



# National Women's Safety Alliance

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committed to ending **gender based** violence

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

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Submitted by

Katherine Berney

Director

National Women's Safety Alliance

[www.nwsa.org.au](http://www.nwsa.org.au)

## About NWSA

The **National Women's Safety Alliance** brings together a diversity of voices, expertise, and experience to inform and guide national policy on women's safety. The NWSA, established in August 2021, connects the sector, experts, government, and victim-survivors with a shared vision to end violence against women. This will be achieved through consultation, research, and the collaborative development of expert policy advice to government.

More information about NWSA is available on our [website](#).

## Introduction

NWSA welcomes the opportunity to participate in the Australian Government consultation to inform the amendment to the *Crimes Act 1914* for the purposes of strengthening criminal justice responses to sexual violence. In June 2023, we were invited by the Attorney General's Department to provide comment on the proposed reforms. We used this early opportunity to address many longstanding concerns regarding the treatment of vulnerable complainants in the court system and the abundant tendency of the reporting process to retraumatise survivors of sexual violence.

We endorse the submissions to this consultation made by our members including Women's Legal Services Australia, The Deakin Network Against Gendered Violence and the Queensland Sexual Assault Network.

In August 2023, the Government hosted a National Roundtable on Justice Responses to Sexual Violence which brought together victim-survivors, representatives from the service and advocacy sectors, other experts, and Commonwealth, state and territory ministers. The National Women's Safety Alliance was represented at this roundtable and supported the approach by the Attorney General towards reform.

Our submission to the June 2023 invitation included the following overarching considerations:

- Child Complainants and Child Witnesses
- Expanding the list of offences for a court to declare a person a special witness or vulnerable adult complainant.
- Evidence of sexual reputation and of sexual experience

We use this submission to comment on these elements of the exposure draft.

## Comments on the Exposure Draft

### **Section 15YA Child Complainant and Child Witness**

The new definitions acknowledge the lifelong trauma endured by survivors of child sexual abuse, the statistical reality of their journey to disclosure and their vulnerability to re-traumatisation even as they age.

We support these amendments which reflect our earlier contribution and the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse.

## Section 15YCB Evidence of sexual experience – vulnerable adult proceedings

NWSA largely welcomed the proposed reforms to 15YCA and 15YCB which would place limits on evidence relating to sexual reputation and sexual experience being presented at proceedings with vulnerable adult complainants. This reform is a longstanding campaign of our members. Despite this progress, we share the following concerns with the language in the exposure draft:

- **15YCB (1)** – The current draft raises the prospect that non-consensual sexual activity can be admissible. There is the possibility that a complainant may be cross-examined regarding previous sexual offences complaints, which may have been withdrawn or discontinued for any number of reasons. There is a tangible risk that in such circumstances defence counsel can insinuate that the complainant has the propensity to ‘make complaints’ and not see them through.
- To counteract this probability, we suggest the following amendment:
  - *“Evidence of a vulnerable adult complainant’s experience with 18 respect to sexual activities (**whether they are alleged to be consensual or non-consensual**) is inadmissible in a vulnerable adult 19 proceeding ...”*
- **15YCB (2)** – We believe there would be very few instances where sexual reputation or sexual experience would be relevant in vulnerable adult proceedings and that the admissibility test must, accordingly, be high.
- To ensure this high bar, we suggest the following amendments:
  - (2) *The court must not give leave unless the court is satisfied that:*
    - (a) *the evidence is substantially relevant to facts in issue in the proceeding; **and***
    - (b) *the evidence has substantial probative value.*
- **15YCB (4)** - We harbour deep concerns regarding this paragraph and its inference that sexual assault complainants lie or make up claims of sexual assault. The retention of this paragraph has the capacity to undermine the immense reform this Bill endeavours to achieve.
- **In determining probative value, we also suggest the following be considered:**
  - The need to encourage reporting of sexual offences and the public interest in responding to and supporting complainants; and
  - The reasonable expectation of complainant privacy.

In regard to the broader question of probative value and the durability of rape myths in the court, we note the comments by The Deakin Network Against Gendered Violence:

*“the question as to why or how any prior sexual experiences of complainants are considered ‘probative’ means that this Bill risks upholding the current rape myths and stereotypes that still exist in courtrooms. Further to this, the ‘experience’ of a complainant cannot be viewed in isolation to their ‘reputation’, evidence of which has been deemed inadmissible, as reputational damage inevitably occurs in the courtroom because defence counsel can and do use complainants’ prior sexual experiences to damage their character and credibility at trial”.*

### **Section 15YDB – Evidence recording hearings**

We are concerned that the current proposal at (2)(iii) opens the door for a defendant's decision to waive legal representation to be a factor in determining whether evidence can proceed as a recorded hearing or not.

To this end we understand that at the state level there is legislation prohibiting a defendant from cross examining the complainant and under such circumstances, makes provisions for Legal Aid to represent the defendant. It is an urgent priority for our members, that a defendant not be permitted the opportunity to personally cross-examine their complainant due to the absence of legal representation. We urge the drafters to consider pre-existing state legislation that accommodates the scenario where a defendant does not have legal representation.

### **15YR – Publication identifying another person as a child witness, child complainant, vulnerable adult complainant or special witness**

We support the amendments repealing the existing legislation which criminalised victim-survivors of sexual offences from speaking about their experience without leave of the court.

## **Independent Legal Representation**

In our submission to the June 2023 consultation, we noted how many survivors feel sidelined by the judicial process and the delegation of prosecutorial service. Our members have collectively raised the need for Independent Legal Representation (ILR) to be made available to complainants. The ILR operates independently of the prosecutor and prioritises the interest of the complainant

including case management, advocacy, and liaison. The Alliance believes that Independent Legal Representation for sexual assault complainants in criminal trials would support better outcomes and contribute to ensuring that the stronger legislative protections for victim-survivors in this Bill are appropriately utilised and effective.

Independent legal representation can ensure that complainants are aware of their substantive legal entitlements in federal offence proceedings, such as opportunities to share their wishes with the court in relation to evidence recorded hearings, make a victim impact statement, rights to an interpreter, rights to not be subjected to inappropriate or aggressive cross-examination, and rights to not have evidence about their sexual reputation admitted. This will ultimately lead to better experiences for victim-survivors as they navigate the system and understand the options and protections available to them. The Women's Legal Services are well placed to provide this specialist assistance with claimants as they navigate the legal system.