Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024

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Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024

The Association appreciates the opportunity to comment on the proposed Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024 (**the Bill**).

Introductory observations

The Bill proposes major changes to the criminal justice system.

The changes are said to be *"primarily aimed at supporting women and girls as victim survivors in the criminal justice system."* The Association agrees that this is a worthwhile goal but maintains that this can be achieved without diminishing the standard of proof, shifting the burden of proof, or otherwise further disadvantaging defendants in the criminal justice system. The Association is only concerned with the protection of the innocent from the consequence of wrongful conviction. The protection of the innocent serves the interest the community.

The Association submits that substantial changes to the current law should not be made without a clear understanding as to why the current law exists and only if it is clearly established by evidence that the proposed changes will further the interests of justice.

Part 3: Amendments to the *Corrective Services Act 2006*

Section 266 of the *Corrective Services Act 2006* is entitled 'programs and services to help offenders.' The aim of this section is to encourage accused persons to enter rehabilitation while on remand. The insertion of sections 344AA and 344AB, as it refers to the ability of prosecuting authorities to use information provided by a prisoner in a program or service against them for 'an offence allegedly committed by a prisoner whilst participating in a section 266 program or service,'[1] is not supported by the Association. In most cases an accused, without access to legal advice, will be unable to determine what relates to the charges they are facing and what relates to other uncharged misconduct. Rehabilitation of prisoners will be

[1] See section 344AB (2)

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adversely affected if voluntary disclosures in therapy or programs can be used in later criminal investigations or criminal proceedings.

Part 4 Amendment of Criminal Code

The Association understands the purpose for the inclusion of section 210A. It supports *specific* reference to those classes of persons who fall within the category of 'having a child under their care, supervision, or authority,' however submits that the list of prescribed relationships at section 210A(3) be exhaustive. This would allow the community to have a proper understanding of what is meant by the term "care, supervision or authority". It would also ensure that young and often immature people of both genders, engaged in entirely consensual and non-exploitative relationships, would not be at risk of inadvertently committing a serious criminal offence.

Part 5 Amendment of Evidence Act

Expanding directions hearings – Insertion of a new section 21AAB into the Evidence Act 1977

The Association considers that the introduction of additional and specific directions hearings about the evidence to be given by a special witness in a relevant proceeding, that is a criminal proceeding relating wholly or partly to a sexual offence or a domestic violence offence, as proposed by the new s 21AAB, is both unnecessary and has the real potential to lead to miscarriages of justice by unduly restricting the way in which an accused person conducts their defence.

In relation to the utility of the proposed section, the Association submits that there are already adequate provisions within Queensland's criminal justice system to help facilitate access to justice for vulnerable witnesses.

The existing s 21 of the *Evidence Act* (which is renumbered as s 20A under the current Bill) gives the trial judge a broad power to prevent improper questioning which is defined as questioning that 'uses inappropriate language or is misleading, confusing annoying harassing intimidating offensive, oppressive or repetitive'. In applying this broad power, the trial judge must take into account relevant matters such as the witnesses age, education, level of understanding, cultural background or relationship to any party to the proceeding.

Section 21A(2) gives trial Judges additional powers to control the cross examination of special witnesses, such as making directions about rest breaks for the special witness, requiring that questions be kept simple, be limited by time, or direct that the number of questions for a special witness on a particular issue be limited.

The Queensland Intermediary Scheme, Division 4C in the Evidence Act, provides further protective measures for special witnesses in child sexual offence matters and, of course, the rules of evidence place further restrictions on the matters that can be properly raised in cross-examination.

The Association submits that judges routinely, effectively and efficiently apply the rules of evidence and these relevant provisions of the *Evidence Act* in relevant proceedings and that further legislative intervention is both unnecessary and likely to lead to delays in the timely resolution of criminal proceedings.

As well as questioning the utility of the new section, the Association has significant concerns about proposed sub-section 21AAB(4) which has the potential to unduly restrict the manner in which an accused person conducts their defence, including by limiting the manner, duration and content of proposed cross-examination and by requiring an accused to disclose their case

through identifying topics of cross examination in advance of trial. This proposed section ignores the fundamental principle that an accused does not have to, and should not be compelled to disclose his or her defence.

In many cases, particularly cases involving sexual and domestic violence offences, cross examination is the only way the truthfulness and reliability of a witness can be tested. Given the restrictions on cross examination at committal hearings it is very difficult to reliably predict in advance of trial how long cross examination of a witness will take or what matters will be or will become relevant.

Restricting an accused's right to challenge the testimony of a witnesses through cross examination in accordance with the rules of evidence and section 21 of the *Evidence Act,* is a breach of an accused's right to examine witnesses, which recognised as one of the minimum guarantees that a person charged with a criminal offence is entitled to under s 32(2)(g) of the *Human Rights Act 2019.*

Similarly, allocating topics about which a witness may be questioned to particular counsel in cases in which there is more than one defendant, is a breach of an accused's right to be choose their legal representation, which is another minimum guarantee that is recognised in s 32 (2)(d) of the *Human Rights Act.* Such a provision fails to recognise that a defendant in a criminal trial may have different interests and more or less competent representation than some or all of his or her co-accused.

