



Victorian Council for Civil Liberties Inc
Reg No: A0026497L
GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

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22 March 2024

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

legcon.sen@aph.gov.au

Dear Committee Members,

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

1. The Senate has been referred an Inquiry into the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (Cth) (**the Bill**) which would amend the *Crimes Act 1914* (Cth). This bill proposes to strengthen protections afforded to complainants and other vulnerable persons involved in Commonwealth criminal proceedings and implement several recommendations of the 2017 Final Report of the Royal Commission into Institutional Responses to Child Sexual Abuse.
2. The Inquiry and Report are due by **24 April 2024**. Thank you for the opportunity to provide a submission to this important inquiry.

3. This is a public submission and is not confidential.

About Liberty Victoria

4. Liberty Victoria is committed to the defence and advancement of civil liberties and human rights. We seek to promote compliance with Australia's obligations under international law as recognised in various State and Federal human rights instruments such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC). As such, we frequently contribute to federal and state committees of inquiry.
5. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for both prosecution and the defence. More information on our organisation and activities can be found at: <https://libertyvictoria.org.au>.
6. The focus of our submissions and recommendations reflect our experience and expertise as outlined above. Some of the following is drawn from work undertaken by Liberty Victoria in response to previous inquiries and proposed legislative reforms.

Reforming the Criminal Justice Response to Sexual Violence

7. The principal objective of Liberty Victoria is to ensure people's rights, freedoms and dignity are valued and protected.
8. Liberty Victoria supports the introduction of measures to better support vulnerable persons appearing as complainants and/or witnesses in Commonwealth criminal proceedings, insofar as the accused's fundamental right to a fair hearing and the presumption of innocence are not adversely affected.
9. The proposed changes to the *Crimes Act 1914* (Cth) (Crimes Act) include:
 - expanding the range of offences to which special rules for proceedings involving children and vulnerable adults apply in order to more comprehensively protect vulnerable persons;
 - making evidence of a child or vulnerable adult complainant's reputation with respect to sexual activities inadmissible;
 - 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 facts in issue in the proceeding;

- introducing evidence recording hearings to allow a vulnerable person to have their evidence recorded, which can be tendered and relied on as evidence in any subsequent trial or retrial;
- introducing an offence to deter misuse of the recorded evidence of a vulnerable person; and
- clarifying that the current restriction on publishing material that identifies (or is likely to identify) another person as a child witness, child complainant or vulnerable adult complainant in a proceeding does not apply to a vulnerable person who publishes self-identifying material, as well as streamlining the requirements for another person to publish the identifying information of a vulnerable person with their consent.

10. We have supported previous reforms to the laws governing sexual offences such as amendment to the law of consent now reflected in Part 5, Division 1 of the *Jury Directions Act* and s 36 of the *Crimes Act 1958* (Vic) as well as the introduction of intermediaries to ensure that persons with cognitive impairments and children are afforded equal participation in the criminal trial process.¹

11. However, Liberty Victoria advocates a very cautious and selective evolution of the criminal law in circumstances where unnecessary added complexity could create injustice for accused persons. Further, some of the proposed amendments would be much more restrictive than equivalent provisions in Victoria and New South Wales, meaning that there is an inequality for those who are charged with Commonwealth offences. The proposed provisions have a real risk of resulting in miscarriages of justice.

The proposed changes

Expansion of offences to which vulnerable witness protections apply

12. We note that if enacted, this legislation would affect the criminal procedure applicable to a broad range of offences contained in s 15Y of the *Crimes Act* including not only sexual offences but also, for example, drug offences involving children under Division 309 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) and aggravated offences regarding referral

¹ Liberty Victoria Submission: Review of Sexual Offences (Web Page, 17 January 2014), [24]-[27].

of lawful non-citizens in breach of their work conditions or unlawful non-citizens for work, under the *Migration Act 1958* (Cth).² The definitions of child complainant and child witness would also be expanded to include complainants and witnesses who were children at the time of the alleged offending but are no longer children at the time of the proceeding.³

13. As outlined in the Explanatory Memoranda to this Bill, the right of all people to the presumption of innocence as well as a fair hearing is enshrined in Article 14 of the ICCPR. Whilst Liberty Victoria accepts that witnesses and complainants in proceedings covered under the proposed changes to s 15Y *Crimes Act* are more likely to be vulnerable, we would query whether the additional measures proposed by this bill are necessary in light of significant protections afforded to vulnerable witnesses pursuant to the *Criminal Procedure Act 2009* (Vic).

