



Law Council  
OF AUSTRALIA

# Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024

Senate Legal and Constitutional Affairs Committee

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## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes 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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on more than 104,000 Australian lawyers.

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 Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is [www.lawcouncil.au](http://www.lawcouncil.au).

## Acknowledgements

The Law Council is grateful for the contributions of the Law Institute of Victoria and the Victorian Bar Association as well as the oversight and guidance of its National Criminal Law Committee and National Human Rights Committee in the preparation of this submission.

## Executive Summary

1. The Law Council of Australia welcomes the Australian Government's commitment to improving the criminal justice response to sexual violence, including these proposed legislative reforms.
2. The Law Council supports the Bill's aims of strengthening protections and criminal justice outcomes for vulnerable witnesses and victim-survivors of sexual violence, particularly women and children. We recognise that victim-survivors face significant barriers within the criminal justice system and are at a particular disadvantage compared with other witnesses when called to give evidence about their experiences. These issues were highlighted by the important findings of the Royal Commission into Institutional Responses to Child Sexual Abuse (**Royal Commission**).<sup>1</sup>
3. The Law Council notes that it is important to recognise that most sexual offence proceedings relate to state and territory offences. The proposed amendments are limited to proceedings relating to federal offences listed under Part IAD of the *Crimes Act 1914* (Cth). These Commonwealth provisions cover a diverse range of offences, requiring a tailored approach to special protections available to vulnerable parties.
4. Reasonable and proportionate adjustments need to be made to court processes to enable victim-survivors to give their best evidence, given that such processes are frequently traumatic experiences. The Law Council supports measures designed to promote the rights of victim-survivors, strengthen available protections and provide courts with the necessary tools and flexibility, provided that such measures are carefully balanced against the right of the accused to a fair trial.
5. We therefore support the intent of proposed amendments outlined in the Bill. However, we make some targeted recommendations as follows:
  - Default special protections for adult complainants should extend only to those sexual offences listed in Part IAD of the Crimes Act, noting that the discretion to declare special witnesses under the existing section 15YB can provide appropriate protections for witnesses in other proceedings.
  - While the Law Council supports the Bill's prohibition on questions relating to a vulnerable person's sexual reputation, the court should not be restricted to only granting leave to adduce evidence with substantial probative value relating to sexual activity that:
    - took place with the defendant in the proceedings; and
    - occurred or was recent at the time of the commission of the alleged offence.

We agree that it is appropriate to impose restrictions to protect vulnerable persons from the trauma associated with questioning of sexual experience. However, while they are likely to be rare, there may be limited circumstances beyond the criteria set out above where evidence will be relevant and highly probative (see particular examples in this submission).

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<sup>1</sup> See, for example, the recommendation that State and territory governments should ensure that the necessary legislative provisions and physical resources are in place to allow for the prerecording of the entirety of a witness's evidence in child sexual abuse prosecutions: Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report: Recommendations (15 December 2017) 107 [52]-[55].

In such cases, the court should be empowered to grant leave to adduce evidence provided the substantial probative value of the evidence outweighs any distress, humiliation, or embarrassment to the vulnerable adult or child complainant. The Law Council considers that, as presently drafted, the limitations on when leave can be provided impedes the judiciary's discretion to ensure that they can act as justice requires in cases before them.

- If a recording is to be used as a witness's evidence-in-chief, whether by way of a recorded interview or at an evidence-recording hearing, it should be video-recorded and not merely an audio recording.
  - If Parliament takes the view that audio-only evidence-in-chief is permissible, the Bill must clarify that this is reserved for exceptional circumstances where there is a significant risk of re-traumatisation due to the use of video.
- Proposed subsection 15YDB(2), concerning the factors to be taken into account when determining whether to order an evidence-recording hearing, should be expanded to require courts to consider:
  - the undesirability of fragmenting the proceeding, and
  - any additional legal costs to the defendant that would be likely to result from the pre-recording of the evidence.
- Proposed subsection 15YDF(5), concerning access to recordings, should be amended to allow access to recordings/transcripts of evidence that have been ruled inadmissible; and
- The word 'physical' should be removed from proposed section 15YOA of the Crimes Act to ensure the provision includes a broader range of disabilities when specifying a right to an interpreter.

