THE UNIVERSITY OF MELBOURNE
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Senate Legal and Constitutional Affairs Legislation Committee

Dear Senator Green:

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

Thank you for the opportunity to testify today in the public hearing in this inquiry. The purpose of this brief follow-up submission is to provide the relevant citations and reasoning behind the legal points I made today. I am happy for these to be made available to the Attorney-General's Department representatives as well.

The meaning of 'experience with respect to sexual activities'

In response to a question from Senator Scarr, witnesses representing Rape and Sexual Assault Research and Advocacy (RASARA) and Full Stop Australia testified that the term 'experience' in the current and amended s. 15YC and proposed s. 15YCB of the *Crimes Act 1914* (Cth) does not include activities that comprise alleged crimes.

As I testified today, that is not a tenable reading of the current, amended or new provisions. In 2000, the High Court issued its major ruling to date on the operation of rules of evidence relating to sexual offence complainants' sexual activities, specifically the Western Australian provisions. The Western Australian provisions are one of three state provisions that concern a complainant's experiences. In their reasons, a majority of the Court (McHugh, Gummow & Hayne JJ) wrote:[1]

> *Most evidence tending to prove the sexual experiences of the complainant will be evidence of events anterior to the occasion of the charge. But, as s 36BC itself recognises by its reference to res gestae, the sexual experiences of the complainant include those that are connected to or occur contemporaneously with the event which is the subject of the charge.*

The High Court issued its judgment on 11 May 2000. The bill to insert the current s. 15YC[2] was introduced on 4 April 2001 and was enacted on 20 September 2001.

While I am not aware of any specific reference to the High Court's decision, I would suggest that the drafters could scarcely have ignored it. Indeed, it seems clear to me that they deliberately adopted it. That is because, although the explanatory memorandum says that s. 15YC was based on 5.2.39 of the Model Criminal Code[3] (which uses the term 'evidence… of specific sexual activities'), s. 15YC instead used the term 'experience relating to sexual activities'. Similarly to (but not identically to) the

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[1] *Bull v R* [2000] HCA 24; 201 CLR 443, [63].
[2] Measures to Combat Serious and Organised Crime Bill 2001, schedule 3, clause 1.
[3] Notes to section 15YC in the Explanatory Memorandum to the Measures to Combat Serious and Organised Crime Bill 2001: 'The proposed section is based on section 5.2.39 of the Model Criminal Code…'. The Model Criminal Code is available at < https://pcc.gov.au/uniform/crime%20(composite-2007)-website.pdf>, where s. 5.2.39(1) states: 'In proceedings that relate to an offence against this Part (including committal proceedings), evidence is not to be admitted as to the specific sexual activities of the complainant (other than with the accused), except with the leave of the court.'

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Western Australian provision discussed by the High Court, the then s. 15YC exempted the complainant's sexual activities with the defendant from its scope. As well, a. 15YC used the term 'experience' rather than 'experiences', perhaps because the High Court observed in the same judgment that the former term is broader than the latter. [4]

In short, as it would contradict a then very recent High Court ruling, RASARA and Full Stop's interpretation is very unlikely to be adopted by courts interpreting the proposed amended and new provisions.

Victoria's provisions

In response to a question from Senator Green concerning possible amendments to achieve the intended effect of items 23, 24 and 26 of the Bill, I noted Victoria's provisions on this topic.[5] As I discussed, the ALRC has previously endorsed Victoria's main provisions in its 2010 report on Family Violence.[6]

As I observed, two of Victoria's provisions are similar to the Bill's proposed blanket exclusion of sexual reputation evidence and the Law Council's proposal that evidence of experience with respect to sexual activities be admissible with leave (as well as codifying RASARA's position that the provisions not include activities 'to which the charge relates' [7]:

> ***341 Prohibition on questions and evidence concerning sexual reputation of complainant***
>
> *The court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant.*
>
> ***342 Restriction on questions and evidence concerning complainant's sexual activities***
>
> *The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or non-consensual) of the complainant (other than those to which the charge relates), without the leave of the court.*

However, as I noted, Victoria also sets out further restrictions on what it terms 'sexual history evidence':[8]

> ***sexual history evidence*** *means evidence that relates to or tends to establish the fact that the complainant—*
>
> *(a) was accustomed to engaging in sexual activities; or*
>
> *(b) had freely agreed to engage in sexual activity (other than that to which the charge relates) with the accused person or another person*

As can be readily seen, this category is narrower than the other examples, and specifically appears to be limited to evidence of sexual disposition and consensual sexual activities, the categories that RASARA and Full Stop testified is the 'common sense' scope of the federal provisions and which they suggested could be included as a 'definition' in the current Bill. Victoria goes on to bar particular uses of this narrower category of evidence as follows:

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[4] *Bull v R* [2000] HCA 24; 201 CLR 443, [62].
[5] *Criminal Procedure Act 2009* (Vic), ss. 339-352.
[6] [27.49] (on s. 342) and [27.76] (on s. 349.) See also recommendations 27-2, 27-3 and 27-4.
[7] *Criminal Procedure Act 2009*, ss. 341 & 342.
[8] *Criminal Procedure Act 2009*, s. 340.

343 Admissibility of sexual history evidence

Sexual history evidence is not admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates.

352 Limitation on sexual history evidence

Sexual history evidence is not to be regarded—

(a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or

(b) as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

These particular uses seem to be the same as the uses that RASARA and other groups submitted today should be barred.

In short, enacting equivalents to ss. 340, 341, 342, 343 and 354 (modified appropriately for their application to federal proceedings and to child witnesses, and with appropriate procedural provisions equivalent to those in the current federal law and proposed amendments), would appear to be one way of implementing the intended effect of the Bill, specifically to the effect seemingly supported by RASARA and other advocates in testimony today.

Minor errors in my earlier submission

Finally, as included in my draft opening statement, but not today's testimony, please note the following minor typographical and transposition errors in my initial submission:

- p6: "February 2002" should be "February 2022"
- P7: "March 2002" should be "March 2022"
- p9: "such any sexual experience' should be "any such sexual experience"
- P20, second para: 'the defence would have to seek and obtain leave from the court before it could call evidence" should be "the defence would be absolutely barred from calling evidence"
- P25: "(hence all the court ruligns!)" should be "(hence all the court rulings!)"

Yours Sincerely,

Jeremy Gans