Evidence regarding sexual activities

14. One of the proposed changes in this bill involves omitting the words ‘unless the Court grants leave’ in s 15YB(1) of the *Crimes Act* and removing all subsequent subsections that set out circumstances in which the Court could grant leave for evidence regarding the sexual ‘reputation’ of child witnesses to be admitted in child proceedings (those in which the complainant or witness is between the ages of 10 and 18).
15. The bill also proposes introducing s 15YCB making evidence relating to a vulnerable adult complainant’s sexual reputation inadmissible. The purpose of these amendments is to remove the Court’s discretion to grant leave for this type of evidence to ever be admitted on the basis that “such evidence is too far removed from evidence of actual events or circumstances for its admission to be in the interests of justice in any circumstance.”⁴ We note s 15YC (child witness or complainants) and s 15YCB (vulnerable adult complainants) preserves the Court’s discretion to admit evidence of a complainants’ ‘experience’ with sexual activities, if certain criteria in those sections is met.
16. We have had the advantage of reading a draft of Professor Jeremy Gans’ submission to the Inquiry in respect of the sexual experience provisions. We adopt and endorse Professor Gans’ submission. We outline some further issues with the proposed provisions in this submission.
17. Whilst we acknowledge the difference between sexual reputation evidence as opposed to

² Explanatory Memoranda, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (Cth), [8].

³ Ibid, [13]-[15].

⁴ Ibid, [27].

evidence of sexual experience, Liberty Victoria opposes removing a Court's discretion to admit evidence of this type for such a broad range of offences. Although evidence of sexual reputation is unlikely to be relevant or admissible in many circumstances, removing judicial discretion completely has the potential to cause a miscarriage of justice.

18. This bill also proposes to restrict the admissibility of sexual experience evidence of children unless the Court gives leave having regard to specific criteria and the evidence is of sexual activities with the defendant and in the case 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.⁵
19. In Victoria, [s 342 of the Criminal Procedure Act 2009 \(Vic\)](#) already provides protection to all complainants concerning evidence as to their sexual activities (other than those to which the charge relates) which cannot be adduced without the leave of the Court. This section applies not only to cross-examination of the complainant but all witnesses and evidence regarding the complainant's sexual activities. [Section 343](#) provides that 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. [Section 344](#) sets out the circumstances in which leave can be granted.
20. In NSW, [s 294CB of the Criminal Procedure Act 1986 \(NSW\)](#) also restricts the admissibility of that evidence to particular scenarios and only with leave of the Court.
21. The proposed change means that the new Commonwealth provisions would be much more restrictive than the NSW provision in s 294CB of the *Criminal Procedure Act 1986* (NSW) and the Victorian provision in s 342 of the *Criminal Procedure Act 2009* (Vic).⁶ This would create a scenario where in limited circumstances in NSW and Victoria, an accused would be able to seek leave for relevant and substantially probative evidence to be led in order to defend themselves, but if a person is charged under Commonwealth provisions, the right to defend themselves is much more restricted.
22. The extreme restrictive nature of the proposed provision would mean that in a case such

⁵ Ibid, [31]-[35], [38]-[41].

⁶ Professor Jeremy Gans has been critical of this aspect of the proposed amendments and has published some commentary on X (formerly Twitter): https://twitter.com/jeremy_gans/status/1755050887637344363. We incorporate some of his criticism with which we agree in this submission.

as *R v Martinez*,⁷ an accused would be prohibited from leading highly probative evidence in order to defend themselves. In *R v Martinez*, the trial judge⁸ admitted limited evidence of the complainant having made a complaint of sexual assault against a person named CG. The complainant had become intoxicated and:

initiated and had enthusiastic sex with CG and then told him either the next day or shortly thereafter that she had no memory of those events and later still accused him of sexual assault in relation to those events, because, and only because, she could not remember the event.⁹

It appears that this limited evidence was admitted by the trial judge as it met the strict threshold of s 294CB of the *Criminal Procedure Act 1986* (NSW). Other, arguably highly probative, evidence of similar complaints made by the complainant against four others were not admitted due to the strict nature of s 294CB.¹⁰ Nevertheless, the accused in *R v Martinez* was able to call evidence from CG and the judge directed the jury that they could use that evidence to show that ‘the Complainant had a tendency when she had sex in alcoholic blackout to accuse her partner of sexual intercourse without consent simply because she could not remember the events’.¹¹

23. Under the new proposed Commonwealth provisions, the evidence of CG would not be admissible because the sexual activity was not evidence of sexual activity with the accused (but someone else).¹² This would mean that a person such as Mr Martinez would be prevented from putting highly probative evidence before the jury, preventing them from being able to fully and adequately defend themselves.

