THE UNIVERSITY OF MELBOURNE
Prof Jeremy Gans
Melbourne Law School

8th March 2024

Senate Legal and Constitutional Affairs Legislation Committee

Dear Senator Green:

Submission – Inquiry into the Crimes Amendment (Strengthening Criminal Justice Responses to Sexual Violence) Bill

I am an academic at Melbourne Law School, specialising in all aspects of criminal justice. I am the author of *Modern Criminal Law of Australia* (2nd ed, Cambridge, 2017) and a co-author of *Uniform Evidence* (3rd ed, Oxford, 2019) and *Criminal Process and Human Rights* (Federation, 2012). Since 2007, I have advised the Victorian Parliament's Scrutiny of Acts and Regulations Committee on the compatibility of proposed Victorian laws with that state's human rights charter.

I make this submission in response to the Committee's web announcement one week ago.

My submission concerns the Bill's provisions on evidence of sexual experience, specifically items 23, 24 and 26 of schedule 1, which narrow the admissibility of such evidence in various federal criminal proceedings. In this submission, I will:

- describe the effect of items 23, 24 and 26, including noting some possible inadequacies in the Bill's consultation and explanatory materials
- outline the adverse impact of items 23, 24 and 26 on the ability of federal prosecutors to prosecute some federal crimes and on the ability of some defendants in some federal proceedings to defend themselves
- note various possible options the Committee may consider for recommendation on items 23, 24 and 26

The effect of items 23, 24 and 26

Current federal law on evidence of sexual experience

Nearly all federal criminal proceedings occur in state and territory courts and therefore are mostly governed by state or territory rules of evidence, including state or territory rape shield laws. These laws are 'picked up' in federal proceedings by s68(1)(c) or s79 of the *Judiciary Act 1903* (Cth), except where federal law or the *Constitution* 'otherwise provide'. State and territory court proceedings are not generally subject to the main federal evidence law statute, the *Evidence Act 1995* (Cth), which mostly only applies to federal courts, which in turn only hear a small number of mostly commercial or minor criminal offences. However, other federal statutory provisions concerning federal criminal proceedings can and, I assume, generally do apply in federal criminal proceedings heard in state or territory courts.

Professor Jeremy Gans, Melbourne Law School, University of Melbourne, 3010.

For the purposes of this submission, I assume that this includes rules on evidence of sexual experience in the *Crimes Act 1914* (Cth), which currently consists of one provision:[1]

> ***15YC Evidence of sexual experience***
>
> *(1) Evidence of a child witness' or child complainant's experience with respect to sexual activities is inadmissible in a child proceeding, unless:*
>
> *(a) the court gives leave; or*
>
> *(b) the evidence is of sexual activities with a defendant in the proceeding.*

This current rule requires parties in 'child proceedings' (defined in s15Y(1) as proceedings for various federal offences) to seek and obtain leave before evidence of 'experience with respect to sexual activities' of alleged child victims (whether or not they are a trial witness) or child witnesses (whether or not they are alleged victims) can be admitted (i.e. be used by the fact-finder.) The current requirement for leave in s15YC(1)(a) does not apply in two situations: if the 'evidence is of sexual activities with a defendant in the proceeding' (s15YC(1)(b), above) or if 'the child is a defendant in the proceeding' (s15YC(5)).

In most respects, current s15YC(1) is similar to state and territory provisions on sexual experience. Like nearly all such rules in Australia,[2] the leave requirement in s15YC(1) applies to all parties in a criminal proceeding, including the prosecution and any co-defendant. There is no definition of 'experience with respect to sexual activities', however s15YC is likely to be interpreted like similarly worded laws elsewhere in Australia, where such terminology has been held to cover both consensual and non-consensual sexual activities (i.e. including sexual abuse) and evidence of the absence of sexual experience (e.g. virginity, or of particular types of sex.) The meaning of the terms 'evidence of' and 'with respect to' is murkier, but may include indirect evidence of a child's sexual activities, such as things asserted to others or that can otherwise be inferred about the child's possible past or future sexual activities.[3]

In some key ways, existing s15YC(1) differs from some or all state and territory rules on sexual experience. In one respect, s15YC(1) provides broader protection than all other rules; its protection extends to child witnesses who aren't alleged victims of the offence that is the subject of the proceedings; state and territory shield laws are limited to alleged victims. However, in other respects, s15YC(1)'s protection is narrower than other rules. s15YC(1)'s protection for alleged victims is limited to alleged child victims; all state and territory laws protect adult victims as well. Also, s15YC(1) has a blanket exception from its leave requirement for 'sexual activities with a defendant'; while the ACT and South Australia have somewhat similar, albeit narrower, exceptions,[4] the remaining state and territory laws all require a court's leave before such evidence can be given.[5]

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[1] There is also a provision on evidence of sexual reputation, which also permits such evidence with leave; however, items 19 to 21 will remove that leave requirement, making the bar on evidence of sexual reputation absolute for child witnesses.
[2] The exception is Western Australia: *Evidence Act 1906* (WA), s36BC.
[3] There is no equivalent in federal law, current or proposed, to Western Australia's ban on 'evidence of sexual disposition': *Evidence Act 1906*, s. 36BA. In uniform evidence law jurisdictions, such evidence will be partly regulated by the 'tendency rule' in s97 of that legislation (and see also current s15YB(3)).
[4] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s76(2) (limited to 'specific sexual activities'); *Evidence Act 1929* (SA), s34L(b) (limited to 'recent sexual activities').
[5] s15YC(5) has further a blanket exception where the child witness (or, though this would be rare, alleged child victim) is also a defendant in the proceeding. There are no similar exceptions in state or territory laws.

The narrowness of s15YC(1)'s protection compared to state and territory laws is not necessarily a problem, as the gaps in federal law may well be filled by state or territory rules of evidence (e.g. rules on tendency or credibility evidence) or state or territory rape shield laws. However, that isn't ideal because: the other rules differ from jurisdiction to jurisdiction; they don't apply in (admittedly rare) criminal proceedings in federal courts; and they are subject to an argument that federal rules (including s15YC(1)) 'otherwise provide' and therefore that the state/territory laws cannot be 'picked up' in federal proceedings. To their credit, items 23 and 26 largely solve these problems, by largely removing the gaps between s15YC(1)'s protection and those offered by state and territory laws.

But, crucially, they (and item 24) go well beyond that.

The effect of item 23

Item 23, if enacted, would change s15YC(1) to the following rule:

> ***15YC Evidence of sexual experience —child proceedings***
>
> *(1) Evidence of a child witness' or child complainant's experience with respect to sexual activities is inadmissible in a child proceeding, unless:*
>
> *(a) the court gives leave; and*
>
> *(b) the evidence is of sexual activities with a defendant in the proceeding.*

A seemingly small change - replacing 'or' with 'and' at the end of s15YC(1)(a) – will have a very dramatic effect. The change removes the existing exemption from the leave requirement for evidence covered by s15YC(1)(b): 'sexual activities with a defendant in the proceeding'. However, it goes much further than that. It also completely bars the admission of any evidence of a child witness's or alleged child victim's sexual activities that fall outside of s15YC(1)(b), whether or not a court would otherwise give leave to admit such evidence.

That is, the effect of item 23 will be that neither the prosecution nor the defence in any child proceeding will ever be able to introduce or invite the use of evidence of the child's experience of any sexual activities with anyone who is not a defendant in the proceeding. That includes any evidence of the child's sexual activities with (including sexual abuse by) a person who has not been or cannot be charged with an offence for any reason, or who has been or will be charged in a separate proceeding. If item 23 is enacted, all such evidence will be absolutely barred in federal child proceedings, even if a court gives or would otherwise give leave.[6]

The only existing state or territory law on sexual experience that is even remotely similar in effect to item 23 is in NSW, where sexual experience evidence is only admissible if it falls within one of a set of statutory 'gateways'. One of those gateways – evidence that relates to a 'relationship' between the complainant and the accused[7] - is somewhat similar to s15YC(1)(b).[8] Crucially, though, NSW law

[6] The Bill does not amend or repeal existing s15YC(5), the exemption for where the child is themselves is a defendant in the proceeding. This means that a child defendant who testifies can be asked about their experience of sexual activities with anyone without any need for leave under federal law. Likewise, all parties can introduce evidence about the experience of sexual activities of a child defendant who is also said to be an alleged victim of a co-defendant in the proceeding.

[7] *Criminal Procedure Act 1986* (NSW), s294CB(4)(b). Obviously, the use of the term 'relationship' in relation to a child is unclear and jarring. Note that the NSW provision covers adult alleged victims too.

[8] It isn't identical, though. The NSW exception doesn't apply to sexual activities between an alleged victim and a defendant that was not part of an existing or recent 'relationship' between the alleged victim and the defendant. On the

allows five other (some admittedly fairly narrow) gateways for evidence that is not related to such a relationship, whereas item 23 would not allow any alternative gateways for admitting evidence of a non-defendant child witness's or victim's sexual activities with a non-defendant. Item 23 therefore imposes a more restrictive rule than NSW's, which is already by far Australia's narrowest rule on evidence of sexual experience.

