioning of a complainant's sexual experiences risks victim-blaming, impacts complainants' confidence when testifying, and undermines their credibility in the eyes of the jury, which does little to support the prosecution's case that the alleged is guilty beyond reasonable doubt. The dangers of being questioned on sexual experiences is a key reason as to why complainants withdraw from the criminal process. It also discourages other complainants from reporting their assaults, which completely undermines the integrity of the criminal 'justice' system - that reporting crime leads to a safer community and will not cause further harm.

Seeing as though most sexual offences are heard within respective state and territory jurisdictions (and not at a Commonwealth level), we urge caution that this Bill is not celebrated as one that will impact the lives of most complainants whose cases progress through state or territory jurisdictions.

With these risks in mind and the consequences this section of the Bill will have for complainants, and indeed the community who rely on complainants to report crime for community safety, we ask that the Commonwealth Attorney-General's Office consider changing the wording of the current Bill to ensure that all questioning relating to a complainant's sexual experiences, with or without the accused person, are precluded from admission into the court; that is, all sexual experiences of the complainant be deemed as inadmissible evidence, without exceptions/applications for leave.

If the current wording of the Bill cannot be changed, then we propose that independent legal representation (ILR) be assigned and made available to the complainant of sexual violence to enforce the protection of their sexual experiences, as well as counselling records and other therapeutic notes, which often feature information relating to sexual experiences. Allowing victims to be heard in these circumstances challenges the myths underpinning the frequency and rationale of applications to adduce victims' private and sensitive information (McGlynn, 2017; Iliadis, 2019). Not only does it foster a sense of agency and voice for the victim, it is crucial to "carrying out the balancing exercise" of the rights of the defendant, the state and the victim required under applications to invade victims' privacy (Keane & Convery, 2020).

The Case for Independent Legal Representation (ILR)

ILR provides victims with their own lawyer during the criminal prosecution process. The ILR is independent of the prosecutor and prioritises the complainant's interests. There are different models of ILR for victims around the world. The role can include, but not be limited to, providing case management, advocacy, advice and representation to victims at various stages of the police and legal processes, including prior to reporting, during the investigation, pre-trial, during trial and after proceedings are finalised. ILR can mitigate secondary harm, improve the state's prosecution efforts and strengthen the integrity of the justice system.

Very few countries fail to offer victims any form of legal representation, with countries prioritising non-legal advocacy for victims still offering some form of legal advocacy with greatly varying participation rights (Smith & Daly, 2020). This suggests that ILR is not all that uncommon within adversarial systems. Ireland's and Scotland's models of ILR, which do not disrupt but in fact strengthen the prosecutorial process, in particular demonstrate that ILR can be implemented with ease in Australia's legal system.

In New South Wales and Queensland, ILR is afforded to complainants under the 'sexual assault communications privilege' and the 'counselling notes protect' schemes, respectively, to enforce existing legislative protections in relation to complainants' counselling records. In NSW, ILR has operated since 2011 to prevent or restrict the disclosure of sexual assault complainants' counselling notes that may contain confidential material, for example, in relation to previous sexual experiences (*Evidence Amendment (Confidential Communications) Act 1997* (NSW)). In Queensland, it is available to counselled persons for representation at domestic violence and criminal law proceedings to determine if leave will be granted to subpoena protected counselling notes (regarding a related sexual assault) and/or if material produced under a subpoena can be disclosed (Division 2A of the *Evidence Act 1977* (QLD)). Queensland are currently advocating to extend the remit of ILR to protect a complainant's prior sexual experiences that do not necessarily feature in counselling records.

The Commonwealth Attorney-General's Department currently has a number of processes in train that are looking to better empower sexual assault complainants before the criminal justice system. These include pilot services in three Australian jurisdictions (the Australian Capital Territory, Western Australian, and Victoria) to provide complainants with greater access to dedicated legal services to support their recovery and engagement with the legal system. The pilot in Victoria (commissioned by Victoria Legal Aid, Djirra and Women's Legal Service Victoria) will expand Victoria's state-wide Victims Legal Service (VLS) to provide legal information and targeted advice for victims, and representation and case work for complainants seeking to protect confidential communications. The representation will extend into the courtroom, so that complainants can be granted ILR in court where defence counsel make late applications to adduce leave and cross-examine complainants on such evidence.