Concerningly, despite mentioning the right to a fair trial pursuant to art 14 of the ICCPR, the Bill’s Statement of Compatibility does not engage in any analysis of whether the proposed provision is compatible with an accused’s right to a fair trial. In Liberty Victoria’s opinion, the narrow nature of the proposed changes to the Commonwealth provision are not compatible with the right to a fair trial and the narrow nature cannot be justified.

24. The proposed change should be abandoned.

⁷ [2023] NSWDC 552 [4]–[5]; [53]; [72]–[85].

⁸ *R v Martinez* (14 November 2023, unreported).

⁹ *R v Martinez* [2023] NSWDC 552 [42]–[43].

¹⁰ *Ibid* [76]–[78].

¹¹ *Ibid* [73].

¹² Under ss 342 and 344 of the *Criminal Procedure Act 2009* (Vic) it is arguable that both the evidence of CG and the evidence of the four others accused of offending by the complainant in similar circumstances would be admissible, as the provisions are not as restrictive as those in NSW.

25. In Liberty Victoria's view, an identical provision to s 342 should be introduced in the *Crimes Act 1914* (Cth). This provision strikes a fairer balance between the accused's right to a fair trial and the protection of the privacy and reputation of a complainant. Our experience is that judges take their responsibilities very seriously when it comes to the potential admission of sexual history evidence, and while it should be a high bar, it should not be an impossible one.

Evidence Recording Hearings and recording requirements

26. This bill also proposes changes empowering a court, if it is satisfied that it is in the interests of justice to do so, to order an evidence recording hearing for a vulnerable person to give evidence and requiring all evidence given by a vulnerable person outside of an evidence recording hearing, including on cross-examination and evidence in chief, to be recorded so that it may be used in later proceedings, with the aim of minimising re-traumatisation that might be caused by providing evidence multiple times in relation to the same matter.¹³
27. In Victoria, s 198 of the *Criminal Procedure Act 2009* (Vic) allows for any party to a criminal proceeding to apply for an order that the evidence of a person (including cross-examination and re-examination) be taken at a time and place fixed by the Court. This provision conveys a broad power on Courts to order pre-recording of evidence where the Court considers that it is appropriate that the evidence of the person should be taken before the trial and so long as it is satisfied that it is in the interests of justice.¹⁴ Further, all Court hearings involving the taking of evidence in Victoria are recorded and transcribed by the Victorian Government Reporting Service.
28. Division 5 of the *Criminal Procedure Act* applies to a criminal proceeding for a sexual offence, an offence involving family violence or indictable offences involving assaults on or injuries to a person, or where witnesses are under the age of 18 or have a cognitive impairment and allows for the admission of recorded evidence in subsequent hearings of the same matter. Where the evidence of a complainant in a matter involving allegations of sexual offending has been recorded, there is a legislated presumption in favour of admitting the recording.¹⁵ Unless that presumption is rebutted and the Court considers it is not in the interests of justice, recorded evidence would ordinarily be utilised in re-hearings of the same matter in Victoria.

¹³ *Ibid*, [45]-[68].

¹⁴ *Criminal Procedure Act 2009* (Vic), S198(2) and s198(4).

¹⁵ *Criminal Procedure Act*, s381(1).

29. In addition to those protections, s 360 *Criminal Procedure Act* provides power for the Court to direct that alternative arrangements be made for the giving of evidence by witnesses involved in matters relating to a sexual offence or family violence. These measures include use of a remote witness facility, the use of screens, permitting witness support people to be present during the giving of evidence, closing the Court to the public, requiring legal practitioners not to robe and requiring practitioners to sit whilst conducting examination-in-chief or cross-examination.
30. The explanatory memorandum to this bill asserts that the proposed amendments are consistent with Article 14 of the ICCPR providing for the presumption of innocence and setting out minimum guarantees in criminal proceedings including the right to secure attendance and examination of witnesses against him or her.¹⁶ However we are concerned that where broad legislative powers already exist to ensure the protection of vulnerable complainants and witnesses, further restrictions that may impact the accused's ability to adequately test the strength of the case against them and could infringe the accused's right to a fair trial.