No other Australian provision (or indeed any other provision I'm aware of elsewhere) has anything like the effect of item 23. That is, while they all require leave to admit all or most evidence of sexual experience, none place an absolute bar on evidence of anyone's sexual activities with a non-defendant.

Effect of item 24

Item 24, if also enacted, would add an additional restriction to s. 15YC(1) as follows:

> ***15YC Evidence of sexual experience — child proceedings***
>
> *(1) Evidence of a child witness' or child complainant's experience with respect to sexual activities is inadmissible in a child proceeding, unless:*
>
> *(a) the court gives leave; and*
>
> *(b) the evidence is of sexual activities with a defendant in the proceeding; and*
>
> *(c) the evidence relates to sexual activity that occurred or was recent at the time of the commission of the alleged offence*

The effect of new subsection 15YC(1)(c) is to further limit the sole admissible category of sexual experience evidence permitted item 23 – evidence of the child's sexual activities with a defendant in the proceeding – by only allowing evidence of such an activity to be admitted if it 'occurred or was recent' when the alleged offence was committed.

That is, the further effect of item 24 will be to absolutely bar the prosecution and any defendant in a child proceeding from introducing or inviting the use of evidence of a child witness's or alleged child victim's experience of sexual activities that either occurred in the non-recent past or at any point after the alleged offence was committed. [9] That would include a non-recent past or subsequent incident of abuse by the defendant, unless that other incident was the subject of a further charge and that further charge was laid and heard jointly in the proceeding.

Again, the only existing state or territory law on evidence of sexual experience that is even remotely similar to item 24 is NSW's law. Item 24's operation is somewhat similar to two of the six gateways for admissibility in NSW's law: the connected set of circumstances gateway (which is limited to activity 'at or about the time' of the alleged offence) and the relationship gateway (which is limited to a relationship that was 'existing or recent' at the time of the offence.)[10] However, neither gateway is as narrow as the combined operation of items 23 and 24, and, again, NSW's law still allows for four other (admittedly narrow) options to admit evidence of non-recent/contemporaneous sexual

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other hand, the NSW exception may theoretically cover sexual activities between the alleged victim and a third party that somehow 'relates to' the relationship between the alleged victim and the defendant.

[9] Because of the retention of s15YC(5), the sole exception will be if the child is a defendant, in which case the prosecution and defence will be able to introduce evidence of the child defendant's experience of sexual activities with anyone at any time, including with a co-defendant, with no requirement to seek leave.

[10] *Criminal Procedure Act 1986* (NSW), s294CB(4)(a)(i) & (b).

activities, whereas the proposed amended s15YC(1) does not allow for any other options for admitting such evidence, with the defendant or anyone else.

Again, no other Australian provision (or any other provision I'm aware of elsewhere) excludes all non-contemporaneous, non-recent sexual activities with anyone, let alone a defendant; rather, subject to a court giving leave, it is generally possible to admit such evidence.

Effect of item 26

Item 26, if enacted, will introduce a new, additional federal provision on evidence of sexual experience that commences:

> ***15YCB Evidence of sexual experience—vulnerable adult proceedings***
>
> *(1) Evidence of a vulnerable adult complainant's experience with respect to sexual activities is inadmissible in a vulnerable adult proceeding, unless:*
>
> *(a) the court gives leave; and*
>
> *(b) the evidence is of sexual activities with a defendant in the proceeding; and*
>
> *(c) the evidence relates to sexual activity that occurred or was recent at the time of the commission of the alleged offence.*

This provision will end the current failure of federal legislation to specifically protect adult alleged victims from the admission of evidence of their experience with respect to sexual activities. That is a welcome change (albeit one that may already have been partially covered by state or territory laws picked by ss 68 or 79 of the *Judiciary Act 1903* (Cth).) However, it does far more than that.

New s15YCB(1)'s terms do not reflect the current s15YC(1) or any state or territory law on sexual experience, but rather enact a rule for adult alleged victims that is in almost identical terms to s15YC(1) if it was amended by items 23 and 24. That is, the new s15YCB(1) would limit the admissible evidence of experience of sexual activities of alleged adult victims in vulnerable adult proceedings (defined in s15Y(2) as proceedings for various federal offences) to evidence of an adult victim's sexual activities with a defendant in the proceeding, and only if that evidence relates to an activity at the time of the commission of the alleged offence or that was 'recent' at that time.

In short, the effect of item 26 is that it absolutely bars prosecutors and defendants alike from introducing or inviting the use of evidence of the alleged adult victim's sexual activities with anyone else, including people who were charged or were found guilty or pled guilty in separate proceedings and people who are not charged for any reason, or with the alleged victim's sexual activities with a defendant in the proceeding in the non-recent past, or after the alleged offence was committed, including alleged abuse that is either uncharged or is or was dealt with in separate proceedings or occurred after or well before the commission of the charged offence.[11]

Again, despite some partial similarity to some parts of NSW's law on evidence of sexual experience (as noted above in the discussion of items 23 and 24), no state or territory law (or any other similar

[11] Item 26 does not insert an equivalent exception to the one retained in s15YC(5) for child witnesses or alleged victims who are also defendants in the proceeding. That is, in the unlikely event that an adult defendant in a proceeding is also the alleged victim of a co-defendant in a proceeding, the prosecution, defence or co-defendant would need leave before introducing any evidence of the adult defendants sexual activities with that co-defendant, and would be barred from introducing any evidence of such activities with that co-defendant that occurred in the more distant past or after the alleged offence, or introducing any evidence at all of sexual activities with a non-party to the proceedings.

law I'm aware of) has the effect of item 26. Rather, all state and territory laws on sexual experience allow evidence of some or all of an alleged victim's sexual activities with non-defendants or non-recent/non-contemporaneous activities with defendants to be admitted so long as a court gives leave.

Other items in Schedule 1

My submission is exclusively about items 23, 24 and (part of) 26 of Schedule 1.

For completeness, I should note that other items in Schedule 1 (items 1-9, which expand the existing definitions of 'child proceedings' and 'vulnerable adult proceedings', items 10 & 11, which may expand the existing definitions of 'child witness' and 'child complainant' and items 22 & 25) will, if enacted, have the effect of expanding the scope or operation of amended s15YC(1) and new s15YCB(1). While that would expand not only the good aspects of items 23, 24 and 26 (e.g. removing the exemption for activities with a defendant, and the new protection for alleged adult victims) but also the bad aspects (e.g. the restrictions on criminal defendants and prosecutors that I detail below), they are not themselves problematic, and could properly be enacted whether or not items 23, 24 and 26 are enacted.

As well, items 18-21 and item 26 amend or introduce complete bans on evidence of the 'sexual reputation' of alleged adult victims. In contrast to the amended s15YC and the new s15YCB, an absolute ban on sexual reputation evidence applies in nearly every state and territory.[12] Such provisions accordingly already apply (unless a federal law otherwise provides) in nearly all federal criminal proceedings. Amended s15YB and new s15YCA also likely duplicate other existing general rules of evidence governing federal criminal trials, notably the hearsay, opinion, tendency and credibility rules and the discretionary exclusion of prejudicial evidence. In short, while items 18-21 and new s15YCA are welcome, their actual effect will be minimal or non-existent.

Finally. the remaining items in Schedule 1 (items 12 to 17 & 27 to 59) are not concerned with rules about evidence of sexual experience, but rather procedural rules concerning how various people may testify in some federal criminal proceedings. This submission does not address those items, except in one small way: as detailed later in this submission, one possible side-effect of item 26 is that it may adversely affect the practical operation of some of those other protections.

Consultation on items 23, 24 and 26

I understand that the Bill has gone through extensive stakeholder consultation, including via the dissemination of confidential draft bills in 2022 and 2023.[13] Here I will briefly note my concern that this consultation may have been inadequate in relation to items 23, 24 and 26.

In February 2002, Legal Aid NSW published its submission on an unpublished draft bill seemingly circulated that year.[14] In relation to evidence of sexual experience, NSW Legal Aid said (citing clauses 15 and 16 of the unpublished draft bill):

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[12] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s75; *Criminal Procedure Act 1986* (NSW), s294CB(2); *Criminal Law (Sexual Offences) Act 1978* (Qld), s. 4, rule 1; *Evidence Act 1928* (SA), s34L(1)(a); *Evidence Act 2001* (Tas), s194M(1)(a); *Criminal Procedure Act 2009* (Vic), s341; *Evidence Act 1906* (WA), s36B. The Northern Territory allows such evidence to be admitted with leave: *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s. 4(1)(a).

[13] For completeness, note that I was not part of this consultation and have seen no draft bills.

