



**Legislative Assembly for the
Australian Capital Territory**

Standing Committee on Justice and
Community Safety

Inquiry into the Justice and Community Safety Legislation Amendment Bill 2022 (No 2)

Legislative Assembly for the Australian Capital Territory
Standing Committee on Justice and Community Safety

Approved for publication

Report 11
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About the Committee

Establishing resolution

The Assembly established the Standing Committee on Justice and Community Safety on 2 December 2020.

The Committee's areas of responsibility are:

- ACT Electoral Commission
- ACT Integrity Commission
- Gaming
- Minister of State (JACS reporting areas)
- Emergency management and the Emergency Services Agency
- Policing and ACT Policing
- ACT Ombudsman
- Corrective services
- Attorney-General
- Consumer affairs
- Human rights
- Victims of crime
- Access to justice and restorative practice
- Public Trustee and Guardian

You can read the full establishing resolution [on our website](#).

Committee members

Mr Peter Cain MLA, Chair

Dr Marisa Paterson MLA, Deputy Chair

Mr Andrew Braddock MLA

Secretariat

Ms Kathleen de Kleuver, Committee Secretary

Ms Emma Weaver, Acting Assistant Secretary

Mr Alexander Hildyard, Administrative Assistant

Contact us

Mail	Standing Committee on Justice and Community Safety Legislative Assembly for the Australian Capital Territory GPO Box 1020 CANBERRA ACT 2601
Phone	(02) 6207 0524
Email	LACommitteeJCS@parliament.act.gov.au
Website	parliament.act.gov.au/parliamentary-business/in-committees/jcs

About this inquiry

The Justice and Community Safety Legislation Amendment Bill 2022 (No 2) was presented in the Assembly on 24 November 2022. It was then referred to the Standing Committee Justice and Community Safety as required by clause 5 of the establishing resolution. This clause allows committees to inquire into and report on bills within two months of their presentation. An extension to the reporting date was agreed to in the Assembly until 31 January 2023.¹

The Committee decided to inquire into the bill on 28 November 2022 but to limit the inquiry to the *Evidence (Miscellaneous Provisions) Act 1991* amendments in the Bill and specifically sought comments from Women's Legal Centre, the ACT Law Society, the ACT Bar Association, the Victims of Crime Commissioner, Legal Aid ACT and the Director of Public Prosecutions by 9:00 am on 12 December 2022.²

The Committee did not hold a public hearing for this inquiry.

The Committee thanks everyone who participated in, or otherwise assisted in, this inquiry, including those that made submissions.

Terms of Reference

At its meeting on 2 December 2020 (amended 4 August 2022), the Legislative Assembly resolved that:

'all bills presented to the Assembly stand referred to the relevant standing committee for inquiry and report within two months from the presentation of the bill, except for those bills introduced in the last sitting week of the calendar year where the committee shall report in two months. Within 21 days of the presentation of the bill in the Assembly, the committee must decide whether or not to undertake an inquiry, and shall inform the Speaker of its decision, the Speaker must then arrange for all members to be notified. In the event that the subject matter of the bill makes it unclear which committee it should be referred to, the Speaker will determine the appropriate committee.'

The [Justice and Community Safety Legislation Amendment Bill 2022 \(No 2\)](#) was presented in the Assembly on 24 November 2022 and referred to the Standing Committee on Justice and Community Safety (the Committee). The Committee resolved to undertake an inquiry only into the amendments to the *Evidence (Miscellaneous Provisions) Act 1991* in the Bill.

¹ Legislative Assembly for the ACT, *Minutes of Proceedings No 68*, 24 November 2022, p 953-954.

² Standing Committee on Justice and Community Safety, 'Justice and Community Safety Legislation Amendment Bill 2022 (No 2)', *Media Release*, 29 November 2022.

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Acronyms

Acronym	Long form
AFPA	Australian Federal Police Association
AVL	Audio Visual Link
CCT	Closed Circuit Television
DPP	Department of Public Prosecutions, ACT
NSW	New South Wales
VOCC	Victims of Crime Commissioner

Recommendation

Recommendation 1

The Committee recommends that the ACT Legislative Assembly support the Bill.

Recommendation 2

The Committee recommends that the ACT Government include the pre-condition of consent in the proposed new subsections 69(2A) and (2B) and examine an 'opt out' approach.

Recommendation 3

The Committee strongly recommends that the ACT Government work with stakeholders on the implementation of the Bill in relation to the concerns raised in the inquiry.

