



January 2022

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

Background

The Crimes and Other Legislation Amendment (Strengthening the Criminal Justice Response to Sexual Violence and Other Measures) Bill 2022 (the Bill) amends the *Crimes Act 1914* (Crimes Act) to strengthen protections and criminal justice outcomes for vulnerable witnesses and victim-survivors of sexual violence, particularly women and children.

The Bill strengthens criminal justice responses to sexual offences, and supports and supplements broader work being progressed towards this aim. This includes the multi-jurisdictional initiative announced in May 2021 by Attorney-General, Senator the Hon Michaelia Cash, which will develop a joint program of work with all jurisdictions to strengthen justice responses to sexual assault, sexual harassment and coercive control.

The Bill advances Theme 2 of the National Strategy to Prevent and Respond to Child Sexual Abuse 2021-2030, 'Supporting and Empowering Victims and Survivors'.

The Bill also aligns Commonwealth vulnerable witness protections with recommendations of the 2017 Final Report on Criminal Justice released by the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission).

The department is seeking views from interested parties on the proposed reforms in the Bill.

Submissions are welcomed for a four week period and will be due on or before 14 February 2022 to CriminalLaw@ag.gov.au.

Existing vulnerable witness protections

Under Part IAD of the Crimes Act, vulnerable witnesses in Commonwealth prosecutions are categorised as children involved in specific proceedings (slavery, trafficking, child sex offences and child pornography offences), adult complainants in specific proceedings (slavery and trafficking offences) and special witnesses.

The Court may declare an individual a “special witness” in a Commonwealth matter under Section 15YAB if it is satisfied that the person is unlikely to be able to satisfactorily give evidence in the ordinary manner because of:

- a. a disability; or
- b. intimidation, distress or emotional trauma arising from:
 - i. the person’s age, cultural background or relationship to a party to the proceeding; or
 - ii. the nature of the evidence; or
 - iii. some other relevant factor.

Once declared a special witness, the Court may then give leave for them to access certain protective provisions, within Part IAD, including:

- section 15YG (unrepresented defendants);
- section 15YH (represented defendants);
- section 15YI (closed-circuit television);
- section 15YL (alternative arrangements);
- section 15YM (use of video recordings);
- section 15YO (accompanying adults);
- section 15YP (excluding people from the courtroom); and
- section 15YE (inappropriate or aggressive cross-examination)

This reform package will build upon these existing protections for vulnerable witnesses to enhance witness and victim-survivor participation in the criminal justice system. The reforms broaden the range of witnesses and complainants that can automatically access the protections and offers new protections, including pre-trial hearings and ground rules hearings. These proposals respond to and implement feedback from victim-survivors whose engagement with the criminal justice system can compound their trauma, and deter people from seeking justice.

Overview of Reform Package

Expanding the vulnerable witness classification

The Commonwealth definition of vulnerable witnesses includes child witnesses and child complainants in child sexual abuse prosecutions. This fails to recognise that many complainants wait until they are adults before notifying authorities. The Crimes Act provides protections for ‘special witnesses’, which could include adult complainants in child sexual abuse prosecutions, but this protection is not automatically afforded. A court must declare someone a special witness, and also determines which protections the special witness can access.

The Royal Commission identified that the most significant gap in terms of eligibility for some special measures is the coverage of adult complainants who do not have a disability. It further found that many survivors of institutional child sexual abuse who are now adults and do not have disability are ‘vulnerable’.

Response

The Bill will amend the Crimes Act to ensure adult complainants in child sexual abuse offences are automatically deemed vulnerable witnesses and are able to access existing and proposed vulnerable witness protections. The Bill will expand existing protections to a larger range of criminal proceedings to include

crimes against humanity, war crimes, additional child sexual abuse crimes and drug offences involving children, to ensure greater access to vulnerable witness protections for proceedings that are likely to be traumatic. The Bill would allow adult victim/survivors to access the same protections as child complainants.

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

Under the Crimes Act, evidence concerning a child's sexual experience or reputation is inadmissible, unless the court is satisfied that the evidence is substantially relevant. The Commonwealth restrictions apply to all children in any child proceeding. The current provisions do not apply to evidence about the sexual reputation or sexual experience of adult victim-survivors in child sexual assault proceedings.

The admission of sexual experience or reputation evidence can have the effect of re-traumatisation through humiliation and 'victim-blaming'. It is important that restrictions on the use of such evidence applies to all victim-survivors in sexual assault cases, including adults.

Response

The Bill amends the Crimes Act to ensure that evidence of sexual experience or reputation of all victim-survivors of child sexual abuse – including adults – is inadmissible unless the court is satisfied that the evidence is substantially relevant to facts in issue in the proceeding.