## Introduction

6. The Law Council welcomes the opportunity to provide a submission in response to the Senate Legal and Constitutional Affairs Committee's inquiry into the provisions of the Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024 (the **Bill**).
7. The Bill aims to strengthen protections for vulnerable persons involved in certain Commonwealth criminal proceedings by:
  - expanding the range of offences to which special rules for proceedings involving children and vulnerable adults in Part IAD of the Crimes Act apply. The expanded offences include crimes against humanity, war crimes and drug offences involving children;
  - making the evidence of a vulnerable person's reputation with respect to sexual activities when appearing as a complainant and/or witness in criminal proceedings inadmissible;
  - restricting the admissibility of sexual experience evidence of vulnerable persons appearing as a complainant and/or witness in criminal proceedings unless the court grants leave, and the evidence is of sexual activities with a defendant in the proceeding. The court must also have regard to whether the probative value of the evidence outweighs any distress, humiliation or embarrassment to the vulnerable person;
  - 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 set out conditions on how the evidence-recording hearing must be conducted;
  - 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. This is so that it may be used in later proceedings to minimise re-traumatisation; 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. The Bill also streamlines the requirements for another person to publish the identifying information of a vulnerable person with the vulnerable person's informed consent.<sup>2</sup>
8. The Bill seeks to implement recommendations 52, 53, 56 and 61 of the 2017 Final Report of the Royal Commission in relation to protections for vulnerable persons involved in Commonwealth criminal proceedings.<sup>3</sup> The Bill also intends to advance Theme 2 of the First National Action Plan of the National Strategy to Prevent and Respond to Child Sexual Abuse 2021–2030, and support the Standing Council of Attorneys-General Work Plan to Strengthen Criminal Justice Responses to Sexual Assault 2022–2027.<sup>4</sup>

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<sup>2</sup> Explanatory Memorandum, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, 1-2 [5].

<sup>3</sup> Explanatory Memorandum, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, 1 [2].

<sup>4</sup> Ibid, 1 [3]-[4].

9. The Law Council supports reasonable and proportionate adjustments to court processes to enable victim-survivors to give their best evidence. Such measures are directed towards promoting the fundamental human rights of victim-survivors and, as recognised by the Parliamentary Joint Committee on Human Rights, the Bill would:

*... promote a number of rights, including the rights to privacy, freedom of expression, and equality and non-discrimination. The committee notes that these protections would operate in relation to children, and may have a particular effect in relation to female victim-survivors, and so would likely promote the rights of the child and rights of women.<sup>5</sup>*

10. The Law Council welcomes measures designed to promote these rights, 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.<sup>6</sup>
11. It is important to note that the reforms introduced by the Bill apply to a relatively narrow, albeit serious, set of Commonwealth offences within the Crimes Act. Comments on the measures contained in the Bill are, therefore, limited to their application to this finite list of Commonwealth offences, and are not indicative of the Law Council's views on policy settings currently in place as they relate to state and territory sexual assault proceedings. We anticipate that the latter frameworks will be a key focus area of the Australian Law Reform Commission's current inquiry into justice responses to sexual violence in Australia.

## Expansion of protections

12. The Bill seeks to expand the application of special rules contained in Part IAD of the Crimes Act to a broader set of criminal offences involving children and vulnerable adult complainants. Expanded offences include crimes against humanity, war crimes, crimes against the administration of justice by the International Criminal Court, torture involving children and drug offences involving children. The Bill also proposes to extend protections to 'vulnerable adult complainants' who are, or who are alleged to be, a victim of one of these offences.

### Expanded offences involving adult complainants

13. Clauses 1 to 9 of the Bill would expand the scope of the protections offered by Part IAD of the Crimes Act by inserting references to additional offences. In principle, the Law Council does not oppose the extension of these protections to the additional offences, noting that the offence types are those that are likely to involve a vulnerable complainant (if any).
14. However, in its current form, clause 6 appears to be incompatible with other proposed provisions. That clause expands the range of relevant proceedings involving vulnerable adult complainants to include various offences against children. This creates conflict with the proposed expanded definition of 'child complainant' in clause 10. If both provisions are enacted in their current form, a complainant who is an adult, but was a child at the time of one of the relevant offences would simultaneously be considered a 'child complainant' (under the new proposed

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<sup>5</sup> Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 2 of 2024* (20 March 2024), 26.