Audio only recordings of evidence

31. We are particularly concerned that the Bill, in its current form, appears to permit the adducing of audio only recordings of the evidence of vulnerable witnesses. This would be a dramatic change and a significant erosion of an accused person's right to a fair trial.
32. The experience of pre-recorded Evidence in Chief (EIC) interviews has been that they already can cause significant difficulties at trial.
33. Many investigators are not formally trained in respect of the adducing of evidence in a trial, and this can result in leading questions and the adducing of evidence that is irrelevant and/or unfairly prejudicial. Where EIC interviews are used, which can extend to many hours of recordings, it is commonly the case that there has to be significant resources (including of the Courts) used to consider edits and have the interview placed before the jury in a properly admissible form.
34. It is also the case that regularly EIC interviews are made contemporaneously with the allegations (which is partly the point), but an accused person does not have the opportunity to test the evidence through cross-examination at trial for years, and sometimes several

¹⁶ Explanatory Memorandum, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (Cth), [21]-[25].

years. This places an accused person at a significant forensic disadvantage given, amongst other things, the fading of memory and the prosecution will understandably rely on the more proximate evidence as being superior.

35. Liberty Victoria accepts there are sound public policy reasons for permitting the adducing of EIC interviews into evidence in some circumstances. However, to permit audio only recordings would be a step too far:
- a. It is vital that fact-finders are able to observe and assess witnesses giving evidence. While there are limitations to this (which juries are commonly warned about), it is a fundamental part of assessing credibility and reliability;
 - b. Often witnesses will gesture or make other important movements that need to be seen on video. It should not be left for an investigator to have to explain on a recording what particular gesture was made. This can involve, for example, estimations of distance and the orientation as to where something occurred; and
 - c. Having a video protects against a witness being prompted or otherwise influenced “off camera” (or the allegation of such conduct). It is an important integrity measure.
36. In a criminal trial, where an accused person may face a lengthy period of imprisonment, they should be able to see the witness giving evidence. That witness may be in a remote facility, or with a screen so the accused person himself or herself cannot be seen by the witness, or through a pre-recorded interview, but it should never be the case that we accept a situation where a formal allegation can be made and adduced into evidence through an audio recording alone.

Identifying child witnesses, child complainants or vulnerable adults

37. Section 15YR of the *Crimes Act* currently prohibits the publication of information that could identify child complainants or vulnerable adults. It is noted that this bill proposes to amend the section to clarify that vulnerable persons who publish self-identifying material, as well as streamlining the requirements for another person to publish the identifying information of a vulnerable person with the vulnerable person’s informed consent will not be committing an offence.¹⁷

¹⁷ Ibid, [133]-[134].

38. Article 17 of the *ICCPR* enshrines the right to protection of privacy and attacks on reputation. Section 13 of the *Charter of Human Rights and Responsibilities* also protects the right to privacy and reputation. Liberty Victoria acknowledges the importance of addressing the harm and trauma caused by sexual violence and other offences perpetrated on vulnerable witnesses and we accept that allowing complainants to self-identify can give complainants a sense of agency and power in an imperfect criminal justice system that can leave them feeling otherwise powerless.
39. However, stigmatising reputational damage can accompany being accused of a crime involving a child complainant or vulnerable adult. All accused persons are entitled to the presumption of innocence however the nature of offences involving vulnerable witnesses, being so contrary to community standards of acceptable behaviour, mean that merely being accused of such a crime can cause lifelong reputational damage. The prohibition on publication of identifying information in these types of proceedings can serve to protect the human rights not only of complainants, but also of accused persons.

Conclusion

40. Liberty Victoria does not oppose all aspects of this Bill however we would urge the committee to reconsider permitting audio only recordings to be adduced into evidence, and the proposed Commonwealth “rape shield” law which is much narrower than the NSW or Victorian provisions.
41. Further, we urge the committee to consider whether aspects of this Bill which overlap with existing laws are necessary and whether the proposed changes may impact the fundamental rights of an accused person to the presumption of innocence and to a fair trial in which they can adequately test the strength of the evidence against them.
42. We would be pleased to give evidence to this important inquiry.
43. If you have any queries regarding this response, please do not hesitate to contact Michael Stanton, Immediate Past President of Liberty Victoria, or Julia Kretzenbacher, Past President of Liberty Victoria, through the Liberty Victoria office at info@libertyvictoria.org.au.

Liberty Victoria

22 March 2024