1. Introduction

Background to the Bill

1.1. The Bill is an omnibus bill which amends a range of legislation in the Attorney-General and Minister for Consumer Affairs' portfolios and follows consultation with a number of ACT Government Directorates and independent agencies.

1.2. The Explanatory Statement explains the amendment to the *Evidence (Miscellaneous Provisions) Act 1991* as follows:

The Bill amends the *Evidence (Miscellaneous Provisions) Act 1991* so that section 69 of the Act applies to a witness in a relevant proceeding who is ordered to give evidence in court under section 68(3) in the same way that it applies to witness who gives evidence in a relevant proceeding by audio visual link under section 68.

Division 4.3.5 of the Evidence (Miscellaneous Provisions) Act relates to the giving of evidence via audio visual link (AVL) in sexual, violent and family violence proceedings. Section 68(2) provides that some witnesses in a relevant proceeding are to give evidence via AVL unless the court orders otherwise. Section 68(3) provides the factors the court must be satisfied of to make an order that the witness give evidence in the courtroom. These include a witness's preference to provide evidence in the court room opposed to via audio visual link.

Section 69 applies if a witness gives evidence in a relevant proceeding by AVL under section 68. Section 69 provides for the recording of evidence that is given via AVL to be admissible in a related proceeding such as a retrial.

Currently, section 69 of the Act does not allow for the recorded evidence of a witness who is ordered to provide their evidence in the courtroom under section 68(3) to be admissible as the witness's evidence in a related proceeding. This is in contrast to the recorded evidence of a witness who delivers their evidence by audiovisual link.³

1.3. The explanatory statement goes further to explain the purpose of the amendment:

The legitimate purpose of this amendment is to reduce the risk of re-traumatising a vulnerable witness giving evidence in a related proceeding by allowing their evidence given in the courtroom to be recorded and used in a subsequent proceeding if the witness consents to this process.

The legislation as currently drafted provides that in the case of a retrial, the power to rely on the recorded evidence is limited to where a relevant witness does not elect to give evidence in the courtroom. This has the potential to lead to a structural cost to a witness choosing to give evidence in a courtroom under s68(3){a), in that in

³ Justice and Community Safety Legislation Amendment Bill 2022 (No 2), Explanatory Statement and Human Rights Compatibility statement, p 2.

the event of a re-trial, they must give evidence all over again. Remedying this anomaly is rationally connected to legitimate purpose identified above.⁴

- 1.4. On 28 November 2022, the Standing Committee on Justice and Community Safety resolved to inquire into the Bill and called for submissions by 12 December 2022. Six submissions were received. These are listed in Appendix A. The Committee met on 21 December 2022 to consider the Chair's draft report, which was adopted on the same day, for tabling.

Legislative Scrutiny

- 1.5. The Bill has not been considered by the Standing Committee on Justice and Community Safety (Legislative Scrutiny role) at the time of tabling this report due to the reporting deadline. The Committee notes that the Assembly will also consider the relevant report of the Scrutiny Committee and any recommendations it makes.

⁴ Justice and Community Safety Legislation Amendment Bill 2022 (No 2), *Explanatory Statement and Human Rights Compatibility statement*, p 8.

2. Issues raised in evidence

General considerations

- 2.1. Submissions generally supported in principle or did not object in principle to the amendments to the *Evidence (Miscellaneous Provisions) Act 1991*.
- 2.2. All submissions raised the issue of consent that will be addressed in detail in paragraphs 2.6 onwards. Other issues raised in submissions included:
- a) Legal Aid ACT⁵ and the ACT Law Society⁶ raised concerns that further amendments are needed to include warnings to juries when viewing recorded evidence as a safeguard against prejudice. Both submissions raised concerns that the recording itself may indicate to the jury that they are presiding over a retrial.
 - b) The ACT Law Society told the Committee that they are concerned that the proposal will require all courts to have cameras with audio-visual recording capacity in all courtrooms. They questioned if the courts had been consulted on the resourcing demands following these amendments.⁷ The Committee notes other Australian jurisdictions have allocated substantial funding to improve AVL systems in courtrooms.⁸
 - c) The need for clear guidelines and practice guides was raised by the AFPA. These documents will need to consider (and be not limited to) aspects such as audio-visual quality, editing capacity, freedom of information implications, and audio-visual storage requirements.⁹ The Committee notes there are a range of technological, administrative, and procedural issues documented regarding the use of AVL technologies in Australian criminal courtrooms.¹⁰
 - d) The Women's Legal Centre commented on the absence of a dedicated legal service to advise victim-survivors on the criminal justice process. While there are victim-survivor support services, the Women's Legal Centre stated they are unable to provide legal and strategic advice about optimising engagement in the criminal justice system.¹¹

⁵ Legal Aid ACT, *Submission 4*, p 3.