[14] See https://www.legalaid.nsw.gov.au/content/dam/legalaidnsw/documents/pdf/about-us/law-reform/law-reform-submissions-

> *Under the Crimes Act, evidence of a child's sexual experience or reputation is inadmissible. The Bill extends this provision to include the sexual reputation or experience of adult survivors in vulnerable adult proceedings.*
>
> *This proposed amendment is largely consistent with NSW provisions.*
>
> *We acknowledge that the admission of sexual experience or reputation evidence can re-traumatise witnesses through humiliation and 'victim blaming' and can further 'rape myths'. We therefore support this amendment to restrict its admissibility in all cases, including for adults.*

NSW Legal Aid's submission does not mention any changes to the existing s. 15YC on the sexual experience of child witnesses or alleged victims, and refers only to the draft bill 'extend[ing]' existing provisions concerning children to adult victims. It notably fails to mention any other change to the federal conditions for the admissibility of evidence of sexual experience with the defendant, much less the new absolute bars on categories of that evidence created by items 23, 24 and 26. It also describes the draft bill's amendments as 'largely consistent with NSW provisions', even though the NSW provisions have six gateways that only partially overlap with the single gateway permitted by items 23, 24 and 26. It therefore seems possible that the 2022 draft bill simply did not include provisions equivalent to items 23, 24 and 26. Indeed, I find it inconceivable that NSW Legal Aid, which has repeatedly litigated its concerns about NSW's law on evidence of sexual experience (which, while narrower than all other Australian laws on this topic, is much more generous to the defence than items 23, 24 and 26) would describe a bill that included equivalents to items 23, 24 and 26 in the terms quoted above.

In March 2002, the Law Council of Australia published its submission on an unpublished draft bill seemingly circulated that year.[15] In relation to evidence of sexual experience, the Law Council says:

> *Item 17 and associated definitional amendments create evidentiary presumptions against the admission of evidence of sexual experience or reputation of a vulnerable adult complainant unless the court is satisfied that the evidence is substantially relevant to a fact in issue in the proceeding. The proposed provisions undoubtably operate to exclude evidence which would, at least in theory, be admissible under the tendency and coincidence provisions in the Uniform Evidence Law. The same position currently applies in all other Uniform Evidence Law jurisdictions where there is specific legislation dealing with sexual history evidence.*
>
> *The Law Council is pleased to support these provisions which provide significant protections for vulnerable complainants while retaining exceptions for properly relevant and probative evidence. The proposed Commonwealth provisions appear to be similar to those existing in other Uniform Evidence Law jurisdictions such as the provisions in Victoria, where robust restrictions on the admissibility of evidence regarding sexual experience or reputation exist in relation to certain classes of witnesses in sexual offences, as contained in Division 2, Part 8.2 of the Criminal Procedure Act 2009 (Vic).*

The first paragraph's description of 'Item 17' notably does not mention aspects of items 23, 24 and 26 that introduce an absolute bar on significant categories of evidence of sexual experience. It instead

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2022/Crimes%20and%20Other%20Legislation%20Amendment%20(Strengthening%20the%20Criminal%20Justice%20Response%20to%20Sexual%20Violence%20and%20Other%20Measures)%20Bill%202022.pdf.

[15] See https://lawcouncil.au/publicassets/ef0a3650-05c2-ec11-9450-005056be13b5/4184%20-%20%20SCJRSCVOM%20%20Bill%202022.pdf. The submission notes 'contributions of the Law Society of New South Wales, the Law Institute of Victoria, Mr Stephen Odgers SC as well as the oversight of its National Criminal Law Committee in the preparation of this submission.' It is worth noting that Mr Odgers is an outspoken commentator and critic of NSW's rape shield law.

describes 'Item 17' as permitting a court to admit any such evidence if a court finds substantial relevance to a fact in issue. Consistently with this, the second paragraph describes 'Item 17' as similar to Victoria's provisions, which permit a court to admit any evidence of sexual experience if a court finds substantial relevance and grants leave. It therefore seems possible that item 17 in the 2022 draft was quite different to the present items 23, 24 and 26. Indeed, it is inconceivable to me that the contributors to the LCA's submission (including people who have publicly criticised NSW's law) would have described or endorsed a provision equivalent to items 23, 24 and 26 in the terms quoted above.

It is of course possible that both bodies simply failed to appreciate what was proposed in the draft bill submitted to them, perhaps because of the narrow timelines of any consultation. Indeed, if they were considering the same draft bill, then I am at a loss to explain why they would separately describe them as similar to NSW's and Victoria's existing provisions, which dramatically differ from eachother. It is also possible that subsequent consultations (where submissions have not been published to date) did include equivalents to items 23, 24 and 26. Nevertheless, I note my concern that, for whatever reason, there may not have been adequate or effective consultation on items 23, 24 and 26.

Again, I realise that no consultation is ever complete, perfect, or even necessary for bills before parliament, and also that the present inquiry's role is not to review any such consultation. I nevertheless raise it here because of the possibility that, because of deficiencies in the consultation on items 23, 24 and 26, it is possible that bill's drafters themselves failed to appreciate the effects of those items, and accordingly may not have turned their mind to the possible adverse impacts I describe in the middle part of my submission.

Explanatory material on items 23, 24 and 26

In its clause-by-clause discussion, the explanatory memorandum correctly, albeit tersely, describes the effect of items 23, 24 and 26 in terms consistent with my descriptions above:

> ***Item 23 - Paragraph 15YC(1)(a)***
>
> *31. This item amends s 15YC(1)(a) by repealing 'or' and substituting it with 'and'. This means that both elements of s 15YC(1) must be satisfied when determining whether evidence of the sexual experience of a child is admissible. This means that a party must seek leave of the court for the evidence to be heard, and the evidence must relate to sexual activities between the child witness or child complainant and the defendant in the proceeding.*
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> ***Item 24 - At the end of subsection 15YC(1)***
>
> *33. This item amends s 15YC(1) by adding new s15YC(1)(c), which requires that, in determining the admissibility of sexual experience evidence in a child proceeding, the court must be satisfied that the sexual activity with the defendant in the proceeding was existing or recent at the time of the commission of the alleged offence.*
>
> ***Item 26 - After section 15YC***
>
> *Section 15YCB*
>
> *38. This item inserts a new s 15YCB 'Evidence of sexual experience - vulnerable adult proceedings'. Section 15YCB provides that evidence relating to a vulnerable adult complaint's sexual experience is inadmissible unless the court grants leave, the evidence is of sexual activity with the defendant to the proceedings and the evidence relates to sexual activity that occurred or was recent at the time of the commission of the alleged offence.*

Here I briefly note my concern that other parts of the explanatory material are nevertheless inadequate in describing the effect of these items.

First, the Minister's second reading speech says:

> *Greater restrictions are also placed on sexual experience evidence, making it inadmissible except in limited circumstances and where the court grants leave. This type of evidence is ordinarily too far removed from evidence of the alleged crime for its admission to be in the interests of justice, and can retraumatise vulnerable persons by victim blaming. A court will therefore need to be satisfied that sexual experience evidence is substantially relevant to the proceedings, and to consider whether its probative value outweighs any distress, humiliation or embarrassment to the vulnerable person.*

This passage notably does not specify what the 'greater restrictions' are or do, i.e. the absolute exclusion of all sexual experience evidence other than recent or contemporaneous sexual activities with the defendant. I am also concerned that the language 'except in limited circumstances and where the court grants leave' may be misread as describing alternative ways sexual experience evidence may be admitted (i.e. as current s15YC(1) provides), as opposed to items 23 and 26's actual effect, which is to impose cumulative requirements on admissibility. This ambiguity is amplified by the use of the word 'ordinarily' in the next sentence and the use of 'therefore' in the final sentence, which may falsely imply that such any sexual experience evidence may be permitted if a court finds substantial probative value etc and grants leave. As noted above, that will not be true for most sexual experience evidence.

Second, paras [2]-[4] of the explanatory memorandum state that the bill implements, advances and supports existing reports or plans as follows:

> *2. The Bill implements recommendations 52, 53, 56 and 61 of the 2017 Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission).*
>
> *3. The Bill advances Theme 2 of the First National Action Plan of the National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030 (National Strategy), which seeks to support and empower victims and survivors through recognising that the effects of child sexual abuse can be cumulative, complex and long-lasting. Consistent with the National Strategy, the Bill strengthens existing protections afforded to victims, survivors and witnesses in criminal proceedings involving child sexual abuse-related Commonwealth offences.*
>
> *4. The Bill also supports the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027 by strengthening the legal frameworks necessary to improve justice outcomes and protections for victims and survivors.*

However, none of these documents discusses, let alone recommends, any changes to laws on the admissibility of evidence of sexual experience.[16] The cited recommendations of the Royal Commission report concern procedures for recording evidence.[17] While Theme 2 of the National Strategy refers broadly to 'enhanc[ing] legislative protections for vulnerable witnesses', the specific

[16] See also the 'Summary' on the Bill webpage: 'Amends the *Crimes Act 1914* to implement certain recommendations of the Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse in relation to protections for vulnerable persons involved in Commonwealth criminal proceedings.' As noted, the Royal Commission report makes no recommendations in relation to evidence of sexual experience.