The decision to extend ILR into the courtroom addresses the shortcomings of the current limitations of confining ILR to the pre-trial phase (as is the case in Queensland and New South Wales). In light of evidence of routine circumvention of judicial instructions or determinations established in the pre-trial phase that might establish ground rules or limits to cross-examination in relation to complainant privacy (Kelly et al., 2006; Smith, 2018; Iliadis, 2019 & 2020), ILR should be able to protect complainants' rights and interests at times when decisions are being made, confidential information is subpoenaed and inappropriate questions are posed without objection. This is arguably no less than they are already entitled to, but fail to receive. The representative is simply a check on other parties (Bacik et al., 1998; Braun, 2014). In fact, offering representation only for the pre-trial stage leaves victims just as vulnerable as if they had no representation at all (Iliadis, 2019; Sarkozi, 2023).

Notably, circumvention of legislation 'protecting' complainants' privacy impairs the clarity of their testimony (Ellison, 2001; McGlynn, 2017), and makes them vulnerable to suggestive defence questioning (Gillen Review, 2019), which leaves inappropriate statements by defence unchallenged. In contrast, enforcing legislation with ILR secures quality, probative evidence which is properly adduced and tested (Kirchengast, 2021), minimises unnecessary delays caused by the posing of inadmissible questions (Braun, 2014) or lengthy follow-up questions due to complainant distress causing unclear testimony (Temkin, 2002), and dissuades the jury from relying on victim-blaming myths used to discredit the complainant and therefore the prosecution. There is a clear relationship between ILR and successful prosecution (O'Connell, 2021), because procedural justice has utility for substantive justice (Liu, 2019).

Arguments in favour of ILR

The prosecution cannot meet the victim's emotional needs or protect their interests adequately due to under-resourcing, frequent changes in assignments and the demand for impartiality. The balancing of complainant and public interests is "ultimately incompatible" (Doak 2005).

Existing non-legal support mechanisms fall short of providing the information, advocacy and protection that complainants require to effectively participate in the justice process and retain some form of wellbeing and protection. There is no improvement in the treatment of complainants when non-legal supports accompany them to court (Clark, 2010; Braun, 2014). Where advocacy workers are not equipped to advise on the law, ILR provides opportunity for victims to understand the rationale behind decisions being made, as they act as an interpreter of the law and prosecution process (Carroll, 2022). This is crucial to feelings of inclusion. Complainants' legal and human rights can *only* be preserved through some form of ILR (Doak, 2005) (Raitt, 2013).

ILR provides emotional support to victims, which comes from the consistent case management of the legal representative creating an important sense of continuity amidst a confusing and inconsistent process. One legally qualified source replaces the fragmented arrangements of a host of advocate bodies delivering support at various times, and who may not collect information effectively or communicate it to the right party at the right time (Keane, 2021).

Since the adversarial trial system relies on the balance of power between prosecution and defence, objections to third-party participatory rights tend to centre on the perceived threat to the accused's right to a fair trial and the longstanding principle of equality of arms (Hoyano, 2015 via Iliadis, Smith & Doak, 2021). The system is perceived to be out of balance if another party were involved, in this case ILR for the complainant. This would be the case if defendants had to defend themselves against two accusers (Braun, 2014; VLRC, 2016; Iliadis, 2020), but few jurisdictions adopt a model where the independent counsel performs a duplicate prosecutorial function (Rape Crisis Scotland, 2009). The implementation of ILR for complainants can be seen as upholding a "triangulation of interests" (Lord Steyn, 2001 via Bowden et al., 2014 and Iliadis 2020), where the legal system strikes a balance between the interests of the victim, the accused and the state (O'Connell, 2018).

