



Law Council  
OF AUSTRALIA

# Exposure Draft: Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022

**Attorney-General's Department**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000<sup>1</sup> lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
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- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margey Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

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<sup>1</sup> Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

## Acknowledgement

The Law Council of Australia is grateful for the 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.

## Executive Summary

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to provide this submission in response an exposure draft of Schedule 1 of the Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022 (**Draft Bill**) prepared by the Attorney-General's Department (**Department**).
2. In principle, the Law Council supports the Draft Bill's aims of strengthening protections and criminal justice outcomes for vulnerable witnesses and victim-survivors of sexual violence, particularly women and children. The Law Council recognises that victim-survivors can face barriers within the criminal justice system and are at a particular disadvantage compared with other witnesses when called to give evidence about their experiences.
3. Reasonable and proportionate adjustments need to be made to court processes to enable victim-survivors to give their best evidence, and the Law Council supports measures designed to strengthen available protections and provide courts with the necessary tools and flexibility, provided that such measures are carefully balanced against the fundamental right of the accused to a fair trial.
4. The Law Council generally supports the proposed amendments outlined in the Draft Bill, however submits that the witness intermediary and pre-recording of evidence provisions in the Draft Bill lack necessary detail to effectively guide the courts, complainants, and the accused. This risks the possibility of delays and appeals as courts try to determine Parliament's intention. The lack of procedural fairness safeguards, such as the requirement for complete disclosure before pre-recording commences, also risks unfair trials.
5. The Law Council therefore makes some targeted suggestions for amendment of the Draft Bill, and would welcome the opportunity to continue to engage with the Department as the reforms develop further.

## Background to the Draft Bill

6. Schedule 1 of the Draft Bill seeks to amend the provisions in Part IAD of the *Crimes Act 1914 (Crimes Act)*. This Division presently creates special provisions governing the admissibility of evidence regarding vulnerable persons, rules about their cross-examination, special facilities (such as alternative arrangements like closed circuit television and screens) for vulnerable persons to give evidence, provisions facilitating the use and admissibility of pre-recorded evidence of vulnerable persons, and miscellaneous rules to assist vulnerable persons giving evidence and preventing their repeat examination.
7. The amendments in the Draft Bill seek to broaden the class of persons who can automatically access the protections, and to provide new protections.

## Proposed Reforms

### Expanding the vulnerable witness classification

8. As identified by the Royal Commission into Institutional Responses to Child Sexual Abuse, the most significant eligibility gap for vulnerable witness protections in child sex abuse prosecutions is the coverage of adult complainants without a disability.
9. The Law Council notes the Department's statement that the Commonwealth definition of vulnerable witnesses includes child witnesses and child complainants in child sexual abuse prosecutions, but that this fails to recognise that many complainants wait until they are adults before notifying authorities.
10. Whilst there is not, in fact, a definition of 'vulnerable witness', but definitions of 'vulnerable adult complainant' (a definition which is referable to the persons status as a victim of a class offences in subsection 15Y(2)) or a 'child complainant' (involved in proceedings for the offences in subsection 15(1)), the Law Council acknowledges the result identified by the Department is correct in that, for instance, the class of offences where protections are afforded to child complainants is much broader than the class where adult complainants are protected.
11. Items 1-10 of the Draft Bill would extend the protections to proceedings for a broader range of criminal offences including crimes against humanity, war crimes, additional child sexual abuse crimes and drug offences involving children. The items would also extend the categories of proceedings where adult complainants are automatically covered to include child sexual abuse offences.
12. The Law Council supports protections applying to proceedings involving child complainants for this broader range of offences, however it does not support the automatic application of the protections to adult complainants, especially for non-sexual offences (e.g. war crimes, crimes against humanity). The recording and, in particular, pre-recording of evidence can lead to delays, increased costs, and unfairness to the accused.
13. If the category of special witnesses is to be broadened to adult complainants, then, in our view, it should only be expanded to sexual offences. The existing discretion in section 15YAB to declare a person a 'special witness' in relation to a proceeding if satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner is appropriate and should be maintained.

## Restricting the admissibility of sexual reputation/experience in certain vulnerable adult proceedings

14. 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 undoubtedly operate to exclude evidence which would, at least in theory, be admissible under the tendency and coincidence provisions in the Uniform Evidence Law.<sup>2</sup> The same position currently applies in all other Uniform Evidence Law jurisdictions where there is specific legislation dealing with sexual history evidence.<sup>3</sup>
15. 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).

## Pre-trial recording of evidence and Ground Rules Hearings

16. Item 18 (and associated definitional amendments) would insert new Division 2A into Part IAD of the Crimes Act to create regimes for:
  - the conduct of pre-trial hearings to take and record the evidence of a vulnerable person including cross and re-examination and allow for these recordings to be tendered and relied on as the person's evidence in any subsequent trial or retrial; and
  - the conduct of Ground Rules Hearings with prosecution and defence counsel prior to a vulnerable witness giving evidence in order for the court to make orders in advance directing the manner of questioning and management of the witness's evidence.