<sup>6</sup> Law Council of Australia, Exposure Draft: Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022 (1 March 2022).



definition) and a 'vulnerable adult complainant' by virtue of clause 6 and section 15YAA.

15. Due to proposed clause 10, which includes in the definition of child complainant a person who was a child at the time the offence was alleged to have occurred, the Law Council queries the need for an expanded list of offences for adult complainants as proposed by clause 6 of the Bill. While there may have been a specific drafting decision made in relation to this point, it is unclear from the explanatory material whether this was indeed intended.

## Automatic extension of protections to adult complainants

16. The Law Council queries whether it is desirable to automatically apply special protection measures to all adult complainants for all offences listed in Part IAD, especially, for non-sexual offences (for example, war crimes, crimes against humanity).
17. The existing discretion contained in section 15YAB of the Crimes Act to declare a person a 'special witness' in relation to a proceeding remains appropriate for these matters.<sup>7</sup> In the absence of an identified vulnerability (which would support an order that the person be considered a 'special witness') the presumption of innocence requires that an adult witness be subject to appropriate scrutiny.
18. Legal Aid NSW shared similar views in its submission on an earlier exposure draft of the Bill, noting that the amendment to automatically deem adult complainants to be vulnerable in all instances is unnecessary, and pointing out that these amendments go beyond what was recommended by the Royal Commission:

*The Royal Commission noted that adult survivors are **likely** to be vulnerable witnesses but did not state that all adult survivors are necessarily vulnerable, nor did it make any recommendations suggesting that they be treated as such. Those who are likely to be vulnerable witnesses can be declared special witnesses under the existing section 15YB.*

*Further, while the Royal Commission noted the possible vulnerability of adult survivors of child sexual offences, there is no evidence that adult complainants of other offences (for example, drug offences involving children or war crimes) are necessarily vulnerable.<sup>8</sup>*

19. While the Law Council does not object to an expansion of the special protections afforded by Part IAD of the Crimes Act, as set out below, concerns have been raised in relation to the extension of the proposed changes to the protections themselves. In some instances, the Law Council is concerned that the proposed amendments to the special protections may be weighted too greatly in favour of the complainant, at the expense of the right of the accused to a fair trial.

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<sup>7</sup> A 'special witness' is defined in section 15YAB and is a person who the court is satisfied is 'unlikely to be able to satisfactorily give evidence in the ordinary manner' because of 'a disability' or 'intimidation, distress or emotional trauma' arising from factors such as the person's age, cultural background or relationship to a party to the proceeding, or the nature of the evidence.

<sup>8</sup> Legal Aid NSW, Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022 (Submission, 18 February 2022) 4 (emphasis in original).

## Special witness provisions

20. The Law Council supports amendments that increase the range of protections available to special witnesses, such as those proposed in clauses 13 to 17 of the Bill. The judicial discretion and sensible threshold test strike an appropriate balance between the need to protect vulnerable witnesses and the accused person's right to a fair trial. If further protections are deemed necessary for any class of witness, consideration ought to be given to using a similar mechanism.

### Recommendation

- **Default special protections for adult complainants should extend only to sexual offences listed in Part IAD of the Crimes Act, noting that the discretion to declare special witnesses under the existing section 15YB can provide appropriate protections for witnesses in other proceedings.**

## Restrictions on evidence of sexual reputation and experience

21. The measures proposed in the Bill have several effects on the admissibility of a complainant's sexual reputation and activity for relevant Commonwealth offences, including:
- prohibiting any evidence being adduced or any cross-examination of a child or vulnerable adult complainant in relation to their sexual reputation. This prohibition is absolute, applicable to both the prosecution and defence, with no power of a court to grant leave;
  - in relation to evidence of sexual experience, requiring that leave be obtained before any evidence is adduced, or a child or vulnerable adult complainant is questioned, in relation to sexual activity with a defendant; and
  - prohibiting any evidence being adduced in relation to a child or vulnerable adult's sexual activity other than where both the following criteria are met:
    - the evidence is of sexual activities with a defendant in the proceedings; and
    - the evidence relates to sexual activity that occurred or was recent at the time of the commission of the alleged offence.
22. The Law Council is supportive of appropriate restrictions on adducing evidence relating to past sexual activity for Commonwealth offences, while retaining appropriate exceptions for properly relevant and highly probative evidence. To this end, the following comments are provided.

