

Senate Legal and Constitutional Affairs Legislation Committee

Attorney-General's Department

Hearing date: 12 April 2024

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Paul Scarr asked the following question:

Senator SCARR: Next one is the Law Council of Australia's submission with respect to video as opposed to audio recordings, and the strong submission is that, from an evidentiary perspective and in terms of testing evidence, a video recording has inherent benefits over and above an audio recording. The Law Council of Australia did, though, countenance the fact that if both were permitted, there could perhaps be inclusion of some clarification as to exceptional circumstances, where audio recordings would be permitted. The view from different stakeholders we heard earlier in the day, appeared to be somewhat open to that possibility. Is that somebody which the Attorney-General's Department considered as part of its preparation of this bill, including whether or not appropriate legislative drafting notes could be included to give a bit of a steer as to whether or not audio recordings would be acceptable as opposed to video recordings of testimony?

Ms McKeag: Yes, the change was made in response to stakeholder feedback and particularly, as has been described, where there was a specific concern that the filming would create specific additional trauma to the witness. We've heard and are aware of the feedback from the Law Council, that there might be an opportunity by way of drafting note or otherwise to more specifically clarify the intent of that provision and I don't think there's any dispute with the general statement that audiovisual as a starting point would be the preferred way for evidence to be received. But where there might be exceptional or specifically relevant circumstances, the position was that scope should still be made for audio-only evidence.

Senator SCARR: But there is the potential to potentially add some drafting notes, explanatory information which could better tease that out and potentially address the Law Council of Australia's concern?

Ms McKeag: The department will look afresh at all the feedback coming through this process and also the recommendations of the committee, with respect to providing further advice to government on the bill.

Senator SCARR: Could you take on notice and provide to the extent you can—it doesn't have to be war and peace—in relation to the other recommendations made by the Law Council of Australia, some of which were actually made by a number of other parties. If you could potentially give your response to those recommendations?

The response to the question is as follows:

The department has considered the submission of the Law Council of Australia's (LCA) submission to the Committee on the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill (Bill) and has addressed the key points raised by the LCA below.

Automatic extension of child offences to adult complainants

The LCA has noted that extending offences specifically against children to vulnerable adult complainants may lead to an adult being considered as both a vulnerable adult and a child complainant simultaneously for the purposes of proceedings.

The Bill is intended to provide comprehensive coverage for child complainants, child witnesses and vulnerable adult complainants who are victims and survivors of the offences listed in sections 15Y(1) and 15Y(2) of the Bill.

The department will provide advice to Government on options for clarification of the interaction between offences that apply to vulnerable adult complainants and child complainants and witnesses.

Special protections for adult complainants should only extend to sexual offences

The LCA has recommended that Part IAD should only extend to sexual offences in relation to vulnerable adults.

The list of offences (amended by items 1, 3, 5 and 6 of the Bill) was developed in consultation with government and non-government stakeholders, including victim and survivor advocacy groups, the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

Criminal proceedings for non-sexual offences listed in the Bill and in s 15Y of the *Crimes Act 1914* (Act) (Crimes Act) such as slavery or war crimes have the potential to be highly traumatic. The department considers it appropriate to ensure the availability of vulnerable witness protections for vulnerable adults in these prosecutions.

The department considers that it is appropriate that protections in Part IAD apply automatically to adult complainants in relation to a wider range of serious Commonwealth offences than only sexual offences.

Broadening sexual experience evidence provisions

The LCA recommended that the court should be permitted to grant a party leave to adduce evidence of sexual experience beyond activities with a defendant recent or at the time of the offending, provided that the substantial probative value of the evidence outweighs any distress, humiliation, or embarrassment to the vulnerable adult or child complainant.

Sections 15YC and 15YCB of the Bill are intended to reduce the risk of re-traumatisation of vulnerable persons by ensuring sexual experience evidence is only admissible where that evidence has genuine probative value to the matter being heard. These sections do this through stringent requirements, including that:

- a. The evidence is of sexual activities with the defendant in the proceeding that occurred or was recent at the time of the commission of the alleged offence; and
- b. The court gives leave for the evidence to be admitted.