### Pre-recording of evidence

17. The Law Council acknowledges that the criminal justice system can be daunting for victim-survivors, particularly with respect to the giving of evidence. For this reason, it is generally supportive of procedural reforms designed to minimise any re-traumatisation of victim-survivors in criminal trials. However, any such reforms must be carefully balanced against the fundamental right to a fair trial, which requires that the accused be able to test the evidence.
18. In principle, the Law Council supports the introduction of provisions, in matters proceeding on indictment, allowing for the pre-recording of evidence of vulnerable witnesses so that this can occur in the absence of a jury. These proposed measures are similar to provisions existing in jurisdictions such as Victoria<sup>4</sup> and New

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<sup>2</sup> See, for instance: the tendency rule at s 97 of the *Evidence Act 1995* (Cth).

<sup>3</sup> See, e.g., *Criminal Procedure Act 1986* (NSW), s 293.

<sup>4</sup> See Division 7 of Part 8.2 of the *Criminal Procedure Act 2009* (Vic).

South Wales, and appear to be consistent with the recommendation of the Royal Commission.<sup>5</sup>

19. The Explanatory Note to the Draft Bill states that the provisions are designed to improve the quality of the evidence (as the witnesses' memories are fresher), be less onerous on vulnerable witnesses and allow trials to run more efficiently. However, as presently drafted, the Draft Bill risks creating inefficiencies. For example, proposed subsection 15YDE(1) allows the court to order a pre-trial hearing to occur any time before the proceeding (i.e., the trial proper) commences. Unless courts and parties are adequately resourced to hold the balance of the trial soon after the vulnerable witness' evidence is pre-recorded, and there are procedural fairness safeguards including provisions to mandate full prosecution disclosure – then pre-recording can risk delaying or staying the ultimate proceedings.
20. The Law Council recommends that the Draft Bill should expressly provide that the pre-recording of the complainant's evidence is the commencement of the trial (as is the case in the New South Wales scheme). It also recommends that the court should be required to consider other factors when determining whether it is in the interests of justice to order a hearing for the taking of pre-recorded evidence, including:
  - whether the accused person has sought and received advice from an Australian legal practitioner;
  - whether both parties have been heard on the order;
  - whether all pre-trial disclosure and case management requirements have been complied with;
  - the wishes and circumstances of the witness; and
  - the availability of court and other facilities needed for a pre-recorded evidence hearing to take place.
21. Additionally, the Draft Bill should also contain provisions that stipulate how the pre-recording is to be admissible in a trial, how it is to be dealt with (i.e., who may receive or keep a copy), and an entitlement for the accused to be given private access to the recording at a convenient time.

### Ground Rules Hearings

22. The Law Council understands these provisions are a response to the Royal Commission recommendation that, where the pre-recording of cross-examination is used, it should be accompanied by a Ground Rules Hearing to maximise the benefits of such a procedure.<sup>6</sup>
23. However, the Law Council also queries whether it is necessary to introduce a requirement to conduct a Ground Rules Hearing with respect to adult witnesses who are not disabled or impaired as significant protections already exist. Notable, for example, are the limitations regarding sexual history in the Draft Bill, and a court's existing powers to restrain inappropriate or aggressive cross-examination.
24. Whilst the Law Council supports the introduction of Ground Rules Hearings, it is concerned that the provisions may enable directions to be given which may unfairly

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<sup>5</sup> Recommendation 52-53, 2017 Final Report on Criminal Justice released by the Royal Commission into Institutional Responses to Child Sexual Abuse.

<sup>6</sup> Recommendation 54, 2017 Final Report on Criminal Justice released by the Royal Commission into Institutional Responses to Child Sexual Abuse.

impact on an accused's right to a fair trial. These directions may result in contested Ground Rules Hearings and subsequent appeals.

25. Proposed paragraph 15YDD(2)(b) allows a court to make a direction about the duration of questioning of a vulnerable person. Whilst it is acknowledged that it may be appropriate to make a direction that allows a vulnerable witness sufficient breaks, the Law Council is concerned that this provision might be used to put a time limit on the evidence given by the witness.
26. Proposed paragraph 15YDD(2)(d) allows for a direction about the allocation amongst co-accused of matters about which the vulnerable person may be questioned. The case against each accused is inherently different, and the defence of each accused may similarly differ. This provision has the potential to deprive an accused the opportunity to put their defence or answer to the charge to the witness, and unduly interfere with an accused's fundamental right to a fair trial.
27. The Law Council recommends that each accused be entitled to question the witness themselves or through their own legal practitioner, without relying upon questioning by a co-accused or a co-accused's legal practitioner who may not represent their interests. Courts have the power (for instance under section 41 of the Uniform Evidence Law) to disallow unduly repetitive questioning and the proper application of this power ought to provide sufficient protection to complainants.