⁶ ACT Law Society, *Submission 3*, p 2.

⁷ ACT Law Society, *Submission 3*, p 1.

⁸ In November 2020, New South Wales (NSW) Government allocated an additional \$54 million over three years to enhance service delivery in court rooms. [Audiovisual link technologies in Australian criminal courts: Practical and legal considerations \(aic.gov.au\)](#) (Accessed 16 December 2022)

⁹ AFPA, *Submission 6*, p 4.

¹⁰ [Audiovisual link technologies in Australian criminal courts: Practical and legal considerations \(aic.gov.au\)](#) page 4 (Accessed 16 December 2022)

¹¹ Women's Legal Centre, *Submission 1*, p 2.

- e) The ACT Law Society raised concerns that the amendments may create uncertainty for both parties around how evidence will be presented if a case is retried, which may place them on unequal footing.¹²

Consultation process

- 2.3. The explanatory statement to the Bill noted that the following stakeholders were consulted on the amendments to the *Evidence (Miscellaneous Provisions) Act 1991*:
- ACT Bar Association
 - ACT Courts and Tribunal
 - ACT Human Rights Commission
 - ACT Law Society
 - ACT Department of Public Prosecutions
 - Legal Aid ACT¹³
- 2.4. However, concerns were raised about the limited consultation process, and it is noted that many who were engaged with the government’s consultation process raised significant concerns with how the amendments will work in practice, especially in relation to the issue of consent from the witness to the recording, despite being generally supportive in principle to the amendments.
- 2.5. The ACT Law Society also stated the limited timeframes for stakeholders to consider the proposal may lead to unintended consequences. They encouraged further engagement with stakeholders on the implementation and welcomed the opportunity for further consultation. The difficulty of offering considered and informed feedback without a detailed understanding of the quality, position, and extent that witnesses can be captured during recordings was highlighted.¹⁴
- 2.6. The AFPA expressed similar concerns that consultation only occurred with selected organisations who were given a brief period to review the Bill. The AFPA stated that community expectations for consultation have not been met during the review process for the Bill.¹⁵

Requirement for witness consent for the recording of evidence

- 2.7. Part 3 of the Bill proposes to amend subsection 69(2) of the *Evidence (Miscellaneous Provisions) Act 1991* so that evidence given by a witness needs to be recorded, both in audio and visual form.¹⁶ Section 69, subsections 2A and 2B relate to consent:

¹² ACT Law Society, *Submission 4*, p 1 – 2.

¹³ Justice and Community Safety Legislation Amendment Bill 2022 (No 2), *Explanatory Statement and Human Rights Compatibility statement*, p 8.

¹⁴ ACT Law Society, *Submission 3*, p 1 – 2.

¹⁵ AFPA, *Submission 6*, p 3.

¹⁶ Justice and Community Safety Legislation Amendment Bill 2022 (No 2), p 6.

(2A) However, unless the court otherwise orders, evidence given in the courtroom may be recorded only if the witness consents.

(2B) In deciding whether to make an order under subsection (2A), the court must consider the wishes of the witness.¹⁷

- 2.8. The explanatory statement to the Bill described the requirement of consent from the witness for recording evidence given in the court room as a safeguard, to be the least restrictive limitation on the human rights of right to privacy:

This is the least restrictive limitation of the right to privacy as the Bill includes safeguards such as seeking the witness's consent to the recording, or in circumstances where the court orders the recording that the witness's wishes are considered.¹⁸

- 2.9. The DPP raised strong concerns regarding the consent provisions due to the risks of failing to seek consent prior to recording it, unclarity around the timing of consent, ambiguity around using video recordings where consent has not been received prior to recording, and implications if consent is denied and the witness subsequently becomes unavailable:

The subsection 2A and 2B precondition of consent attaching to the video recorded aspect of a sexual assault complainant's evidence where that evidence is given in the courtroom alone, creates a significant risk of error in failing to seek such consent prior to recording it, which could effectively punish the complainant by excluding the prosecution's ability to rely on that evidence for a subsequent proceeding, thus inadvertently forcing a sexual assault complainant back into the witness box.

The timing of the consent is unclear, specifically whether the actual recording must be consented to, or whether the playing must be consented to. This is significant, because a complainant's position may change over time and be influenced by a large range of factors. For example, a psychologically traumatised complainant may not wish for their evidence to be recorded due to the emotional trauma of the event, or a lack of appreciation of the prospects of a discharged jury or successful appeal at a first trial, but if the matter is overturned on appeal or a jury is discharged, the complainant may subsequently change their mind and wish for it to be played instead of giving evidence afresh. This opens the likelihood that a trauma induced decision, or a decision based on a misperception during the conduct of a first trial, may bind a complainant into the future and deny them a right.