When considering whether to grant leave to admit sexual experience evidence, the court must be satisfied that the evidence is substantially relevant to the facts in issue in the proceeding, or (if the evidence relates to the credibility of the vulnerable person and is to be adduced in cross-examination) – the evidence has substantial probative value. Sections 15YC and 15YCB

set out matters to which the court may have regard when deciding whether evidence has substantial probative value.

It is not the intention of the Bill for these sections to frustrate the parties' abilities to adduce evidence that has genuine probative value or to create statutory bars on the admission of evidence that is substantially relevant to the matter being heard.

The department considers that it is necessary for the court's leave to be required to admit sexual experience evidence. In considering whether to give leave, the court should be required to have regard to whether there is a sufficient nexus to the proceedings, and requiring that the court only admit the evidence where its probative value outweighs any distress, humiliation or embarrassment to the vulnerable person.

The department will provide advice to Government on options to address the issues raised by the LCA and others in relation to sexual experience evidence.

Audio-only evidence

The LCA recommended that audio-only recordings should not be admissible as evidence-in-chief. The LCA further submit that, if Parliament considers that audio-only evidence-in-chief is permissible, the Bill should clarify that this type of evidence is reserved for exceptional circumstances where there is a significant risk of re-traumatisation due to the use of video.

The department understands that during the hearings held by the Committee, both the LCA and Rape and Sexual Assault Research and Advocacy considered that it may be appropriate for legislation to allow audio-only evidence in chief in limited circumstances at the discretion of the court.

Section 15YDB of the Bill was developed in response to stakeholder feedback that vulnerable witnesses and complainants may have specific trauma associated with being video recorded, and that requiring a video recording in those circumstances may lead to significant distress and re-traumatisation.

There provisions in the Bill that the court may use if it is determined audio-only evidence significantly hampers the jury's ability to assess a witness's demeanour. In respect of audio-only recordings of an earlier interview (for example, audio recordings of an interview with police), section 15YM(4) of the Bill requires the witness must be available for cross-examination in respect of that evidence. It is open to the court to decide whether this cross-examination is conducted by way of evidence recording hearing, and if so, whether the evidence should be video recorded (s 15YDB). Moreover, the court has ultimate discretion to admit recorded evidence (s 15YDE) and may decide not to admit audio-only recordings if it considers it would be inappropriate in the circumstances

The department is considering the submissions and evidence given to the Committee, and will provide advice to Government on options to further clarify this issue.

Timing of pre-recorded evidence

The LCA recommend that subsection 15YDB(2) of the Bill be amended to require that the court also take into account:

- the undesirability of fragmenting the proceeding, and

- any additional legal costs to the defendant that would be likely to result from the pre-recording of the evidence.

These factors may already be considered by the court in determining whether it is appropriate to order an evidence recording hearing. Subsection 15YDB(2) includes matters the court must take into account in that determination, however these are not exhaustive, and the court may take into account any other matters that it considers to be relevant in considering whether ordering an evidence recording hearing is in the interests of justice.

Access to inadmissible evidence

The LCA recommended that subsection 15YDF(5) of the Bill be amended to allow parties to the proceedings access to recording and transcripts of evidence that the court has ruled inadmissible.

Subsection 15YDF(5) states that the court is not required to provide evidence that is ruled inadmissible to the parties and jury. Section 15YDF does not prohibit the court from providing transcripts of inadmissible evidence to parties should it wish to do so.

Use of police interviews

The LCA noted that police interviews conducted prior to legal proceedings may be undertaken by investigators who are not trained in adducing evidence, which may result in leading, emotive or irrelevant questions.

The Bill preserves the ability of the Court to admit evidence (including where provided for, earlier interviews of the vulnerable person) in whole, or only in part as appropriate with regard to the relevant facts and circumstances.

The Australian Law Reform Commission (ALRC) is conducting an inquiry into Justice Responses to Sexual Violence. As part of the terms of reference for that inquiry, the ALRC will inquire into the training and professional development for judges, police, and legal practitioners to enable trauma-informed and culturally safe justice responses. The ALRC has been asked to provide its final report to the Attorney-General by 22 January 2025.

