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

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Dear Chair

RE: *Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024* (Cth)

A. Introduction

Rape and Sexual Assault Research and Advocacy (**RASARA**) thanks you for the opportunity to respond to *the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024* (Cth) (**Bill**), which seeks to amend the *Crimes Act 1914* (Cth) (**Act**).

RASARA is an independent, not-for-profit charitable organisation established to build and hold the evidence base for survivor-centric rape justice reform. We advocate for best practice in legal responses to rape and sexual assault. More information about RASARA is available at: http://rasara.org.

RASARA's view, as detailed below, is that evidence of sexual experience in either vulnerable adult proceedings or child proceedings should not be admissible under any circumstances. RASARA supports ss 18 to 21 of the Bill, and proposed s 15YCA, which would make evidence of sexual reputation in child and vulnerable adult proceedings inadmissible without limitation.

Evidence of sexual experience (of both child and vulnerable adult complainants) should also be equally inadmissible without limitation. The high threshold to admissibility of this type of evidence as proposed by the Bill[1] is not sufficient — the evidence should be excluded in all cases. This is especially the case in circumstances where the Explanatory Memorandum to the Bill states that the purpose of the Bill is to "*implement trauma-informed measures that better support vulnerable persons when appearing as complainants and/or witnesses*" (see paragraph 1). The prospect of 'sexual experience' evidence being admitted, with the result that a child complainant/witness or vulnerable adult is cross-examined as to their 'sexual experience' with their perpetrator cannot be said to be a 'trauma-informed measure'.

Further, if the purpose of the Bill is to implement trauma-informed measures, then the fact that the Court, when considering whether to admit such evidence, must expressly consider whether the

[1] See ss 22 to 25 of the Bill (child proceedings), which would amend current s 15YC of the Act, and proposed s 15YCB (vulnerable adult proceedings).

probative value of the evidence outweighs any distress, humiliation or embarrassment to the child or vulnerable person, is in fact a clear indication that the admission of the evidence can *never* be trauma-informed.

B. Relevant provisions of the Bill and the Act

Child proceedings (ss 15YB and 15YC)

Currently, ss 15YB and 15YC of the Act provide that, with the leave of the Court and when certain conditions are met, sexual reputation evidence and sexual experience evidence of a child witness or a child complainant is admissible.

Appropriately, sections 18 to 21 of the Bill seek to amend s 15YB of the Act to make sexual reputation evidence in a child proceeding inadmissible as a blanket rule with no exception, as follows (amendments are underlined):

> **15YB Evidence of sexual reputation—child proceedings**
>
> (1) Evidence of a child witness' or child complainant's reputation with respect to sexual activities is inadmissible in a child proceeding~~, unless the court gives leave~~.
>
> ~~(2) The court must not give leave unless satisfied that the evidence is substantially relevant to facts in issue in the proceeding.~~
>
> ~~(3) The evidence is not to be treated as substantially relevant to facts in issue merely because of inferences it may raise as to the child witness' or child complainant's general disposition.~~
>
> ~~(4) If the evidence is admitted, it must not be treated as relevant to the child witness' or child complainant's credibility.~~
>
> ~~(5) This section does not apply if the child is a defendant in the proceeding~~

RASARA supports this amendment.

However, in relation to sexual experience evidence, sections 22 to 25 of the Bill unfortunately do not go as far as required to protect complainants. These proposed sections seek to amend s 15YC of the Act as follows (amendments are underlined):

> **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:
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> (a) the court gives leave; ~~or~~ 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.

(2) The court must not give leave unless satisfied that:

(a) the evidence is substantially relevant to facts in issue in the proceeding; or

(b) if the evidence relates to the credibility of a child witness and is to be adduced in cross-examination of the child—the evidence has substantial probative value.

(3) The evidence is not to be treated as being substantially relevant to facts in issue merely because of inferences it may raise as to the child witness' or child complainant's general disposition.

(4) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred; and

(c) whether the probative value of the evidence outweighs any distress, humiliation or embarrassment to the child witness or child complainant.

(5) This section does not apply if the child is a defendant in the proceeding.

Vulnerable adult proceedings (s 15YCA and 15YCB)

In respect of proceedings involving vulnerable adults, proposed ss 15YCA (which relates to evidence of sexual reputation) and 15YCB (which relates to evidence of sexual experience)[2] largely mirror ss 15YB and 15YC (which apply to child proceedings).

In relation to sexual experience evidence, the only difference between ss 15YC and 15YCB is that s 15YCB does not include proposed s 15YC(5) ("*This section does not apply if the child is a defendant in the proceeding*"). There is no mirror provision of sub-s (5) in s 15YCB. Further, witnesses to vulnerable adult proceedings are not expressly included in this section, as in child proceedings.