It would further create additional ambiguity surrounding the use of the video recorded evidence if consent has not been received prior to recording it, for example, is it proposed the prosecution could then only use the recording of audio alone, rendering the tribunal of fact in a worse position to assess the credibility of the witness.

¹⁷ Justice and Community Safety Legislation Amendment Bill 2022 (No 2), p 6.

¹⁸ Justice and Community Safety Legislation Amendment Bill 2022 (No 2), *Explanatory Statement and Human Rights Compatibility statement*, p 9.

Finally, it raises serious issues if the complainant does not consent to the recording, and subsequently become unavailable, creating an exception to the hearsay rule. This would deny a tribunal of fact the ability to observe video of the earlier evidence and force them to be limited to the audio.¹⁹

- 2.10. The DPP noted all courts have recording services that record audio of all proceedings and store those recordings without exception and without consent. Without recording court proceedings there would be no accurate record of the court proceedings for review, appeal, or retrial.²⁰
- 2.11. While the VOCC expressed support in principle for the requirement for witness consent for recording of evidence they had concerns that the amendments place onus on the prosecutor to lead evidence of victim consent to enable recording of evidence in a courtroom, and suggested an ‘opt out’ approach:

This means that should there be a procedural oversight or defect in a proceeding that results in the Court not receiving express evidence of witness consent to the recording of evidence, the section 69 protection may not apply.

To alleviate this concern, we consider clause 11 should be re-worded to create a presumption that the evidence will be recorded, unless the relevant witness withdraws their consent for the recording to occur. We consider that this “opt out” approach should apply to a witness’s evidence whether given live in court, via CCTV or pre-recorded hearing. This “opt out” approach would promote victim-survivor agency in the conduct of proceedings while minimising the risk of recorded evidence being inadmissible due to a procedural oversight.²¹

- 2.12. The VOCC also recommended the ACT Government also seek to amend the *Victims of Crime Act 1994* to support victim-survivor access to information about their rights in a justice process to opt out of having their evidence audio-visually recorded.²²
- 2.13. The Women’s Legal Centre stated that victim-survivors should have access to legal advice about making the choice to have evidence recorded in a courtroom and the court process more generally.²³
- 2.14. The ACT Law Society supported the inclusion of a consent provision in the amendments:
- We consider it imperative that express, clear consent is given by the witness before their evidence can be recorded, given the possibility that the recording will be the mode through which their evidence is presented at a later proceeding.²⁴
- 2.15. Legal Aid ACT noted the requirement to consider the consent of the witness is consistent with section 68(3) of the Act.²⁵

¹⁹ DPP, Submission 2, p 2.

²⁰ DPP, Submission 2, p 1.

²¹ VOCC, Submission 5, p 5.

²² VOCC, Submission 5, p 5.

²³ Women’s Legal Centre ACT, Submission 1, p1-2.

²⁴ ACT Law Society, Submission 3, p 2.

²⁵ Legal Aid ACT, Submission 4, p 2.

3. Conclusions

- 3.1. The Committee is of the view that while intention of the bill is supported in principle, there are many issues raised in the evidence received including the precondition of consent to the recording of evidence given by a witness. Given the overriding objective of the Bill is to avoid re-traumatising complainants it is important to ensure that the legislative amendments work as intended. The Committee is of the view that the ACT Government consult further with stakeholders including people who have lived experience to provide insights into how the laws should apply.

Recommendation 1

The Committee recommends that the ACT Legislative Assembly support the Bill.

Recommendation 2

The Committee recommends that the ACT Government include the pre-condition of consent in the proposed new subsections 69(2A) and (2B) and examine an 'opt out' approach.

Recommendation 3

The Committee strongly recommends that the ACT Government work with stakeholders on the implementation of the Bill in relation to the concerns raised in the inquiry.

Peter Cain MLA
Chair
December 2022

Appendix A: Submissions

No.	Submission by	Received	Published
001	Women's Legal Centre ACT	02/12/2022	15/12/2022
002	Department of Public Prosecutions	06/12/2022	15/12/2022
003	ACT Law Society	09/12/2022	15/12/2022
004	Legal Aid ACT	09/12/2022	15/12/2022
005	Victims of Crime Commissioner	13/12/2022	15/12/2022
006	Australian Federal Police Association	15/12/2022	21/12/2022