## Sexual reputation

23. The Law Council supports the Bill's prohibition on questions relating to a child or vulnerable person's sexual reputation. The proposed amendments would bring the Commonwealth provisions into line with other jurisdictions in Australia.<sup>9</sup>
24. While caution should always be exercised when enacting an absolute prohibition against lines of questioning in serious criminal proceedings, the Law Council

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<sup>9</sup> See, for example, *Criminal Procedure Act 2009* (Vic), s 341.

considers that it is appropriate to place an unqualified bar on evidence relating to sexual reputation for the purposes of Part IAD of the Crimes Act.

## Sexual experience

25. The Law Council also supports the proposal to require that leave be obtained before any questioning is permitted relating to a child or vulnerable adult complainant's sexual experience. Insofar as the provisions would require leave in all cases involving questioning about the complainant's sexual experience, including with the defendant, the proposed amendments would bring the Commonwealth provisions into line with most other jurisdictions in Australia.<sup>10</sup>
26. The requirement to obtain leave is appropriate to protect the rights of children and vulnerable adults from inappropriate questioning about their sexual experience with a defendant, whilst maintaining the accused's right to pursue that line of questioning where it is sufficiently relevant and probative.
27. However, the proposed amendments appear to apply more restrictive rules to admissibility than currently exists in any other Australian jurisdiction. This is due to:
  - a mandatory requirement that the evidence relates to sexual activity that occurred or was recent at the time of the commission of the alleged offence; and
  - a restriction of admissibility only for evidence of sexual activity with the defendant in the proceedings.
28. Where the above conditions are met, sexual experience evidence will still be inadmissible for adult and child vulnerable witnesses unless the court grants leave. In order to grant leave, the court must be satisfied that the substantial probative value of the evidence outweighs any distress, humiliation, or embarrassment to the vulnerable adult or child complainant.<sup>11</sup>
29. We acknowledge that in the vast majority of cases, it will be inappropriate to adduce evidence or cross-examine a child or vulnerable adult complainant in respect of sexual activity with a person other than the defendant. This evidence will ordinarily be irrelevant or lacking in sufficient probative value, such that it is appropriate to impose restrictions in order to protect complainants from the trauma associated with such questioning. However, while they may be rare, there may be cases where such evidence will be relevant and highly probative.
30. The Victorian Bar has provided the following examples of how the proposed blanket restriction on evidence of sexual experience with any person other than the accused may lead to concerning outcomes:
  - If, in a prosecution under s 471.25 of the Criminal Code (using a postal service to groom a person under 16) the author of a communication may be in dispute. An accused person would be prevented from adducing evidence that the complainant had engaged in sexual activity with another person who may be the author of the communication.

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<sup>10</sup> Ibid, s 342.

<sup>11</sup> See clauses 20-25 (proposed amendments to section 15YB and 15YC, and proposed sections 15YCA and 15YCB) of the Bill for proposed provisions for admissibility of evidence in child proceedings and clause 26 (proposed sections 15YCA and section 15YCB) of the Bill for proposed changes to admissibility of evidence in vulnerable adult proceedings.

- If, in a prosecution under s 271.2 (2B) of the Criminal Code (trafficking in persons), the only issue was deception as to the nature of sexual services, an accused person would be prevented from adducing evidence that the complainant willingly provided sexual services of that nature (with another person) when the relevant arrangements were made.
31. In the Law Council's view, the Explanatory Memorandum to the Bill does not provide sufficient justification for this notably higher threshold for adducing evidence of sexual experience for offences listed in Part IAD of the Crimes Act. While this approach could be appropriate in light of the particular vulnerabilities of complainants for certain offences within Part IAD, this is not immediately apparent from the Bill's supporting material, and ought to be set out in greater detail to justify the strict approach adopted. This is especially important when one considers the seriousness of the offences within Part IAD.
  32. Currently, the Bill's Statement of Compatibility fails to address these issues and does not point to evidence that the discretions that are present in most other jurisdictions are insufficient to protect the rights of children and vulnerable adults in criminal proceedings from inappropriate questioning about their sexual history.
  33. In this regard, the Victorian Bar has pointed out that Victorian provisions relating to admissibility were recently the subject of careful consideration by the Victorian Law Reform Commission, which concluded:<sup>12</sup>