If ILR for the complainant is confined to filling gaps in their protection, upholding legislation that they are already entitled to, it is difficult to see what prejudice is presented.Given that adversarial systems have already expanded to accommodate amicus curiae, McKenzie friends, children's advocates, and intermediaries, there should be no reason why ILR cannot operate effectively in a context where criminal trials are already adapting to international shifts in relation to evidence and procedure (Iliadis, Smith & Doak, 2021). Provided that ILR schemes are established within clear parameters, "the assumption that the protection of complainants' rights will inevitably result in a diminishing of the accused's rights is contestable" (Schenk & Shakes, 2016).

Some academics go further than this, arguing that “the current adversarial status quo provides defendants with an unfair advantage that may compromise society’s legitimate right to bring offenders to justice” (Bowden et al., 2014). The two-party system actually prevents the balancing of rights, because the rights of each party are inherently not equal (Gerry, 2009). All participants have interests that must be taken into account for a trial to be considered fair, even if this does not equate to a legally upheld ‘right to a fair trial’ (Hoyano, 2015 via Iliadis, Smith & Doak, 2021). Indeed, “a fair trial does not mean a trial which is free from all possible detriment or disadvantage to the accused” (Doak, 2008). In order to be faithful to the adversarial tradition, “the least we can do is to ensure that distinctive, meritorious interests are not handicapped from the outset” (Raitt, 2011).

Our Recommendation

We propose that ILR be assigned to complainants when a decision to prosecute is made, to protect them pre-trial where defence counsel make applications (under the legislative ‘exceptions’) to subpoena a complainant’s protected counselling records, previous sexual experiences, digital communications, education/employment records, and other sensitive ‘third-party’ evidence, and during the trial where late applications are made, such as during cross-examination, to subpoena that information.

The rationale behind recommending that ILR be provided at the time a decision to prosecute is made, rather than at the time of the first subpoena, is two-fold:

- As prosecutors juggle multiple cases and frequent changes in assignments, notice of intention to apply for leave to access complainants’ private records often goes unseen. This leaves the complainant unprotected, with many being unaware of their right to ILR, or with little time for the ILR to intervene without causing delay. Being referred to ILR late means that the complainants’ private information may already have been accessed by the defence.
- ILR can serve as a single point of contact for the complainant, serving as a legally-informed case manager providing advice and assistance. This is crucial to mitigating secondary harm, and has benefits such as ensuring that requests made by the complainant (e.g. giving testimony via video) are appropriately in place.

The ILR should be publicly funded and available through legal service providers such as Women’s Legal Services and Legal Aid, including any culturally-specific or First Nations service providers. The ILR should be trauma-informed and specialised in sexual offence matters.

It is of course vital that complainants are made aware of the specific powers and limits of their legal representative, as any distress or dissatisfaction caused by unmet expectations will undermine the enhanced sense of procedural justice provided by ILR (Manikis, 2015).

Adhering to International Law Principles

The amendments contained in the Bill go some way towards addressing the following rights, as listed in the explanatory memorandum. However, not enacting ILR to defend complainants against the many exceptions to the legislation risks circumventing these efforts:

The International Covenant on Civil and Political Rights and the Convention on the Rights of the Child

"Article 17 of the ICCPR and article 16 of the CRC prohibit arbitrary interference with privacy and unlawful attacks on reputation. The United Nations Human Rights Committee has interpreted the right to privacy as comprising freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy."

Currently in Australia at commonwealth and state and territory levels, complainants experience ongoing reputational attacks to their character and credibility, and this inevitably involves drawing on their experiences (whether it be sexual, character or otherwise). The provision of ILR will safeguard complainants for ongoing unlawful attacks to their repetition and character, which deters others from reporting and contributes to attrition.