Allowing pre-recording of evidence

Part IAD, Division 5 of the Crimes Act allows for a video recording of an interview of a vulnerable person to be admitted as evidence in chief, subject to the interview being conducted by a specified person and the court gives leave. A vulnerable person who gives evidence in chief via video recording must still be available for cross-examination and re-examination.

This Division in the Crimes Act also provides for video recordings of a vulnerable person's entire evidence to be recorded at trial and used in subsequent proceedings, if certain conditions are met. This does not prevent the vulnerable person from having to provide evidence at trial in the first instance.

The Royal Commission took the view that pre-recording the entirety of a witnesses' evidence is likely to have clear benefits for both the witness and the parties in a prosecution. Pre-recording all evidence at an earlier stage improves the quality of the evidence (as the witnesses' memories are fresher), is less onerous on vulnerable witnesses and can allow trials to run more efficiently.

Response

The Bill amends the Crimes Act to allow for pre-trial hearings for the recording of evidence. This will occur prior to a proceeding to pre-record all of a vulnerable person's evidence, including cross-examination and re-examination. The Bill will allow for these recordings to be tendered and relied on as the person's evidence in any subsequent trial or retrial. This will allow vulnerable witnesses to only provide evidence once, even if there is an ongoing appeal process.

Introducing Ground Rules Hearings

Division 3 of the Crimes Act sets out a range of restrictions relating to cross-examination of vulnerable persons. These include limits on questions about sexual history (for vulnerable child complainants in child sex offence matters), inappropriate or aggressive cross-examination, as well as who can ask questions when the

alleged perpetrator is unrepresented. The list of restrictions does not enable the court to be flexible and to consider the specific needs of each vulnerable person, on a case by cases basis.

Ground rules hearings occur with counsel prior to cross-examination and allow the court to make or vary directions relating to a vulnerable witness' evidence to assist vulnerable witnesses to give their best evidence. Rather than being prescriptive about the directions that can be made, ground rules hearings allow a court to determine the specific needs of each vulnerable witness. A court can provide guidance on the way questions may be asked, whether the defence case needs to be put to the witness, and the overall management of the witness' evidence.

The Royal Commission found that there was general support for ground rules hearings, based on public submissions, from both prosecutors and defence attorneys.

Response

The Bill amends the Crimes Act to allow for ground rules hearings in proceedings involving vulnerable witnesses. The Bill permits the court to make or vary any direction for the fair conduct of the proceeding.

Requiring recording of evidence and allowing recorded evidence to be tendered in subsequent trials and retrials

Section 15YNB of the Crimes Act allows a vulnerable person's recorded evidence in an original proceeding to be tendered in new proceedings, subject to giving written notice to the court and defendants. The protections do not currently apply to special witnesses or adult complainants in child sexual abuse proceedings.

The Royal Commission found that by recording the complainant's evidence, this would in most cases avoid the need for the complainant to give their evidence again if there is a new trial. Several submissions to the Royal Commission noted the potential for re-traumatisation from a vulnerable witness repeatedly being required to provide their evidence.

Response

The Bill will require all vulnerable persons' evidence be audio-visually recorded, and allow for these recordings to be tendered and relied on as the witness' evidence in any subsequent trial or retrial. The Bill extends this protection to adult complainants in child sexual offence proceedings and special witnesses.

Allowing victim-survivors to publish identifying material

Overview

Section 15YR of the Crimes Act makes it an offence for anyone to publish information that identifies another person as a child witness, child complainant or vulnerable adult, without leave of the court.

Initially intended to protect survivors from media exploitation, this and similar laws have had unintended consequences and obscure opportunities for the public to learn from survivors and better understand sexual violence. While many sexual assault survivors may not wish to waive their right to anonymity, for those who do, speaking out can hold many benefits to both themselves and the wider community.

In 2020, Tasmania and the Northern Territory reformed their legislation to allow victim-survivors of sexual assault to self-identify in media provided they are over 18, have not been coerced, and there are no ongoing

proceedings. They must not identify other victims without permission. Victoria has also made similar amendments to the *Judicial Proceedings Reports Act 1958* in 2020 and 2021.

Response

The Bill introduces measures aimed at supporting victim/survivors to speak about their experiences, if they choose to do so. The Bill would:

- clarify that a vulnerable person (including children) can publish identifying information about themselves;
- allow vulnerable persons over 18 to consent to another person (such as a journalist) publishing identifying information about them;
- allow a vulnerable person to publish information about another vulnerable person (a co-complainant for example) only if they have that person's consent; and
- explicitly provide that family members can apply to the court to seek leave to publish identifying information about a vulnerable person, where that person is deceased.