Right to an interpreter

The LCA recommend that the word ‘physical’ be removed from section 15YOA of the Bill to ensure consistency across legislation and to be more inclusive of people with non-physical disabilities that may require an interpreter. The department notes that this feedback has also been provided by other witnesses, including Women's Legal Services Australia, as well as in submissions to the Committee.

The intention of section 15YOA is to support vulnerable persons with disabilities or inadequate knowledge of the English language to fully and comfortably participate in the criminal justice process.

The department will provide advice to Government on options to address this issue.

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Paul Scarr asked the following question:

Senator SCARR:Could you also potentially give your response to the issues raised by Professor Gans, which raised a number of—on the face of it—concerning issues around whether or not there are unintended legal consequences arising from the drafting of some of these provisions, for example in the context of places where maybe you have a defendant who's been charged with an offence which doesn't necessarily relate to their interaction with the victim-survivor, as opposed to in the situation where there's, say, been procurement or whatever of the victim-survivor to engage in sexual relations with another party and where that may lead to evidential issues arising, potentially, as unintended consequences from the drafting. I'd find it very useful to get the Attorney-General's Department to look at Professor Gans's quite detailed submission, where I think he raises a number of potential unintended consequences. It would certainly give me some comfort if the Attorney-General's Department had a response to those concerns. Could you take that on notice, please?

Ms McKeag: We'll take those on notice.

The response to the question is as follows:

Professor Gans' submission concerns items 23, 24 and 26 of the Crimes Amendment (Strengthening Criminal Justice Responses to Sexual Violence) Bill (Bill). These items amend the sexual experience provision in s 15YC and introduce a new s 15YCB. These sections limit the admissibility of sexual experience evidence in matters to which Part IAD of the *Crimes Act 1914* applies.

Professor Gans' submits that in a number of contexts, ss 15YC and 15YCB will have adverse impacts on relevant proceedings where a party may seek to adduce sexual experience evidence through frustrating parties' abilities to have evidence admitted that has probative value.

Sections 15YC and 15YCB of the Bill are intended to reduce the risk of re-traumatisation of vulnerable persons by ensuring sexual experience evidence is only admissible where that evidence has genuine probative value to the matter being heard. These sections do this through stringent requirements, including that:

- a. The evidence is of sexual activities with the defendant in the proceeding that occurred or was recent at the time of the commission of the alleged offence; and
- b. The court gives leave for the evidence to be admitted.

When considering whether to grant leave to admit sexual experience evidence, the court must be satisfied that the evidence is substantially relevant to the facts in issue in the proceeding or—if the evidence relates to the credibility of the vulnerable person and is to be adduced in cross-examination—the evidence has substantial probative value. Sections 15YC and 15YCB

set out matters to which the court may have regard when deciding whether evidence has substantial probative value.

It is not the intention of the Bill for these sections to frustrate the parties' abilities to adduce evidence that has genuine probative value or to create statutory bars on the admission of evidence that is substantially relevant to the matter being heard.

The department considers that it is necessary for the court's leave to be required to admit sexual experience evidence. In considering whether to give leave, the court should be required to have regard to whether there is a sufficient nexus to the proceedings, and requiring that the court only admit the evidence where its probative value outweighs any distress, humiliation or embarrassment to the vulnerable person.

The department will provide advice to Government on options to address the issues raised by Professor Gans' submission.

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Varun Ghosh asked the following question:

Senator GHOSH: Thank you. You've gone ahead to my next question, which is wonderful. One of the submissions received today, or at least one of the observations made in the hearing today, related to providing assistance to complainants on the stand. It was, I think, discussed in the context of disabled witnesses or potentially vulnerable witnesses. I'm conscious of what you've just said in terms of both the report to emerge in the middle of the year and how this will, I think, potentially be touched on by the ALRC in its inquiry, but perhaps you could take on notice if it's possible for the Attorney-General's Department to respond—I think Senator Scarr asked for a response to the Law Council of Australia's submission and potentially Professor Gans's submission—on those two issues: ways that advocates for complainants or victims can play a role and havestanding—or rather the complainant and the victim have standing and advocates can play a role—in relation to matters that affect the victim or complainant in the course of a criminal proceeding, including but not limited to that question of the use of evidence relating to that person's sexual experience; and also the ways in which—whether they are called 'witness intermediaries' or 'friends' or whatever the nomenclature is—it's possible to provide for assistance to complainants giving evidence on the stand, the scope of that assistance and the circumstances in which that assistance would be available. That would be very helpful.