Convention on Preventing and Combating Violence Against Women and Domestic Violence

"Article 2 of the CEDAW protects the right of women against discrimination in all its forms. Women are at a statistically higher risk of sexual violence when compared to men (as at 2021 according to the Australian Bureau of Statistics). The amendments contained within this Bill further the protections for victims and survivors of sexual violence, and in turn increase protections afforded to women engaging with the criminal justice system. These protections include: prohibiting all evidence of sexual reputation, restricting evidence of sexual experience and enabling the pre-recording of evidence limiting re-traumatisation of the vulnerable person through the repeating of evidence across proceedings."

Case law under the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) demonstrates the importance of complainants' rights, with Goeckce v Austria ruling that defendants' rights cannot supersede a domestic abuse victim's right to life or physical and mental integrity (Goeckce v Austria (C/39/D/5/2005) via Iliadis, Smith & Doak, 2021). Similarly, in V.K. v Bulgaria, CEDAW found that proceedings must adopt a gendered analysis of violence to avoid stereotypical understandings of rape and sexuality impacting complainants' rights and prospects for a fair trial (V.K. v Bulgaria (C/49/D/20/2008) via Iliadis, Smith & Doak, 2021). The provision of ILR can ensure that complainants' rights are upheld in an adversarial system that is premised on the due process rights of the accused. It can also mitigate the likelihood or extent of rape myths entering the courtroom (Iliadis, Smith & Doak, 2021; Iliadis 2019; Iliadis 2020).

We have also listed some international principles that support the implementation of ILR:

Convention on Preventing and Combating Violence Against Women and Domestic Violence

The Council of Europe (excluding the UK) requires, under the Convention on Preventing and Combating Violence Against Women and Domestic Violence, states to implement 'measures' to protect the privacy of complainants (Article 56(1)(f)) and protect them from intimidation, retaliation, and repeat victimisation (Article 56(1)(a)). Member states must enact legislation that enables victims to be heard, supply evidence and have their concerns presented (Article 56(1)(d)), with appropriate support services and intermediaries so that their interests are duly presented and taken into account (Article 56(10)(e)) (Istanbul Convention, 2011 via Iliadis, Smith & Doak, 2021).

European Court of Human Rights

The European Court of Human Rights acknowledges circumstances where the treatment of complainants has breached their human rights in multiple European countries (Doak, 2008). For example, Y v Slovenia ruled that “A person’s right to defend himself [sic] does not provide for an unlimited right to use any defence arguments.” While defence has to be allowed leeway to challenge the applicant’s credibility, cross-examination should not be used as a means of intimidation or humiliation. Cross-examination by the accused in this case was seen as a breach of the victim’s personal integrity under Article 8 of the European Convention on Human Rights (Y v Slovenia (41107/10, May 2015) via Iliadis, Smith & Doak, 2021).

Rome Statute

Under Article 68(3) of the Rome Statute, the International Criminal Court allows concerns of victims to be introduced at any stage during a proceeding, when the victim deems fit. When leave is obtained, victims can choose their own legal representative and make submissions (Iliadis, Smith & Doak, 2021). Victim participation is considered a benchmark of best practice in truth commissions, inquiries and grassroots transitional justice mechanisms (Doak, 2015 via Iliadis, Smith & Doak, 2021) (Jackson et al., 2024). Trial Chambers are required to be vigilant in preventing witness harassment or intimidation during questioning, especially victims of sexual violence (Jackson et al., 2024). The Chambers are given considerable scope to develop practice, for example in relation to whether lawyers may prepare witnesses for trial by means of ‘witness proofing’, and in how witness evidence should be presented at trial (Jackson and Brunger, 2015).

We encourage the Senate Committee to strongly consider the issues and recommendations we have outlined in this submission, and we welcome the opportunity to consult on our submission further and in a public forum.

Kind regards,

Sarah Rosenberg, Executive Director of With You We Can and Victim Advocate

Associate Professor Mary Iliadis, Criminology, Deakin University, and Co-Convenor of the Deakin Network Against Gendered Violence

Nina Funnell, Journalist and Survivor Advocate