## Witness intermediaries

28. The Draft Bill variously refers to the use of witness intermediaries (proposed paragraphs 15YDB(3), 15YDC(1)(d) and 15YJ(1)(c)). Items 19 to 21 of the Draft Bill would enable a vulnerable person giving evidence by video link to be accompanied by a witness intermediary, and to mandate that the defendant's lawyer and jury be able to see the vulnerable person and any persons accompanying them – presumably in the video frame. Proposed paragraph 15YDB(3) mandates that if a witness intermediary is appointed for the vulnerable person, the court must order a Ground Rules Hearing.
29. The Law Council supports in principle the use of witness intermediaries for witnesses with communication difficulties in Commonwealth proceedings. However, the Draft Bill does not provide a clear framework for their appointment, use in a particular case, regulation or procedural fairness safeguards. The Draft Bill should clearly prescribe criteria governing when a witness intermediary can be appointed, noting that not every vulnerable witness will have communication difficulties and benefit from the assistance of an intermediary.
30. The definition of witness intermediary in proposed section 15YA means a person who is appointed under a law of the Commonwealth, a State or a Territory as a witness intermediary (however described) to assist a person giving evidence in a proceeding, however there are no provisions within the Draft Bill for the appointment of witness intermediaries.
31. In particular, the proposed definition may be problematic in relation to witness intermediaries proposed to be used in Commonwealth proceedings heard in New South Wales. In that jurisdiction, witness intermediaries are only 'appointed' by a court for a particular witness in a particular proceeding under clause 89(3)(a) and (b) of Schedule 2 of the *Criminal Procedure Act 1986* (NSW). Although not expressly stated, appointees are taken from the panel established by Victims Services New South Wales under clause 89(1). There is however no formal 'appointment' process by a court or the Department of Communities and Justice. For clarity, the Law

Council recommends that the various state schemes under which witness intermediaries are appointed or empanelled should be prescribed in the Draft Bill or accompanying regulations.

32. Without a clear legislative and regulatory framework, and resourcing to support it, the amendments risk delays and appeals in Commonwealth criminal proceedings. Valuable lessons can be learnt from the use of witness intermediaries in New South Wales under the Child Sexual Offences Evidence Program and the Law Council recommends consideration of the 2018 evaluation of the pilot scheme (**Attachment 1**).
33. Moreover, there are no provisions within the Draft Bill regulating the use of witness intermediaries (whether Commonwealth or State appointed). That is, there are no provisions equivalent to Schedule 2, Part 29, Division 3, of the *Criminal Procedure Act 1986* (NSW), which regulates the appointment and use of NSW witness intermediaries. It is unclear how State-appointed witness intermediaries could be used under the proposed provisions. The Law Council recommends the Draft Bill be amended to prescribe clear eligibility criteria governing when a witness intermediary can be used in a particular case, noting that not every vulnerable witness will have communication difficulties and benefit from the use of a witness intermediary.
34. To ensure the fair trial of an accused in Commonwealth proceedings, the Law Council also recommends that the Draft Bill include express safeguards defining the role of the witness intermediary in the proceedings. A lack of clarity in the role of the witness intermediary risks appeals and delays: see *SC v R* [2020] NSWCCA 314, where the New South Wales Court of Criminal Appeal found that the trial judge erred by declining to revoke a witness intermediary's appointment where the witness intermediary had assisted the witness in a professional capacity before their appointment. Fair trial safeguards should also include:
  - a witness intermediary duty of impartiality;
  - the ability of court participants to see and hear the evidence; and
  - a requirement that a witness intermediary's evidence be given on oath/affirmation.

## Allowing victim-survivors to publish identifying material

35. Items 27-34 would remove restrictions preventing victim-survivors or another authorised person (such a journalist or family member) from publishing identifying material about themselves (or others over 18, with permission) about matters which might identify them as a vulnerable person in relevant proceedings.
36. The Law Council generally supports measures that permit victim-survivors to publish self-identifying material and to speak about their experiences if they choose to do so. It notes that permitting victim-survivors to publish identifying material "plays an important part of therapeutic justice, ownership and empowerment" for victim-survivors<sup>7</sup>, while also educating society about sexual violence and stimulating public debate and discourse.

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<sup>7</sup> Law Institute of Victoria, Submission to the Victoria Law Reform Commission, *Improving the Response of the Justice System to Sexual Offences* (January 2021) 26, citing Kathleen Daly, Danielle Wade, 'Sibling Sexual Violence and Victims' Justice Interests: A Comparison of Youth Conferencing and Judicial Sentencing' in Estelle Zinsstag, Marie Keenan (eds.), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions*, (Routledge, 2017) 143-178.

37. In Victoria, recent reforms have enabled the publication of identifying information regarding victim-survivors of sexual offences. Specifically, the *Justice Legislation Amendment (Supporting Victims and Other Matters) Act 2020* (Vic) allows victim-survivors to publish identifying material, and the *Judicial Proceedings Reports Amendment Act 2021* (Vic) allows any person to publish identifying details of a deceased victim. The Law Council supports the adoption of similar measures in Commonwealth legislation.