[17] Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Recommendations*, 2017, pp. 107-8. (The cited recommendations are presumably the Criminal Justice report recommendations.)

recommendations cited in relation to that are on recording evidence and ground rules hearings.[18] The National Work Plan refers to changes 'to the admissibility of tendency and coincidence evidence', but that is a reference to evidence of the defendant's activities, and the recommendation is to 'facilitate greater admissibility of these forms of evidence across all jurisdictions'.[19] Otherwise, the procedural measures it recommends are limits on personal examination and giving evidence via audio-visual link or using screens.[20] To reiterate, none of these documents discusses the rules on the admissibility of sexual experience evidence, let alone makes recommendations about them. I am concerned that these paragraphs could mislead readers into thinking that items 23, 24 and 26 were recommended or prompted by any of the three cited documents.

Third, paras [5] and [9] summarise the Bill's effects via dot points, which address item 26 as follows:

- *restricting the admissibility of sexual experience evidence of vulnerable adult complainants unless the court grants leave and considers specific criteria, including that the evidence is substantially relevant to the facts in issue. The court must also give regard to whether its probative value outweighs any distress, humiliation or embarrassment to the vulnerable person;*
- *restrict the admissibility of sexual experience evidence of vulnerable adult complainants unless the court grants leave and considers specific criteria, including that the evidence is substantially relevant to facts in issue in the proceeding;*

Like the Minister's second reading speech, these summaries do not specify that the criteria include that the evidence must concern recent or contemporaneous sexual activities with a defendant. In my view, they may again mislead readers into falsely thinking that item 26 permits any evidence of adult alleged victims' sexual experience to be admitted if a court finds substantial relevance and grants leave, whereas that is only true for a narrow range of such evidence. Neither dot point summary mentions items 23 and 24 at all.

Fourth, para [13] of the statement of compatibility seemingly discusses items 23, 24 and 26 as follows:

> *The Bill amends the Crimes Act to clarify that evidence of sexual experience of vulnerable persons appearing as complainants and/or witnesses in criminal proceedings is inadmissible unless the court grants leave, and the evidence is of sexual activities with a defendant in the proceeding. This amendment is compatible with human rights as there is a presumption against the admissibility of sexual experience evidence unless there are specific, prevailing reasons that persuade the Court to grant leave.*

While the first sentence clearly and correctly describes the effect of items 23 and 26, it omits the further restriction in item 24 and part of 26 to recent or contemporaneous activities with the defendant. I am concerned that the second sentence, by stating that there is a 'presumption' that applies 'unless there are specific, prevailing reasons that persuade the Court to grant leave' potentially misleads

[18] Commonwealth of Australia, *National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030*, 2021, p. 41, item 9, citing the Royal Commission's *Criminal Justice Report* recommendations 52, 54 & 60. See also item 22 (on p. 47), which discusses uniform evidence law reforms and reforms to digital evidence, citing the Royal Commission's recommendations 44-51 (on tendency evidence), 69 (on expert evidence) and 85 (interoperation of regulatory and criminal justice repones). Again, none of these things are about evidence of sexual experience.
[19] Meeting of Attorneys-General, *Workplan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027*, 2022, p8, item 1.2.
[20] Meeting of Attorneys-General, *Workplan to Strengthen Criminal Justice Responses to Sexual Assault 2022-2027*, 2022, pp 8-9, item 1.3.

readers about the effect of items 23, 24 and 26, which is to create an absolute bar on most evidence of alleged victims' or child witnesses' sexual activities, regardless of whether or not a court would have granted leave. Apart from recent or contemporaneous sexual activities with the defendant, any 'presumption' created by items 23, 24 and 26 is completely irrebuttable.

Fifth, at [19]-[20], the statement of compatibility asserts that 'restricting evidence of sexual experience' will 'have a positive impact on' women's right to protection. While that is plausible in the case of restrictions that apply to defence evidence, it does not address the adverse impact of item 23, 24 and 26 on prosecutors, including substantially or absolute preventing them from proving some crimes or offering some prosecution evidence (as discussed below in this submission.)

Sixth, the statement of compatibility's discussion of the right to a fair hearing at [21]-[24] does not addresses items 23, 24 and 26 at all, even though they substantially or absolutely prevent some defendants from offering some defences, rebutting some prosecution evidence or offering some defence evidence (as discussed below in this submission.) While there may well be arguments that items 23, 24 and 26 are nevertheless reasonable limits on defendants' right to a fair hearing, the absence of discussion in the statement of compatibility appears to fail to inform members of parliament of those arguments in accordance with the goals of the *Human Rights (Parliamentary Scrutiny) Act 2011*.[21] I trust that the Parliamentary Joint Committee on Human Rights will report on this issue and seek further information from the Minister. The Senate Legal and Constitutional Affairs Legislation Committee may wish to seek to ensure that the Minister responds in a timely matter for the purposes of the present inquiry.

Of course, I appreciate that explanatory material is never perfect or comprehensive, and also that the present inquiry's role is not to report on the Bill's explanatory material. I nevertheless raise it here because of the possibility that the reason the explanatory material does not fully or accurately describe the effects of items 23, 24 and 26 is because the people who developed and drafted the bill did not appreciate those effects, and accordingly may not have turned their mind to the possible adverse impacts I describe later in this submission. That in turn may explain why the Bill got to this stage of the parliamentary process seemingly without any recognition of such impacts.

Summary so far

While items 23, 24 and 26 repair some unfortunate gaps in the existing federal law on evidence of sexual experience, they go much further than that. If enacted, these items will create an absolute bar on the use by prosecutors and defendants in various federal proceedings of a large category of sexual experience evidence, namely evidence of sexual activities of alleged victims or child witnesses with anyone other than a defendant or co-defendant in the proceedings, and of anything other than recent or contemporaneous sexual activities with a defendant or co-defendant. In this respect, those items significantly differ from all other Australian laws on this topic, may not have been the subject of adequate consultation and are inadequately described in much of the Bill's explanatory material.

[21] An especially well-known overseas ruling on human rights law, *A v R* [2001] UKHL 25, expressly ruled that a provision that limited the admissibility of evidence of sexual activities with the defendant to contemporaneous or similar activities would be incompatible with the right to a fair hearing unless read so as to encompass sexual activities with the defendant some months prior to the alleged offence. Depending on the meaning of 'recent', item 24 may be similarly incompatible with the right to a fair hearing.

Adverse impact of items 23, 24 and 26

In this part of my submission, I outline the adverse impact that items 23, 24 and 26 will have on federal criminal justice if they are enacted. I argue that the items may have very significant adverse impacts on ability of both prosecutors and defendants to argue their cases in various federal criminal proceedings.

Adverse impact on prosecutors

Prosecutors will need the court's leave to offer essential evidence in some federal proceedings

I commence with a mild, albeit somewhat startling, effect of items 23 and 26.

Many, perhaps most, child proceedings and vulnerable adult proceedings involve offences where the prosecution must prove that the defendant engaged in a sexual activity with the alleged victim. If items 23 and 26 are enacted, the prosecution will have to seek and obtain the court's leave before it can offer any and all evidence to prove that, including before the alleged victim can describe what happened to them.

For example:

- in a prosecution under s. 71.8 of the *Criminal Code* (Cth) ('sexual assault of United Nations and associated personnel'), the prosecution would have to seek and obtain leave from the court before it could call any evidence to prove that the defendant sexually penetrated a United Nations or associated person, including before it could ask the alleged rape victim or a witness to describe the alleged rape or to introduce the accused's admissions about the allegations.
- in a prosecution under s. 272.8(1) of the *Criminal Code* (Cth) ('sexual intercourse with a child outside Australia'), the prosecution would have to seek and obtain leave from the court before it could call any evidence to prove that the defendant had sexual intercourse with a child under 16, including before it could ask the child or a witness to describe the alleged abuse or to introduce the accused's admissions about the allegations.
- in a prosecution under s. 474.25A(1) of the *Criminal Code* (Cth) ('using a carriage service for sexual activity with a person under 16 years of age'), the prosecution would have to seek and obtain leave from the court before it could call evidence to prove that the defendant engaged in a sexual activity with a child under 16 via the internet, including before it could ask the alleged child to describe the online abuse or it could offer digital evidence of the abuse.

The requirement for leave cannot be assumed or given orally. Rather, the *Crimes Act 1914* (Cth), in a provision unchanged by the Bill, specifies:

> ***15YD Leave under this Division***
>
> *(1) An application for leave under this Division:*
>
> *(a) must be in writing; and*
>
> *(b) if there is a jury in the proceeding in question--must be made in the jury's absence; and*
>
> *(c) must not be determined before the court has considered such submissions and other evidence as it thinks necessary for determining the application.*
>
> *(2) If the court gives leave under this Division, the court must:*

(a) state its reasons in writing; and

(b) cause those reasons to be entered in the court's records.

Of course, there is no doubt that a court applying amended s15YC and new s15YCB can and would grant leave to permit prosecutors to prove an element of an offence. My point is simply that, if items 23 and 26 are enacted, federal prosecutors will nevertheless have to seek, argue for and obtain leave, and a court would have to receive submissions and evidence, give written leave and provide written reasons, before the prosecution could offer essential evidence of a federal sexual crime. That differs from existing s. 15YC(1), because of its blanket exemption of all of the alleged victim's sexual activities with a defendant.