[2] See s 26 of the Bill.

Admissibility threshold

Essentially, what this means is that sexual experience evidence can be admissible in either child proceedings or vulnerable adult proceedings provided the conditions outlined in s 15YCB and s 15YC can be satisfied.

The evidence can be admitted, if the following conditions are satisfied:

(a) the court gives leave, which can only occur if the court is satisfied that:

(i) the evidence is substantially relevant to facts in issue in the proceeding; or

(ii) if the evidence relates to the credibility of a child witness (which includes child complainants) or the vulnerable adult complainant and is to be adduced in cross-examination—the evidence has substantial probative value;

(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.[3]

The evidence cannot be treated as being substantially relevant to facts in issue merely because of the inferences it may raise as to the vulnerable adult complainant, child witness or child complainant's general disposition.[4]

When deciding whether the evidence has substantial probative value, the court must have regard to:

(a) whether the evidence tends to prove that the vulnerable adult complainant, child witness or child complainant knowingly or recklessly made a false representation when they were under an obligation to tell the truth;

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred; and

(c) whether the probative value of the evidence outweighs any distress, humiliation or embarrassment to the vulnerable adult complainant, child witness or child complainant.[5]

[3] Proposed ss 15YC(1)-(2) and 15YCB(1)-(2).

[4] Section 15YC(3) and proposed s 15YCB(3).

[5] Proposed ss 15YC(4) and 15YCB(4).

C. Sexual experience evidence should never be admissible — the Bill does not go far enough to adequately protect complainants and witnesses

It is inexcusable that the Act currently allows evidence of the sexual reputation of a minor to be admitted in proceedings in which that child is a complainant or witness.[6] RASARA supports the Bill in closing the door on the possibility of this evidence being admitted in federal proceedings.

Unfortunately, RASARA believes that the Bill has missed the opportunity to conclusively prohibit evidence of sexual experience being admitted in child or vulnerable adult proceedings. Sexual experience evidence in proceedings under the Act is at best irrelevant and at worst retraumatising for the complainant and/or witness. The limited exceptions on admissibility proposed in s 15YCB have been included to ensure that there is no prejudice to the defendant in the proceedings; however, RASARA can see no circumstances where a defendant could suffer prejudice by not being allowed to adduce this type of evidence — in most cases, if consent is not present, the sexual experience of the complainant cannot be relevant. The Bill expressly apprehends that cross-examination on this type of evidence would be humiliating, distressing and embarrassing,[7] but the Bill allows for these interests of the complainant to be secondary to the interests of the defendant in some cases.[8]

Further, if the Act were to be amended as proposed by the Bill, the Act would allow evidence of both sexual reputation and sexual experience of adult *witnesses* to be admitted.[9] It is surely uncontroversial to suggest that it would be unusual, at the very least, for evidence regarding the sexual reputation or experience of a witness (who is not the complainant) in proceedings to somehow be relevant. As a result, the exclusion of witnesses in vulnerable adult proceedings in the text of proposed ss 15YCA and 15YCB is nonsensical. That is not to say that RASARA advocates for simply including witnesses in the provision — we say that this type of evidence should never be admissible. However, at the very least ss 15YCA and 15YCB should expressly include witnesses' sexual reputation and sexual experience, to mirror ss 15YB and 15YC in respect of child witnesses.

Although RASARA recognises that the amendments to s 15YC and proposed insertion of s 15YCB are generally in line with current State and Territory legislation in allowing sexual experience evidence to be admissible in limited circumstances,[10] RASARA's view is that under no circumstances is the sexual

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[6] Noting that evidence relating to a complainant's sexual reputation is inadmissible in all Australian States and the Australian Capital Territory: see *Criminal Procedure Act 1986* (NSW) s 294CB(2); *Criminal Procedure Act 2009* (Vic) s 341; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1906* (WA) s 36B; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 75.

[7] See proposed ss 15YC(4)(c) and 15YCB(4)(c).

[8] See proposed ss 15YC(4) and 15YCB(4).

[9] Proposed ss 15YB and 15YC, in relation to child proceedings, specifically state: "*Evidence of a **child witness' or child complainant's** reputation with respect to sexual activities is inadmissible in a child proceeding*" (emphasis added) and "*Evidence of a **child witness' or child complainant's** experience with respect to sexual activities is inadmissible in a child proceeding, unless …*" (emphasis added). However, proposed ss 15YCA and 15YCB, in relation to vulnerable adult proceedings, do not afford the same protection to witnesses in those proceedings — witnesses are expressly absent.

