



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),  
Mr Andrew Braddock MLA

## Submission Cover Sheet

Inquiry into the Sexual Assault Reform  
Legislation Amendment Bill 2022

**Submission Number: 006**

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Standing Committee on Justice and Community Safety  
Office of the Legislative Assembly  
Via [LACommitteeJCS@parliament.act.gov.au](mailto:LACommitteeJCS@parliament.act.gov.au)

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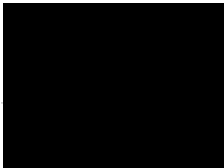
Dear Standing Committee on Justice and Community Safety,

**Submission to the Inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022**

Thank you for the opportunity to make a submission in relation to the Standing Committee's Inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022 (the 'Inquiry').

I request that this submission be published in full.

Yours sincerely



Heidi Yates

Victims of Crime  
Commissioner

## **About the ACT Human Rights Commission**

1. The ACT Human Rights Commission is an independent agency established by the Human Rights Commission Act 2005 (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:
  - 1.1. the President and Human Rights Commissioner
  - 1.2. the Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
  - 1.3. the Public Advocate and Children and Young People Commissioner (PACYPC); and
  - 1.4. the Victims of Crime Commissioner (VOCC)
2. As independent statutory office holders with key oversight responsibilities for the promotion of human rights and welfare of people in the ACT, the Commission is engaged in the ongoing law reform work being undertaken to strengthen the ACT's responses to sexual violence.

## **About Victim Support ACT**

3. The Victims of Crime Commissioner (VOCC) is an independent statutory advocate and the head of Victim Support ACT (VSACT). VSACT is situated within the ACT Human Rights Commission. The VOCC's functions are set out in the *Victims of Crime Act 1994*, the *Victims of Crime (Financial Assistance) Act 2016* and the *Victims of Crime Regulation 2000*.
4. The function of the VOCC is to advocate for the interests of victims of crime in the ACT. Particularly relevant to the subject of this Inquiry, the VOCC's responsibilities include:
  - 4.1. advocating for the interests of victims;
  - 4.2. monitoring and promoting compliance with victims rights;
  - 4.3. consulting on and promoting reforms to meet the interests of victims; and
  - 4.4. delivering frontline support services to victims via the Victim Services Scheme (VSS) and the Financial Assistance Scheme (FAS), which operate under the umbrella of 'Victim Support ACT'.
5. The terms of reference of this Inquiry directly relate to the core functions of the VOCC in consulting and promoting reforms to meet the interests of victims, especially for those who have lived experience of sexual violence in the ACT.

## Preliminary remarks

### ACT Sexual Assault Prevention and Response Steering Committee's Final Report

6. The Steering Committee's Final Report '*Listen. Take Action to Prevent, Believe and Heal*' ('the SAPR Report') was commissioned by the ACT Government with tri-partisan support. It is part of the ACT Government's Sexual Assault Prevention and Response Program, established by the Minister for Women and Minister for Prevention of Domestic and Family Violence, Yvette Berry with tri-partisan support.
7. The Report identified that not only is there an unacceptable prevalence of sexual violence in the ACT community, but that the systems responses available to victim survivors in the ACT are inadequate. The Report heard the voices of victim-survivors through direct input through consultation with the review, and through the data and experience of agencies who work alongside victim-survivors. The recommendations arising from this report is a culmination of the work a network of community and government agencies working to prevent and respond to sexual violence, being led by the lived experience of those who have experienced sexual violence.
8. The Report called on ACT Government to commit to a long-term program of reform and includes 24 recommendations canvassing an array of system responses to prevent and respond to sexual violence. Recommendation 23 of the SAPR Report comprises 18 sub-recommendations for law reform in relation to sexual violence. The Bill that is the subject of this Inquiry seeks to give effect to five law reform proposals outlined in Recommendation 23 of the SAPR Report.
9. The ACT Government issued their response the SAPR Report on 9 June 2022. The VOCC notes the ACT Government has agreed or agreed in principle to all the recommendations that are the subject of this Bill.
10. The SAPR Report acknowledges that as part of the law reform process, additional or revised recommendations may be made and that this set of recommendations is only the beginning of an evolving process. This is reflected in the nuanced approach taken by the Bill, to rationalise the recommendations in light of the ACT's legal framework and evolving affirmative consent laws.