This will be a mostly unique federal problem. Five state and territory laws on evidence sexual experience completely exempt either evidence of the crime itself or contemporaneous sexual activities with the accused from their leave requirements.[22] The remaining three have clear language addressing these scenarios in their criteria for a court being able to grant leave or assessing whether to grant leave.[23] If items 23, 24 and 26 are enacted, amended s15YC and new s15YCB will be the only Australian provisions on evidence of sexual experience that do not address how they apply to evidence required to prove an essential element of the crime.

I mainly mention this fairly mild adverse impact because it so starkly indicates an apparent failure by the Bill's drafters to consider the impact of items 23, 24 and 26 on prosecutors. By contrast, all state and territory drafters appear to have considered and responded to this issue.

Some federal offences will not be able to be proven

I now describe a much more serious effect of items 23 and 26.

Some federal crimes require that prosecutors prove that someone other than the defendant engaged in a sexual activity with an alleged victim. If items 23 and 26 are enacted, the prosecution will be completely barred from proving that at all, and those prosecutions will therefore fail, unless the other person is charged and the charge is considered in the same proceeding.

For example:

- in a prosecution under s272.8(2) of the *Criminal Code* (Cth) ('causing child to engage in sexual intercourse in presence of defendant'), the prosecution would be absolutely barred from calling evidence to prove the element that the child engaged in sexual intercourse with a non-defendant. That is because amended s15YC(1)(b)'s condition would not be satisfied. This problem arises whether the evidence is to be given by the child or is to be proved by other evidence that the sexual intercourse occurred. Accordingly, any prosecution for this offence will fail, unless the person who engaged in sexual intercourse with the child was a co-defendant tried in the same proceeding. In the common scenario where the defendant is accused of procuring a child to have sex in their presence with a third party whose identity is unknown or who cannot be prosecuted or have been separately prosecuted, this offence will not be able to be proved if items 23 and 26 are enacted.

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[22] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s76(2); *Evidence Act 1929* (SA), s34L(2) (parenthetical); Evidence Act 2001 (Tas), s194M(1)(b) (in commas); *Criminal Procedure Act 2009* (Vic), s342 (parenthetical); *Evidence Act 1906* (WA), s36BC (in commas).

[23] *Criminal Procedure Act 1986* (NSW), s294CB; *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s4(3); *Criminal Law (Sexual Offences) Act 1978* (Qld), s4 (rule 4, second sentence);

- in a prosecution under s474.25A(2) of the *Criminal Code* (Cth) ('causing child to engage in sexual activity with another person'), the prosecution would be completely barred from calling evidence to prove the element that the child engaged in sexual activity with another person, unless the other person is a co-accused in the proceeding. That is because amended s15YC(1)(b)'s condition would not be satisfied. This problem applies whether the evidence is given by the child, other person, or a witness, or if the sexual activity is evidenced in some other way (e.g. via digital evidence.) Accordingly, any prosecution for this offence will fail, unless the other person who the child engaged in sexual activity with is a co-defendant in the same proceeding. In the common scenarios where the defendant is accused of procuring a child to have sex online with a person who cannot be prosecuted or won't be prosecuted or is or will be separately prosecuted or has pled guilty, this offence will no longer be able to be proved if items 23 and 26 are enacted.
- in any prosecution charging a defendant with complicity in (i.e. alleging that the defendant aided, abetted, counselled, procured, committed by proxy or engaged in a common purpose or agreeed that another person will commit) a federal offence with a sexual activity element, the prosecution will be completely barred from proving that the sexual activity was engaged in by the other person, unless the other person is a co-defendant. That is because amended s15YC(1)(b)'s or s15YCB(1)(b)'s conditions would not be satisfied. This problem applies whether the evidence of the sexual activity is given by the accused, the alleged victim, the alleged perpetrator or by some other means. Accordingly, any prosecution for complicity in someone else's federal offence with a sexual activity element will fail unless the other person is a co-accused in the proceeding. In the common scenarios where the other person won't be prosecuted or can't be prosecuted, or has been prosecuted separately, or has pled guilty to the offence, complicity in that offence will not be able to proven if items 23 and 26 are enacted.

Crucially, no court can overcome these barriers to proof in these (or similar) federal prosecutions because, as s15YC(1)(b)'s or s15YCB(1)(b)'s condition for admissibility would not be satisfied, no court can give leave (and any leave given will have no effect.)

This will be a unique federal problem. Three state laws on sexual experience have an exemption from the leave requirement for any evidence of the crime itself.[24] Three other state and territory laws have clear language putting beyond doubt that a court may or will grant leave to permit that category of evidence.[25] The two remaining jurisdictions, while not expressly addressing this scenario, clearly nevertheless permit a judge to grant leave, and leave would obviously be granted.[26] The amended and new federal provisions will be alone in Australia (and, as far as I'm aware, the world) in absolutely barring proof of some offences in common scenarios.

Prosecutors in some federal proceedings will be unable to offer commonly crucial evidence of guilt

Items 23 and 26 will have a further, very significant effect.

Some elements of important federal offences are commonly established by evidence that the alleged victim had sexual activity with an uncharged person. If enacted, items 23 and 26 will bar federal

[24] *Evidence Act 2001* (Tas), s194M(1)(b) (in commas); *Criminal Procedure Act 2009* (Vic), s342 (parenthetical); *Evidence Act 1906* (WA), s36BC (in commas).
[25] *Criminal Procedure Act 1986* (NSW), s294CB; *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s4(3); *Criminal Law (Sexual Offences) Act 1978* (Qld), s4 (rule 4, second sentence);
[26] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s78(1)(a); *Evidence Act 1929* (SA), s34L(2)(a).

prosecutors from using this common evidence to prove significant federal crimes, including slavery and child abuse material offences.

For example:

- in a prosecution under s270.3 of the *Criminal Code* (Cth) ('slavery') in the common scenario where the alleged slave was brought to Australia by the accused to work in a brothel, the prosecution will be absolutely barred from proving that the alleged slave was required to have sex with brothel clients, unless the relevant clients were also co-defendants in the proceeding. That is because amended s15YC(1)(b)'s or s15YCB(1)(b)'s condition would not be satisfied. This problem applies whether the evidence of the sex work was given by the alleged victim, the accused, the clients or anyone else. Accordingly, any prosecution for slavery that turns on proof that the slavery involved sex work will fail unless the relevant clients are made co-accused in the proceeding. In the common scenario where the brothel's clients have themselves most likely not committed any offence, the offence of slavery in this context will generally no longer be able to be proved if items 23 and 26 are enacted. For example, the landmark first successful slavery prosecution upheld by the High Court in *R v Tang* [2008] HCA 39 would have failed had items 23 and 26 been enacted two decades ago.
- in a prosecution under s474.22 of the *Criminal Code* (Cth) ('Using a carriage service for child abuse material') in the common scenario where the accused is charged with accessing, transmitting or soliciting child abuse material that consists of real images of an unknown person engaging in sexual activity with a child, the prosecution would be absolutely barred from adducing evidence of the contents of the images. That is because that evidence will be evidence of the sexual activities of the alleged child victim of the offence with a non-defendant, so the condition in s15YC(1)(b) will not be satisfied. This problem applies whether or not the child victim is involved in the proceeding at all (see item 10 of Schedule 1), the child victim's or alleged abuser's identity is known or not, and whether the contents of the images are proved by the images themselves or in someone's description of them or how they were produced. Except in circumstances where the defendant or a co-defendant is themselves depicted in the image, or the image does not depict sexual 'activities' or does not depict real events or the non-activity aspects of the images suffices to prove that they are child abuse material, this offence will no longer generally be able to be proved if items 23 and 26 are enacted.
- in any prosecution under s273B.4 of the *Criminal Code* (Cth) ('failing to protect child at risk of child sexual abuse offence'), the prosecution will be absolutely barred from calling evidence that the defendant was aware that the child was previously sexually abused by another person, unless that other person is a co-defendant in the proceeding. That is because amended s15YC(1)(b)'s condition would not be satisfied in relation to the pervious sexual abuse. This problem arises whether the evidence of the past sexual abuse was given by the child, the accused, the perpetrator of the abuse or any witness to the abuse or to the revelation of the abuse by the child. In the common circumstance where the other person hasn't been or can't be prosecuted, or is prosecuted separately, the prosecution will be limited to other, narrower methods of proving that the accused was aware of a risk of child sexual abuse if items 23 and 26 are enacted.
- in a prosecution for inciting someone else (or conspiring with someone else for that other person) to commit a sexual offence, the prosecution will not be able to introduce evidence to prove that the other person later committed that the sexual offence, unless the other person

was a co-defendant in the proceeding. That is because the condition in s15YC(1)(b) will not be satisfied. This problem arises even if the evidence is offered by the accused, the co-accused or the alleged victim or in some other way. In the common circumstance where the other person hasn't been prosecuted, or is prosecuted separately or pleads guilty, the prosecution will be limited to other, narrower methods of proving that the incitement or conspiracy occurred if items 23 and 26 are enacted.

Again, crucially, no court can ever overcome these barriers to such federal prosecutions because, as s15YC(1)(b)'s or s15YCB(1)(b)'s condition for admissibility would not be satisfied, no court can give leave (and any leave given will be ineffectual.)