[10] See *Criminal Procedure Act 1986* (NSW) s 294CB(4); *Criminal Procedure Act 2009* (Vic) s 342-3; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2)-(4); *Evidence Act 1906* (WA) s 36BC; *Evidence Act 1929* (SA)

experience of a person (complainant or witness) in a child or vulnerable adult proceeding, relevant. The mere fact of an application being made to adduce such evidence, at best would be distressing, humiliating or embarrassing[11] to the complainant or witness but at worst would serve to retraumatise that person and cause actual mental harm. The admission of that evidence is tantamount to victim-blaming. The criminal justice system as it relates to survivors of sexual assault is already retraumatising — it is unnecessary and unethical to make it more so, especially where the purpose of the Bill is to implement trauma-informed measures.

It is especially the case with jury trials that the admission of sexual experience evidence is likely to reinforce existing prejudices of jurors. Even where, of course, the application for admission of sexual experience evidence is heard in the absence of the jury, the fact of the admission of the evidence could cause jurors to reason that because the complainant has had certain sexual experiences, then:

(a) he or she is a person who is more likely to consent to the acts which are the subject of the charge; and/or

(b) he or she is less worthy of belief than a complainant without those features,[12]

despite that reasoning being expressly forbidden.

D. Setting the tone for necessary reform

As mentioned above, it is especially noteworthy that the Bill, as it regards sexual reputation evidence and sexual experience evidence, would bring the Commonwealth jurisdiction generally in line with State and Territory legislation. However, RASARA's position is clear — the Commonwealth should not blindly follow suit in circumstances where sexual experience evidence will clearly be irrelevant and the aim of the Bill is to better protect complainant interests.

If the Bill made sexual experience evidence inadmissible in the same way as sexual reputation evidence, the Commonwealth jurisdiction would have the opportunity to take the lead in fully protecting and preserving the interests of victim-survivors of sexual assault, in a system which is weighted towards preserving the interests of the defendant in such proceedings and in which the vast majority of defendants are not convicted.

Clearly, the high bar of admissibility of sexual experience evidence being proposed in the Bill in practical terms means that this type of evidence would only be adduced only in limited cases. However, in our view there is no type of case in which this evidence can be relevant and simply having the open prospect of admissibility pursuant to the legislation sends a message to survivors that the interests of defendants, which are already protected in our criminal justice system to the detriment of complainants, are superior to the interests of survivors. Survivors are already dealt the most challenging hand if they decide to pursue proceedings against their perpetrators, and the legislation

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s 34L(1)(b); *Evidence Act 2001* (Tas) s 194M(1)(b); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 76; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1).

[11] See proposed ss 15YC(4)(c) and 15YCB(4)(c).

[12] See *Bull v The Queen* (2000) 201 CLR 443 at [53].

should be focused on protecting survivors wherever possible — the wording of legislation matters, as does the message that those words send to the community.

E. Access to free, independent legal representation

While RASARA does not condone the admissibility of sexual experience evidence in any form, should proposed s 15YCB be enacted, RASARA recommends that the Act should also be amended to include a provision which requires vulnerable adult complainants and children to be immediately granted access to free independent legal representation to represent their interests in the proceedings where an application for leave to admit sexual experience evidence is filed with the court.

As set out in a report recently published by the Victorian Victims of Crime Commissioner, survivors often present with confusion and dismay when they realise, at the outset of the proceedings, that they do not have their own lawyer, and are concerned when they realise that it is not the role of the prosecutor to fundamentally uphold their rights and interests.[13]

As recognised in ss 15YC and 15YCB, the admission of sexual experience evidence is highly likely to lead to 'distress, humiliation or embarrassment',[14] it is more important than ever that affected complainants or witnesses have access to their own legal representation where an application for leave is filed.

However, it should not be necessary to reach that point — sexual experience evidence should never be admissible.

Thank you for the opportunity to provide this response. We welcome the opportunity to discuss our recommendations further.

Regards,

Michael Bradley (Chair, RASARA)
On behalf of the Board of RASARA

[13] See Victoria Victims of Crime Commissioner, 'Silenced and sidelined: Systematic inquiry into victim participation in the justice system' (November 2023), Chapter 15: Legal assistance, p 371-2. Available online at: https://victimsofcrimecommissioner.vic.gov.au/media/lpufjx5h/silenced-and-sidelined_systemic-inquiry-into-victim-participation.pdf.

[14] See proposed ss 15YC(4)(c) and 15YCB(4)(c).