Ms McKeag: We would be pleased to take those on notice.

The response to the question is as follows:

The department acknowledges submissions to the Committee recommend that the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill (Bill) provide for legal standing for witnesses in criminal matters, particularly proceedings for sexual offences where sexual experience evidence may be adduced.

The legal standing of witnesses to make submissions in criminal matters is a complex legal issue that goes beyond the scope of the Bill and requires careful consideration and consultation. Standing of this nature is not currently provided for in Commonwealth legislation.

The department notes submissions that raise the importance of witness intermediaries and Ground Rules Hearings. Ground Rules Hearings and witness intermediaries were considered as part of the consultation process on the Bill, however were omitted in response to stakeholder feedback that the shortage of witness intermediaries under existing state and territory schemes would undermine the effectiveness of Commonwealth-level ground rules hearings.

Government has provided \$0.4 million for the department to conduct a scoping study to

explore options to establish a Commonwealth witness intermediary scheme to support witnesses. The scoping study will be provided to Government once concluded.

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Paul Scarr asked the following question:

Senator SCARR: Okay. I will also ask you to take one final thing on notice. Legal Aid NSW made a submission. Have you had the benefit of looking at the Legal Aid NSW submission?

Ms McKeag: Yes.

Mr Malone: Yes, we have.

Senator SCARR: We've really run out of time, but I'm happy for you to add this to the questions to take on notice: I'm interested in the Attorney-General's Department's response to the Legal Aid NSW submission, where they actually referred to a particular recent case in New South Wales and comments from the judiciary in the context of that case. I'd find that very helpful. Sorry, more homework!

Ms McKeag: We're pleased to take those questions on notice.

The response to the question is as follows:

The submission of Legal Aid NSW makes two recommendations in relation to the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill (Bill) being that:

- section 15YCB(1) be amended to reflect the disjunctive "or", so as to permit relevant prior sexual experience evidence with a person other than the defendant to be admitted under a grant of leave; and
- a safeguard in similar terms to s 294BC(6) Criminal Procedure Act (NSW) be adopted in the Bill.

Both of these recommendations go to the breadth of sexual experience evidence that may be admitted in relevant proceedings (being proceedings involving a child witness, child complainant or vulnerable adult complainant).

Sections 15YC and 15YCB of the Bill are intended to reduce the risk of re-traumatisation of vulnerable persons by ensuring sexual experience evidence is only admissible where that evidence has genuine probative value to the matter being heard. These sections do this through stringent requirements, including that:

- a. The evidence is of sexual activities with the defendant in the proceeding that occurred or was recent at the time of the commission of the alleged offence; and
- b. The court gives leave for the evidence to be admitted.

When considering whether to grant leave to admit sexual experience evidence, the court must be satisfied that the evidence is substantially relevant to the facts in issue in the proceeding, or (if the evidence relates to the credibility of the vulnerable person and is to be adduced in cross-examination) – the evidence has substantial probative value. Sections 15YC and 15YCB set out matters to which the court may have regard when deciding whether evidence has

substantial probative value.

It is not the intention of the Bill for these sections to frustrate the parties' abilities to adduce evidence that has genuine probative value, or to create statutory bars on the admission of evidence that is substantially relevant to the matter being heard.

The department considers that it is necessary for the court's leave to be required to admit sexual experience evidence. In considering whether to give leave, the court should be required to have regard to whether there is a sufficient nexus to the proceedings, and requiring that the court only admit the evidence where its probative value outweighs any distress, humiliation or embarrassment to the vulnerable person.

The department will provide advice to Government on options to address the issues raised by Legal Aid NSW submission.