This will, again, be a unique federal problem. Three state laws on sexual experience have an exemption from the leave requirement for any evidence of the crime itself.[27] Three other state and territory laws have clear language putting beyond doubt that a court may or will grant leave to permit that category of evidence.[28] The two remaining jurisdictions, while not expressly addressing this scenario, clearly permit a judge to grant leave, and leave would obviously be granted.[29] The amended and new federal provisions will be alone in Australia (and, as far as I'm aware, anywhere) in banning such evidence regardless.

Prosecutors in federal proceedings will no longer generally be able to offer common types of prosecution evidence

The above problems are caused by items 23 and 26. Item 24 (and the equivalent part of item 26) also causes its own significant problems.

Prosecutors seeking to prove one instance of abuse of an alleged victim by the defendant often offer evidence of other, uncharged instances of the defendant abusing or engaged in sexual activities with the alleged victim, to establish that the charged abuse occurred or its context or impact. If enacted, item 24 will bar federal prosecutors from offering such evidence if the other instances were in the non-recent past or subsequent to the charged offence.

For example:

- federal prosecutors in child or vulnerable adult proceedings will be absolutely barred from offering evidence of the accused's uncharged non-recent sexual activities (whether they involve child abuse, rape or online activities) with an alleged victim or child witness, or of a non-defendant's sexual activities with an alleged victim or child witness, including as narrative evidence or tendency evidence or evidence of a sexual interest in the alleged victim or child witness (so-called 'guilty passion' evidence) in support of the testimony of the alleged victim or child witness, or to contradict contrary evidence by the accused. That is because the conditions in s15YC(1)(c) and 15YCB(1)(c) won't be established. This problem arises whether the evidence is from the alleged victim or child witness or some other source.
- federal prosecutors in relevant sentencing proceedings will be absolutely barred from offering evidence of the a convicted offender's uncharged non-recent or subsequent sexual activities

[27] *Evidence Act 2001* (Tas), s194M(1)(b) (in commas); *Criminal Procedure Act 2009* (Vic), s342 (parenthetical); *Evidence Act 1906* (WA), s36BC (in commas).
[28] *Criminal Procedure Act 1986* (NSW), s294CB; *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s4(3); *Criminal Law (Sexual Offences) Act 1978* (Qld), s4 (rule 4, second sentence);
[29] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s78(1)(a); *Evidence Act 1929* (SA), s34L(2)(a).

with a victim or child witness (or of a non-defendant's sexual activities with the victim or child witness) at the offender's sentencing hearing in support of an argument that the offender's conduct caused continuing harm or requires specific deterrence or is not amenable to rehabilitation or is more serious. That is because the conditions in s15YC(1)(b)&(c) or s15YCB(1)(b)&(c) won't be satisfied. This problem arises whether the evidence is offered in a sentencing report or in a victim impact statement.

Federal prosecutors in these cases will be limited to offering evidence of contemporaneous or 'recent' sexual activities between an alleged victim or child witness and the defendant for these purposes, unless the prosecutors bring charges or receives guilty pleas in relation to each of the other alleged sexual activities and the defendant is jointly tried or sentenced for each charge or plea in a single proceeding. Even then, the court will have to resolve difficult questions about the meaning of 'recent' and how the words 'at the time of the commission of the alleged offence' apply in joint trials of multiple offences occurring at different times.

This will an almost unique federal problem. Seven state and territory laws clearly allow each of these categories of evidence to be adduced with leave from the court. The outlier is NSW, although it expressly allows such evidence with leave if the sexual activity occurs 'at or about the time of the commission' of the offence or, for activities with the defendant, if there was a 'relationship… existing or recent at the time'.[30] The amended and new federal provisions will be alone in Australia (and, as far as I'm aware, the world) in banning all such evidence regardless.

Adult alleged victims may come under pressure to waive their statutory protections

Most of the above problems cannot be solved by a court, as items 23, 24 and 26 prevent a court from effectively giving leave to allow the prosecution to give such evidence, no matter how probative or desirable that would be. The adverse effects of items 23 and 24 on prosecutors in child proceedings, and on alleged child victims or child witnesses, will be absolutely unavoidable.

However, there is a way to avoid the adverse effects of item 26 in vulnerable adult proceedings. That is because new s15YCB(1) only applies to 'Evidence of a vulnerable adult complainant's experience' and existing s15YAA defines 'vulnerable adult complaints' as follows:

15YAA Vulnerable adult complainants

(1) A vulnerable adult complainant , in relation to a vulnerable adult proceeding, is an adult who is, or is alleged to be, a victim of an offence, of a kind referred to in subsection 15Y(2), to which the proceeding relates.

(2) However, the adult is not a vulnerable adult complainant if the adult informs the court that he or she does not wish to be treated as such a complainant.

In a prosecution that would otherwise fail or be impeded by item 26, existing s15YAA(2) allows that problem to be avoided if an alleged adult victim informs the court that he or she does not wish to be treated as vulnerable. If he or she does that, the problems caused by s15YCB, will cease to apply in the proceeding.

Unfortunately, that is not all that will happen. The positive effects of s15YCB, including shielding the complainant from defence evidence of sexual experience, will also cease to apply. So will new s15YCA's ban on sexual reputation evidence. And so will the remaining protections for vulnerable

[30] *Criminal Procedure Act 1986* (NSW), s294CB(4)(a)(i) & (b).

adult complaints in Part IAD of the *Crimes Act 1914* (Cth), including existing provisions: disallowing inappropriate or aggressive cross-examination, preventing personal cross-examination by defendants, for closed-circuit television testimony, for video recorded interviews, allowing accompanying adults in court, excluding others from court, bans on judges warning jurors about unreliability as a class and publications; and new provisions inserted by this Bill for: evidence recording hearings and rights to interpreters.

There appears to be no mechanism for an adult vulnerable complainant to partially waive his or her protections under Part IAD. Accordingly, some adults may face an intolerable choice between a letting the prosecutor fail or struggle, or giving up significant protections under federal law. Again, this will be a unique federal problem.

Conclusion

While items 23, 24 and 26 increase some protections for alleged victims and child witnesses, they also bring a range of significant adverse effects on some categories of federal prosecutions, including making some federal prosecutions impossible or close to impossible. These impacts are either unique or almost unique in Australia and, as far as I'm aware, anywhere else. In short, items 23, 24 and 26 will significantly weaken the criminal justice response to sexual violence.

One possible silver lining is that items 23, 24 and 26 only affect federal criminal justice, which is a relatively small part of the national criminal justice response to sexual violence. Indeed, it is possible that part of their effect will be to shift most of the relatively small number of federal sexual offence prosecutions (e.g. slavery or child abuse material or child protection or complicity offences) to be dealt with by similar state and territory charges instead. Even this silver lining has two limits. First, the option won't be available for some federal offences were there are no state equivalents (e.g. overseas offences, such as child sex tourism offences or crimes against humanity.) Second, this option will have to surmount the complex constitutional law that renders some state offences that overlap with federal ones inoperative.[31]

Adverse impact on defendants

Some defendants will need leave to give or offer their own accounts of alleged crimes

I again commence with a mild, but startling, effect of items 23 and 26.

Some defendants facing sexual offences offer accounts that admit some sexual activity with the alleged victim but deny the charged (or, often, any) offence. If enacted items 23 and 26 will oblige such defendants to seek and obtain the court's leave before they can put their account to prosecution witnesses or testify in their defence.

For example:

- in a prosecution under s. 71.8 of the *Criminal Code* (Cth) ('sexual assault of United Nations and associated personnel'), the defence would have to seek and obtain leave from the court before it could call evidence to argue that the alleged sexual assault was consensual, including putting that proposition in cross-examination of the alleged victim or the defendant testifying their own account.

[31] See *Dickson v R* [2010] HCA 50.

- in a prosecution under s. 272.8(1) of the *Criminal Code* (Cth) ('sexual intercourse with a child outside Australia'), the defence would have to seek and obtain leave from the court before it could call evidence to prove that the defendant's sexual activity with the child occurred in Australia, rather than overseas, including before that claim can be put to the testifying child or the defendant can testify to that effect.
- in a prosecution under s. 272.8(1) of the *Criminal Code* (Cth) ('sexual intercourse with a child outside Australia'), the defence would have to seek and obtain leave from the court before it could call evidence to prove that the defendant's sexual activity with the child did not include sexual intercourse, including before it could put to a testifying child that the activities did not include intercourse or before the defendant testifying their own account.

Of course, there is no doubt that a court applying amended s15YC and new s15YCB can and would grant leave to permit defendants to put and give their alternative accounts of the charged crime. My point is simply that, if items 23 and 26 are enacted, some federal defendants will nevertheless have to seek, argue for and obtain leave simply to offer direct evidence in their defence. Moreover, as noted earlier, that leave cannot be given informally or orally or quickly, but rather will have to be sought, involve submissions and evidence, be given in writing and be accompanied by written reasons.