The Association also submits that the introduction of further interlocutory steps in the trial process will result in further delays in bringing matters to trial and place further strain on an already underfunded Court, DPP and Legal Aid system.

Division 4 - Expert evidence in proceedings for sexual offences

The introduction of expert evidence of the nature suggested in the Draft Bill is not supported by the Association.

The issue in criminal trials is typically whether something happened at all or whether a sexual act was consensual or not. Jurys have a wealth of combined experience, and they remain the tribunal of fact unless a defendant elects for trial by Judge alone. An expert will be unable to provide opinion on either issue without first accepting the evidence of the complainant which is the central issue that the Jury is required to determine.

Significant changes have already been made to bench book directions in Queensland regarding the forensic impact of delay and the manner of making complaints that concern sexual offending. Courts currently direct juries that there is no usual, normal, or typical way for people who have been sexually assaulted to behave and that juries should not make any assumptions in that regard (*R v Cotic*).

The idea that an expert could explain common behaviours of sexual assault survivors to assist the jury to consider whether a complainant is truthful or offer opinions about whether the witness' behaviour is consistent or inconsistent with the behaviour of a survivor of sexual assault is illogical if the premise is there being no atypical response. An expert giving opinion as to the effect of sexual offences on persons generally (s 103ZZH) also has the real potential of causing significant prejudice to the accused.

In this regard it is noted that to give any opinion, it may be necessary for the expert (and the jury) to know of other acts of sexual violence to which the complainant had been subjected or relevant matters that might explain the exhibited behaviours or reactions, independently of the alleged offence. This would necessitate an exploration of a complainant's history of sexual

assault and psychiatric history which is generally inadmissible (without application to the court).

The proposal also presents other practical difficulties including:

a) how a court appointed expert might offer an opinion in advance of trial when the evidence at trial is often different
b) if the evidence of a complainant changes at trial how that will impact the admissibility of the expert's opinion and associated delay
c) whether the complainant will be made available by the prosecution for assessment by an accused's expert
d) availability of Legal Aid funding to engage an expert from the expert evidence panel or allow for independent or alternative expert opinion and assessment

The Association is concerned that the proposed amendments are apt to result in unfairness, significant cost and delays and fail to deal with the practical realities of criminal trials and evidentiary admissibility.

Division 5 - Similar Fact Evidence

Proposed amendments concerning the admissibility of Similar Fact Evidence

The Association submits that the current law adequately and fairly accommodates for the admissibility of propensity, or 'similar fact' evidence and no amendments are required.

The law relating to the admission of similar fact evidence is designed to ensure that people are not convicted simply because they have been 'of bad character' in the past. This is vital for alleged sexual offending because of the substantial, prejudicial effect the introduction of evidence that an accused has committed sexual offences in the past has upon an individual's ability to objectively assess facts, relevant to an accused's guilt.

The Uniform Evidence Laws upon which the proposed amendments are based have been litigated for many years and are the subject of High Court authority. If Parliament is determined to make changes, the provisions of the NSW *Evidence Act* should be adopted in totality (other than section 97A as discussed *below*) to take advantage of the established NSW and High Court authority.

If a new test is introduced, it should apply to all offences. The new test for admissibility should recognise the potential for unfair prejudice to an accused and put in place protections against the dangers of this type of evidence.

Proposed section 129AC to 129AE

The Association strongly opposes the creation of a legislative presumption as to admissibility in sexual cases of 'tendency evidence'

In every case the onus of satisfying the court that the evidence is admissible as tendency or coincidence evidence should be on the party seeking its admission. Sexual offending against children is the most prejudicial type of similar fact evidence and is therefore most likely to be misused by a jury.

For the probative value of the evidence to outweigh its purely prejudicial effect it would have to show more than some sexual interest in a child at some point in the accused's life. Sexual interest alone, without action upon it, could not usually be significantly probative of anything.

As a simple premise, it is well established that some offenders are non-contact offenders whilst others may well be both non-contact and contact offenders. As an example, to treat the

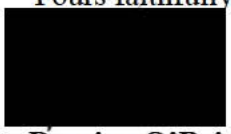
past behaviour of an exhibitionist as being significantly probative in the context of a future offence involving physical contact would be non-sensical. The proposed amendments conflate sexual offending and offenders into a 'class' of people contrary to expert psychological opinion.

The matters proposed in section 129AC(4) are all of the matters that **should** be considered in determining whether the tendency evidence has any probative value and whether that probative value exceeds the merely prejudicial effect of the evidence. They should **not** be excluded from consideration; they should be the focus of the enquiry into the probative value of the evidence.

The Association submits that a provision analogous to section 161A of the *Criminal Procedure Act* 1986 (NSW) should be enacted to remove doubt about the standard of proof that applies to tendency and coincidence evidence.

Thank you for the opportunity to make submissions in respect of the *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024*, the Association would be pleased to answer any questions you may have.

Yours faithfully



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