*We did not recommend reforming the laws relating to sexual history in our Victims of Crime report. We heard that applications to introduce evidence and questions about sexual history were infrequent and that the provisions were 'generally regarded as working as intended'.*

34. Ultimately, the Law Council's fundamental concern with the proposed amendments is that they permit a situation where an accused person is prevented from leading sexual experience evidence that falls outside of subsection 15YCB(1)(a) or (b) (because it is not recent or with the defendant), regardless of whether the evidence is substantially relevant to the facts in issue or has substantial probative value to the credit of a complainant.
35. As noted in the Law Council's long-standing Rule of Law Policy Statement, the judiciary should always have sufficient discretion to ensure that they can act as justice requires in the case before them.<sup>13</sup> Providing the court with the ability to grant leave in the rare case where significant probative value outweighs the trauma associated with such questioning provides an important safeguard against potential injustice. This option must also be coupled with ongoing training and education for judicial officers to ensure decisions are trauma-informed and respectful of the rights of complainants when assessing probative value.

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<sup>12</sup> Victorian Law Reform Commission, Improving the Justice System Responses to Sexual Offences: Report (September 2021).

<sup>13</sup> Law Council of Australia, Rule of Law Principles (Policy Statement, March 2011), 4.

### Recommendation

- **The court should be permitted to grant a party leave to adduce evidence of sexual experience beyond evidence relating to sexual activity that:**
  - **took place with the defendant in the proceedings; and**
  - **occurred or was recent at the time of the commission of the alleged offence;****provided that the substantial probative value of the evidence outweighs any distress, humiliation, or embarrassment to the vulnerable adult or child complainant.**

## The recording of evidence

36. The Bill seeks to insert Division 2A into Part IAD of the Crimes Act, which would empower 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.
37. The introduction of evidence-recording hearings intends to implement Theme 2 of the National Strategy to support and empower victim-survivors and addresses recommendations 52, 53, 56, and 61 of the Royal Commission's Report. The Law Council notes that the intended purpose of permitting pre-recorded evidence is to reduce the re-traumatisation of vulnerable persons by ensuring they are not required to provide the same evidence on multiple occasions where it is practicable and equitable to avoid this occurring.
38. The Law Council also acknowledges that the Bill affords additional protections to vulnerable persons, in line with recommendations under the Royal Commission's Report, such as providing evidence via CCTV, being separated from the defendant, and being supported throughout the evidence-recording hearing. The Bill also introduces arrangements to ensure the defendant can either see or hear the vulnerable person giving evidence.
39. The vulnerable person will not be required to provide further evidence unless this is to clarify the initial evidence, to give proper consideration of information or material that has become available since the evidence-recording hearing, or it is determined to be in the interests of justice.
40. The Law Council remains supportive of procedural reforms designed to minimise re-traumatisation of victim-survivors in criminal trials. However, as mentioned above, any such reforms must be carefully balanced against the fundamental right to a fair trial, which requires that the accused is able to have an adequate opportunity to test evidence. In line with this approach, we make the following observations.

### Audio-only recordings as evidence-in-chief

41. The Bill allows for both audio and video recordings to be used as evidence given by the vulnerable person at an evidence-recording hearing<sup>14</sup> and extends the current law to allow an audio-only interview to become a witness's evidence-in-chief.<sup>15</sup>

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<sup>14</sup> Proposed subsection 15YDD(1).

<sup>15</sup> Proposed amendments to 15YM.

In justifying audio-only evidence (which, under the reforms, may be adduced as evidence-in-chief), the Explanatory Memorandum states:

*It is intended that vulnerable persons need not be video-recorded to participate in an evidence-recording hearing, but may instead opt to only be recorded by audio alone. Because some vulnerable persons' trauma relates specifically to video recording, a requirement to be recorded again could cause re-traumatisation amongst some victims and survivors.<sup>16</sup>*