Five state and territory laws on sexual experience completely exempt either evidence of the crime itself or contemporaneous sexual activities with the accused from their leave requirements.[32] The remaining three have clear language addressing these scenarios in their criteria for a court being able to grant leave or assessing whether to grant leave.[33] If items 23, 24 and 26 are enacted, amended s15YC and new s15YCB will be the only Australian provisions on evidence of sexual experience that do not address how they apply to direct defence evidence concerning the alleged crime. That differs from existing s. 15YC(1), because of its blanket exemption of all of the alleged victim's sexual activities with a defendant.

I mainly mention this because it indicates an apparent failure by the Bill's drafters to consider the impact of items 23 and 26 on defendants. By contrast, all state and territory drafters appear to have considered and responded to this issue.

Defendants will be barred from evidencing some defences to federal crimes

I now turn to a much more serious adverse impact of items 23, 24 and 26.

Some federal defendants will respond to a federal charge by arguing that the crime was done by someone else, or that the alleged sexual activity occurred well before or later than the time alleged by the prosecutor. If enacted, items 23, 24 and 26 will absolutely bar federal defendants from putting or calling evidence to support those arguments and, in some instances, will be absolutely barred from making their claimed defence.

For example:

- in a prosecution under s. 71.8 of the *Criminal Code* (Cth) ('sexual assault of United Nations and associated personnel'), the defence would be absolutely barred from giving or offering

[32] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s76(2); *Evidence Act 1929* (SA), s34L(2) (parenthetical); Evidence Act 2001 (Tas), s194M(1)(b) (in commas); *Criminal Procedure Act 2009* (Vic), s342 (parenthetical); *Evidence Act 1906* (WA), s36BC (in commas).
[33] *Criminal Procedure Act 1986* (NSW), s294CB; *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s4(3); *Criminal Law (Sexual Offences) Act 1978* (Qld), s4 (rule 4, second sentence);

evidence to establish that the sexual assault was actually committed by someone else. That is because the conditions in s15YC(1)(b) and s15YCB(1)(b) would not be satisfied. This problem arises whether the claim that a different person committed the assault is put in cross-examination of the alleged victim or in positive evidence from a witness or through admissions from the claimed actual perpetrator. In short, federal defendants in relevant proceedings will be absolutely barred from offering a defence of mistaken identity.

- in a prosecution under s. 272.8(1) of the *Criminal Code* (Cth) ('sexual intercourse with a child outside Australia'), the defence would have to seek and obtain leave from the court before it could call evidence to prove that the defendant's sexual activity with the child occurred at a different time that is either non-recent or subsequent to the time alleged by the prosecution. That is because the condition in s15YC(1)(c) would not be satisfied. This problem arises whether the claim of a different time is put in cross-examination of the alleged victim or in positive evidence through the accused's testimony, another witness or circumstantial evidence of the timing. In short, federal defendants in relevant proceedings will be absolutely barred from offering a defence that a sexual activity occurred at a time outside of that specified in the indictment, including a later time that would mean that the sexual activity would not be criminal at all.

Crucially, no court can overcome these barriers to these or similar defences because, as s15YC(1)(b)'s or s15YCB(1)(b)'s conditions for admissibility would not be satisfied, no court can give leave (and any leave given will have no effect.)

This will be a unique federal problem. Three state laws on sexual experience have an exemption from the leave requirement for any evidence of the crime itself.[34] Three other state and territory laws have clear language putting beyond doubt that a court may or will grant leave to permit that category of evidence.[35] The two remaining jurisdictions, while not expressly addressing this scenario, clearly nevertheless permit a judge to grant leave, and leave would obviously be granted.[36] The amended and new federal provisions will be alone in Australia (and, as far as I'm aware, anywhere) in absolutely barring some criminal defences.

<u>Defendants will be unable to rebut some prosecution evidence</u>

Items 23, 24 and 26 will have a further significant impact on defendants.

In some proceedings, prosecutors offer circumstantial evidence to prove that the defendant engaged in the charged sexual activity with an alleged victim, and defendants will seek to argue that the evidence is due to another uncharged or non-criminal sexual activity with a different person or at a non-recent or later time. If items 23, 24 and 26 are enacted, federal defendants will be absolutely barred from offering such rebuttals of prosecution circumstantial evidence.

For example:

- where the prosecution offers evidence of semen, pregnancy, disease or injury to prove that a child witness or alleged victim engaged in sexual activity with the accused, the defence will

[34] *Evidence Act 2001* (Tas), s194M(1)(b) (in commas); *Criminal Procedure Act 2009* (Vic), s342 (parenthetical); *Evidence Act 1906* (WA), s36BC (in commas).
[35] *Criminal Procedure Act 1986* (NSW), s294CB; *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s4(3); *Criminal Law (Sexual Offences) Act 1978* (Qld), s4 (rule 4, second sentence);
[36] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s78(1)(a); *Evidence Act 1929* (SA), s34L(2)(a).

be absolutely barred from offering evidence that the semen, pregnancy, disease or injury was due to the child witness or alleged victim engaging in sexual activity with another person. That is because the conditions in s15YC(1)(b) and s15YCB(1)(b) would not be satisfied. This problem arises whether the evidence is put to the complainant in cross-examination or through another witness or through forensic evidence.

- where the prosecution offers evidence that a child witness or alleged victim had knowledge or exhibited behaviour that was due to sexual abuse by the accused, the defence will be absolutely barred from offering evidence that the knowledge or behaviour was due to abuse by another person. That is because the condition sin s15YC(1)(b) or s15YCB(1)(b) would not be satisfied. This problem arises whether the evidence is put to the alleged victim in cross-examination or through direct evidence of the other abuse.
- where the prosecution offers evidence of the accused's admission to have engaged in sexual activity as evidence that the charged sexual activity occurred, the defence will be absolutely barred from offering evidence that the admission was to different sexual activity with the alleged victim that was either non-recent or subsequent to the charged offence, or that the admission was to sexual activity with a different person. That is because the conditions in s15YC(1)(b) & (c) or s15YCB(1)(b) & (c) would not be satisfied. This problem arises whether the evidence is put by the accused in testimony or by other contemporaneous remarks by the accused when making the alleged admission.

This will, again, be an almost unique federal problem. Australia's currently narrowest law on evidence of sexual experience, in NSW, expressly permits (with leave) evidence about semen, pregnancy, disease and injury, and permits the cross-examination of a complainant in relation to other evidence of the presence or absence of sexual experience or activities in a specified period.[37] All other state and territory laws (and indeed every other such law elsewhere that I'm aware of) permit all sexual evidence evidence to be given with the court's leave and will surely do so to permit rebuttal of prosecution circumstantial evidence unless the rebuttal evidence is tendentious.

Federal defendants will be more restricted than any state or territory defendant

In addition to the above critical limits on the ability of some federal defendants to defend themselves at all or to rebut prosecution evidence, items 23, 24 and 26 also impose further limits on federal defendants' ability to offer some other forms of defence evidence, limits that go well beyond those that apply to any other Australian defendants.

Items 23, 24 and 26 are, of course, meant to limit some sorts of defence evidence in various federal proceedings, including some otherwise relevant evidence, in line with similar restrictions in state or territory laws. For example, items 23, 24 and 26 will generally bar defendants from arguing that an alleged victim has a pattern of making false complaints. Current NSW law is to the same effect,[38] while all other Australian jurisdictions permit such evidence so long as a court grants leave. Even though the NSW law has been harshly criticised in this respect, it would not be unusual for the federal parliament to mimic the long-standing approach of a major Australian jurisdiction.

[37] In *HG v R* [1999] HCA 2, some High Court justices found that NSW's law would not permit evidence that a child's memory of abuse by the accused may be due to transference from prior abuse by another.
[38] *Jackmain v R* [2020] NSWCCA 150.

However, in addition to the other adverse impacts listed above, items 23, 24 and 26 will also absolutely bar federal defendants from offering types of evidence that every other Australian jurisdiction, including NSW, permits so long as a court gives leave. For example:

- Federal defendants will be absolutely barred from calling evidence of the complainant's sexual activities at or about the time of the alleged offence that 'form part of a connected set of circumstances' with the alleged offence, where those activities are non-recent, subsequent to the alleged offence or with someone else. There are multiple examples in NSW of leave being granted to admit such evidence.[39]
- Federal defendants will be absolutely barred from calling evidence that relates to an existing or recent relationship between the accused and the alleged victim, to the extent that the evidence is of sexual activities that are non-recent or occurred after the alleged offence. In the United Kingdom, the House of Lords ruled in 2001 that England's then restrictive law on evidence of sexual experience must be reinterpreted under the *Human Rights Act 1998* (UK) to permit such evidence with leave.[40]

Of course, none of this evidence should be admitted unless it is relevant (which will clearly not always be the case) and a court gives leave (which will likely be rare.) However, the amended and new federal provisions will be alone in Australia (and, as far as I know, anywhere else) in barring such evidence absolutely in all cases, whether or not a court gives or should give leave.

Conclusion

While items 23, 24 and 26 properly restrict or bar some defence evidence, they also impose unique restrictions that will absolutely bar some defences to federal offences and rebuttals of some federal prosecution evidence, as well as imposing bars on federal defence evidence that go well beyond even Australia's narrowest existing law on evidence of sexual experience. In my view, in these respects, items 23, 24 and 26, if enacted, will cause criminal injustice in response to sexual violence.

The only silver lining I can think of is the possibility that the deficiencies in amended s15YC(1) and new s15YCB(1) will prompt successful constitutional challenges that may reduce or remove some of their adverse effects. While similar challenges to NSW's law have always failed, the result may be different for these federal provisions for two reasons. First, as noted above, the federal provisions have substantially more extreme effects on defendants than the NSW law. And, second, the requirements imposed on federal proceedings by Chapter 3 of the Constitution are more onerous than the requirements imposed on state and territory proceedings via the *Kable* doctrine. Of course, this silver lining has considerable downsides, including possibly invalidating some of the good aspects of items 23, 24 and 26, and impose delays and many other burdens on affected federal prosecutors and affected child witnesses and alleged victims.

[39] E.g. *Chia v R* [2021] NSWCCA 51; *Cook (a pseudonym) v* R [2022] NSWCCA 282.
[40] *A v R* [2001] UKHL 25 , [46].

Some options for the Committee

I conclude by briefly noting some options the Committee may consider in response to this submission.

Recommending the enactment of items 23, 24 and 26 without amendment

This submission outlines some dire consequences if items 23, 24 and 26 are enacted without change. However, there are several reasons why the Committee might nevertheless be untroubled by my submission.

First, I could be largely or totally wrong. Indeed, I hope I am. I trust that, if I'm wrong, the Attorney-General's Department will speedily tell you so, and where I went awry.

Second, a court may find ways to read amended s15YC(1) and new s15YCB(1) in ways that avoid some or all of the above problems. I'm sure some judges will try to do so, given that the alternative is so dire. Perhaps a court will try to apply s15AA of the *Acts Interpretation Act 1901* (Cth), on the (surely correct) basis that parliament cannot plausibly have meant to create the problems I outline in my submission. Perhaps a court will try to apply s15YS of the *Crimes Act 1914* (Cth), which preserves the court's inherent powers unless Part IAD provides otherwise. If the courts do so, then that's good, though there are some downsides. First, judges reading down the effects of ss15YC(1) and s15YCB(1) is contrary to the purpose of those provisions, which is to alter previously entrenched and problematic judicial practices. Second, a court rereading the provisions mid-trial may cause unfairness to prosecutors and defendants who need to plan for those trials in advance. Third, any court rereadings may be unstable, or unworkable, or unsatisfactory.

Third, prosecutors and defendants might themselves ignore amended s15YC(1) and new s15YCB(1). Rules of evidence are sometimes ignored in courts, in this way due to party agreement or ignorance or a dose of common sense. Again, that may be a good thing, but will also cut across the purpose of provisions like these, which is to protect non-parties (notably children and alleged victims) from lawyers' past practice and 'common sense'. Moreover, even where parties agree at trial to ignore these provisions, there is no guarantee that the trial judge will agree, and even less guarantee that an appeal court will agree down the track.

<u>Recommending that items 23, 24 and 26 be omitted</u>

This will avoid all of the adverse effects I outline in this submission. However, it will also avoid the good effects of those items too.

<u>Recommending that items 23 and 26 be altered to allow all evidence of sexual experience to be admitted with leave</u>

A better alternative would be to preserve the two main good effects of items 23 and 26 – extending the protection of existing s15YC to adult alleged victims and ending the blanket exemption for sexual activities with the defendant – while avoiding all the bad effects. The most obvious way to do this would be to alter those items (and omit item 24) so that the first subsection of the provisions will be as follows:

> ***15YC Evidence of sexual experience—child proceedings***
>
> *(1) Evidence of a child witness' or child complainant's experience with respect to sexual activities is inadmissible in a child proceeding, unless the court gives leave.*

15YCB Evidence of sexual experience—vulnerable adult proceedings

(1) Evidence of a vulnerable adult complainant's experience with respect to sexual activities is inadmissible in a vulnerable adult proceeding, unless the court gives leave.

These changes would make the federal rules very similar to all Australian jurisdictions except NSW. However, they will arguably leave federal alleged victims less protected than NSW alleged victims, and certainly less protected than proposed by items 23, 24 and 26.

Recommending bespoke amendments to items 23, 24 and 26 to reduce their adverse impacts

It is possible to imagine some short amendments that could remove some, perhaps even a lot, of the adverse impacts of items 23, 24 and 26 I've outlined in my submission, while preserving most, perhaps all, of their protective effects. For example, amended s15YC and new s15YCB could be altered so that they are:

- limited to defence evidence (as Western Australia's law on evidence of sexual experience currently is), so that prosecution evidence won't be excluded or require leave. That will avoid the adverse impacts of these provisions on federal prosecutors. But there are some downsides. First, child witnesses and alleged victims will no longer be expressly protected against humiliating or invasive prosecution evidence of their sexual activities. Second, the adverse impacts on federal defendants will remain. Third, a one-sided provision that only limits defence evidence will run counter to principles of fair trials, such as 'equality of arms' and the international human right of criminal defendants to examine witnesses on the same terms as prosecutors. And, finally, there will be some tricky technical issues to manage, such as whether and when the defence can rebut prosecution evidence of sexual experience, and how to manage joint trials involving multiple accused. So, despite the Western Australian precedent, I don't recommend this option.
- subject to exceptions for evidence of the alleged crime itself (i.e. the so-called *res gestae*.) Three state laws on sexual experience have such exemptions[41], so this is a pretty appealing option. But the *res gestae* is a notoriously vague notion – how far does it extend temporarily? How does it apply to complex crimes? Or if there are multiple charges? Moreover, child witnesses and alleged victims will lose their existing protection from humiliating or invasive evidence that falls within this vague limit, and some adverse impacts will remain. All up, this is a partial, inexact option..
- altered to allow a fallback for a court to admit any evidence in exceptional circumstances, i.e. when the prosecution's ability to prove an offence or the defendant's ability to defend themselves will otherwise be impossible or unfairly difficult. That change would probably manage most of the adverse impacts I've outlined. But I'm not aware of any precedents for this, and anyway such a vague change may reduce protection for child witnesses and alleged victims while leaving parties uncertain as to what they'll be permitted to do at the trial.
- subject to some sort of provision for partial waiver of its operation by one or more of the judge, the parties or the alleged victim (and maybe the guardian of a child?) This is also appealing, but complex, technically, practically and as a matte of policy.

[41] *Evidence Act 2001* (Tas), s194M(1)(b) (in commas); *Criminal Procedure Act 2009* (Vic), s342 (parenthetical); *Evidence Act 1906* (WA), s36BC (in commas).

I'm sure there are other possibilities, but my view is that these 'bandaid' measures are not good ideas, at least not when there are other, understandable pressures, to enact the remainder of the Bill.

Recommending that the federal provisions copy a state or territory law

Why reinvent the wheel? Every state and territory has long-standing laws on evidence of sexual experience, and, while none of them are perfect, all of them are better than existing s15YC, amended s15YC and new s15YCB. Just use one of them!

But which one? One option is NSW's law, Australia's narrowest (unless the Bill is enacted unchanged.) There is a lot of court rulings on that law, which will be directly applicable to an identical federal rule. That being said, NSW's law has proved quite tricky to interpret (hence all the court ruligns!) and it is also quite controversial, often criticised in cases and in law reform reports (albeit without prompting any amendments to date.)

That leaves, well, the other Australian laws, which are all pretty similar. At danger of being called parochial, I'd note that Victoria's law was re-enacted relatively recently in a modern form, and seems to be working pretty well.[42] It doesn't attract too many appeal case decisions, and seems to be relatively controversy-free too.

However, this option will mean that the federal jurisdiction will be very much a follower, rather than a leader, on this important issue.

Recommend that a law reform commission urgently consider the federal law on evidence of sexual experience

As I noted earlier, items 23, 24 and 26 seem to have been the subject of inadequate consultation, hence the startling adverse impacts of those items that I've outlined in this submission. Rules of evidence like these typically require a public, expert, consultative analysis. And that is the *raison d'etre* of law reform commissions. Australia's uniform evidence law was the product of Australian Law Reform Commission inquiries in the 1980s, and, although not perfect, has endured and seems set to expand to Western Australia soon(ish). The ALRC didn't attempt to recommend a law on sexual experience, as its plate was very full with the rest of evidence law in the 1980s. But maybe it could now?

And it already is! As the Committee well knows, the ALRC has been given a reference to inquire into justice responses to sexual violence.[43] One of its terms of reference is on 'Laws and frameworks about evidence'. It is due to report relatively soon, on 22 January 2025. Given that, why not recommend that items 23, 24 and 26 be omitted for now, so that any ALRC recommendations on this issue can be considered?

All up, this strikes me as the best of the Committee's various options.

Yours Sincerely,

Jeremy Gans

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[42] *Criminal Procedure Act 2009* (Vic), Part 8.2, Division 2.
[43] < https://www.alrc.gov.au/inquiry/justice-responses-to-sexual-violence/>.