42. Members of the Law Council's National Criminal Law Committee have expressed concerns about the practical implications of audio-only recordings being used as evidence-in-chief in proceedings, particularly given the seriousness of the offences covered by Part IAD of the Crimes Act and the potential for this to distort the adversarial process that underpins our criminal justice system.
43. The proposed changes extend the operation of a significant departure from the normal trial process where a witness is normally required to give evidence in court in person. This requirement is generally ameliorated for vulnerable witnesses by permitting their evidence to be given by CCTV from somewhere other than the courtroom.
44. Further, the existing provisions allow a video-recording of a witness's evidence made outside of court, in the absence of the defendant or defence lawyers, to become that witness's evidence-in-chief. This is a further, but well recognised and accepted, departure from the normal trial process.
45. However, to allow an audio-only recording to become the evidence-in-chief raises concerns. If a witness does not wish to be video-recorded, the witness can give the evidence live during the trial. Presumably, such a witness would not wish to have the evidence pre-recorded on video before trial (see below) or to have the evidence at trial video-recorded. Pre-recording and recording are both *options* designed to minimise the trauma of waiting for the trial date and of having to give evidence at a re-trial. In the extraordinary case where a witness will be severely traumatised by having their interview or testimony video-recorded, the witness can choose not to be recorded at all.
46. Removing the visual component from pre-recorded evidence significantly hampers the ability for a court to assess a witness's demeanour, which remains a fundamental aspect of the jury being able to evaluate a witness's credibility and reliability. To remove this component from a witness's evidence-in-chief is a significant departure from what is required for the fair trial of an accused person.
47. The Law Council acknowledges that there are good policy reasons of transparency and accountability, during the *investigation* of an alleged crime, why a witness statement should be taken from a vulnerable (especially child) witness by way of a recording (including an audio-only recording if the witness declines to be video-recorded). However, if the recording is audio-only, that investigative audio-only recording should not be permitted to be used as the evidence-in-chief of the witness and deprive the fact finder of the capacity to observe the witness giving their account.

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<sup>16</sup> Explanatory Memorandum, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, 16 [60].



### Recommendation

- **If a recording is to be used as a witness’s evidence-in-chief, whether by way of a recorded interview or at an evidence-recording hearing, it should be video-recorded and not merely an audio recording.**
  - **If Parliament considers that audio-only evidence-in-chief is permissible, the Bill must clarify that this is reserved for exceptional circumstances where there is a significant risk of re-traumatisation due to the use of video.**

## Timing of pre-recorded evidence

48. The introduction of provisions, in matters proceeding on indictment, which allow for the pre-recording of evidence of vulnerable witnesses so that this can occur in the absence of a jury, reflect similar provisions that already exist in jurisdictions such as Victoria<sup>17</sup> and New South Wales.<sup>18</sup>
49. Nevertheless, unless the courts and parties are adequately resourced to hold the balance of the trial soon after the vulnerable witness’s evidence is pre-recorded, the proposed measures risk inefficiency. Any delay may have consequential implications for procedural fairness and, in some cases, may risk delaying or staying the proceedings.
50. In recognition of the above, the Law Council suggests that consideration should be given to expanding proposed section 15YDB(2) to require courts, when considering whether to order an evidence-recording hearing, to also take into account:
- the undesirability of fragmenting the proceeding, and
  - any additional legal costs to the defendant that would be likely to result from the pre-recording of the evidence.

### Recommendation

- **Proposed subsection 15YDB(2) should be expanded to require courts to also take into account:**
  - **the undesirability of fragmenting the proceeding, and**
  - **any additional legal costs to the defendant that would be likely to result from the pre-recording of the evidence.**

<sup>17</sup> *Criminal Procedure Act 2009* (Vic) Part 4.7, s 133; Part 8.2.

<sup>18</sup> *Criminal Procedure Act 1986 No 209* (NSW), Part 6.

## Access to inadmissible evidence

51. The Law Council has received feedback that proposed section 15YDF is too restrictive to the extent that it prevents the accused's legal representatives from accessing and possessing recordings/transcripts of evidence that have been ruled inadmissible. This restriction in proposed subsection 15YDF(5) should only extend to the jury's access. The relevance and admissibility of evidence during trial is fluid and representatives for an accused should be able to retain copies and transcripts of evidence ruled inadmissible, as that position may change during the running of the trial. This restriction also significantly complicates the logistical arrangements for running such trials and clouds the concept of "lawful authority" in the corresponding offence provision.
52. The Law Council recommends that proposed subsection 15YDF(5) be reversed to expressly permit access by legal representatives to portions ruled inadmissible.

### Recommendation

- **Proposed section 15YDF(5) should be amended to allow access to recordings/transcripts of evidence that have been ruled inadmissible.**

## Use of police interviews

53. Proposed subsection 15YDB(5) provides that evidence-in-chief may also include a recording of an earlier interview. The Law Council appreciates the policy rationale for attempting to limit the number of times victim-survivors are required to give evidence, and that this proposal seeks to implement Recommendation 9 of the Royal Commission's 2017 Criminal Justice Report.
54. However, the Law Council notes that police interviews conducted prior to legal proceedings can often be conducted by investigators who are not trained in adducing evidence which may result in leading, emotive and irrelevant questions. Parties then have to go through a difficult process of editing the record of interview (and submissions and rulings) which can be a time and cost-intensive process.
55. In light of these observations, the Law Council endorses the principles that accompanied Recommendation 9 of the Criminal Justice Report, especially, that:
  - Investigative interviewing of children and other vulnerable witnesses should be undertaken by police with specialist training. The specialist training should focus on:
    - a specialist understanding of child sexual abuse, including institutional child sexual abuse, and the developmental and communication needs of children and other vulnerable witnesses; and
    - skill development in planning and conducting interviews, including use of appropriate questioning techniques.
  - Specialist police should undergo refresher training on a periodical basis to ensure that their specialist understanding and skills remain up to date and accord with current research.
56. Further, as a result of delays to jury trials, there is a risk that reliance on an interview that took place soon after the time of the alleged offending may lead to prejudicial outcomes if several years have passed before the matter is brought to trial.



## Right to an interpreter

57. Clause 50 of the Bill proposes to insert section 15YOA, which provides the right to an interpreter for a child witness, a vulnerable adult complainant or a special witness due to inadequate knowledge of the English language or a physical disability.
58. The right to an interpreter to accommodate the language needs of people with limited or no proficiency in English is deeply embedded in the fundamental right to a fair trial. It is a critical duty of any judicial officer to ensure that proceedings are conducted fairly. Those involved in legal proceedings must be understood and must be able to understand what is being said.<sup>19</sup>
59. The Explanatory Memorandum notes that this measure ‘strengthens the fairness of proceedings by assisting *all* parties to understand and participate in court process’ [emphasis added].<sup>20</sup> The Law Council queries as to why the proposed provisions only mention physical disability and do not refer to ‘a disability’, thus including a disability which may be other than physical. The Law Council notes this is inconsistent with the definition of special witness, which provides for a person being unlikely to be able to satisfactorily give evidence in the ordinary manner because of a disability (or intimidation, distress or emotional trauma).<sup>21</sup>
60. To ensure consistency across legislation and to be more inclusive of people with disabilities—beyond physical disabilities—that may require an interpreter, we recommend that the word ‘physical’ be removed from proposed section 15YOA.

### Recommendation

- **The word ‘physical’ should be removed from proposed section 15YOA of the Crimes Act.**

## Allowing victim-survivors to publish identifying material

61. Clauses 52 to 56 of the Bill propose to amend section 15YR of the Crimes Act so that victims and survivors can speak out about their experiences by clarifying that they may publish ‘self-identifying’ information or give their informed consent to a third party (e.g., a media organisation) to publish that information.
62. 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. The Law Council recognises that permitting victim-survivors to publish identifying material ‘plays an important part of therapeutic justice, ownership and empowerment’ for victim-survivors<sup>22</sup>, while also educating society about sexual

<sup>19</sup> Law Council of Australia, Australian National Standards for Working with Interpreters in Courts and Tribunals, Judicial Council on Cultural Diversity (3 August 2016) 3.

<sup>20</sup> Explanatory Memorandum, Crimes Amendment (Strengthening the Criminal Justice Response to Sexual Violence) Bill 2024, 23 [121].

<sup>21</sup> See section 15YAB(1) of the Crimes Act.

<sup>22</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.

violence, and stimulating public debate and discourse. The Law Council previously expressed its support of the relevant provisions in an exposure draft of the Bill.<sup>23</sup>

63. The Law Council also noted in its previous submission the recent reforms in Victoria, which 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.<sup>24</sup> The Law Council continues to support the adoption of similar measures in Commonwealth legislation.

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<sup>23</sup> Law Council of Australia, Exposure Draft: Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022 (1 March 2022) 10-1.

<sup>24</sup> *Ibid*, 11.