### The Sexual Assault Reform Legislation Amendment Bill 2022

11. The Commission has previously expressed its support for the Bill, noting the VOCC and President of the Human Rights Commission have collaboratively provided input into the development of the Bill. This work is the product of ongoing consultation with Government and other stakeholders that has built upon the consultative work underpinning the SAPR Report's recommendations.
12. The VOCC commends the Bill to the Standing Committee. We consider the Bill will have an overall positive impact on the rights of sexual violence victim-survivors, and engages positively with human rights, including rights during criminal justice proceedings and post sentencing. Although the Bill engages positively with rights, we note that it may limit an accused person's rights in certain respects, including the right to presumption of innocence and presumption of access to bail. However, we consider these limitations are reasonable and demonstrably justifiable in accordance with s 28 of the *Human Rights Act* and are comprehensively addressed in the Explanatory Statement of the Bill.

## Evidence of prior family violence

### SAPR Report and Government Response

13. As reflected in the SAPR Report, the practice of adducing evidence of prior incidences of domestic and family violence is not widely or consistently understood and practiced. While prior evidence of domestic and family violence can be adduced in sexual offence proceedings according to the existing rules of evidence, the SAPR Report highlighted how these types of offending, when they co-occur, are often siloed by the legal system.
14. Recommendation 23(e) of the SAPR Report recommended reform to make clear that evidence of prior family violence between parties is relevant and admissible in sexual assault cases, provided this evidence is not unfairly prejudicial to the defendant. The SAPR Report conceptualised that such a reform would have an important normative effect upon how Police investigate sexual violence matters that intersect with domestic and family violence, as well as how prosecutors may utilise a history of violence in the broader framework of evidence in a sexual offence matter.
15. The ACT Government agreed to this recommendation and noted that the uniform evidence law and common law already provide for the admissibility of evidence of prior uncharged acts of family violence in sexual assault cases as relationship evidence where it is relevant to a fact in issue and is not unfairly prejudicial. The ACT Government considered there would be a benefit to reiterating this position through legislative reform.

### The Bill

16. The VOCC supports the proposed amendment to legislate the existing common law position in relation to the use of context evidence in such matters, with the intent of influencing normative practices for how police and prosecution investigate and adduce evidence respectively. However, we note our remarks below at [18]-[21] that detail some concern that the reform subject of this Bill does not give full effect to the intent of the recommendation.
17. We note the amendment will engage the right to presumption of innocence in s 22(1) of the *Human Rights Act*, especially where the evidence of prior domestic and family violence relates to uncharged acts. However, we recognise the existing rules of evidence which constantly weigh issues of fairness and prejudice in determining what matters may be rightly admitted into evidence, and that such evidence of uncharged acts are subject to the rules contained within Chapter 3 of the *Evidence Act 2011*. Importantly, this amendment does not alter the rules of evidence insofar as it clarifies the existing common law.

### Tendency evidence – the intent of the SAPR recommendation

18. Currently, instances of prior domestic and family violence may be admissible either using ‘context’ (or ‘relationship’) evidence, or as being relevant to a particular tendency the accused person might have to engage in certain conduct or have a particular state of mind. We note the proposed amendment seeks to give effect to the SAPR recommendation by reiterating the common law position with respect to context evidence alone, and that any amendment should be constructed in such a manner that is reflective of existing practice. The Standing Committee may wish to

consider whether the amendment fully realises the recommendation regarding prior instances of domestic and family violence.

19. To give effect to the recommendation in full, we consider a further amendment could seek to clarify that prior instances of domestic and family violence may also be used as *tendency evidence* in a related proceeding for sexual violence in accordance with the ordinary rules of evidence. The matter of *Queen v Pamkal* [2019] NTSC 80 (15 October 2019) is reflective of a type of case where such tendency evidence was used in a sexual offence proceeding that occurred against the backdrop of prior domestic and family violence.
20. Evidence concerning intimate partner sexual violence shows there is a strong link between the perpetration of domestic and family violence and sexual violence, which may bear relevance on how possible amendments to tendency laws are made. Namely,
  - 20.1. intimate partner sexual violence is understood as a tactic utilised in a domestic and family violence context, and that intimate partner sexual violence usually co-occurs alongside other tactics of domestic and family violence.
  - 20.2. intimate partner sexual violence forms part of a broader pattern of coercive control, and coercive control itself may therefore elucidate a particular tendency with respect to sexual violence in that context.
  - 20.3. certain conduct occurring in a domestic and family violence context, especially non-fatal strangulation, has a strong association with the occurrence of intimate partner sexual violence.
21. There is a concern that by clarifying the common law position in relation to context evidence, without clarifying the possible utility of other rules of evidence such as tendency, there may be an inadvertent inference created regarding how prior family violence history may be admissible in proceedings. In the absence of such an amendment, the VOCC considers the Bill may not give full effect to the SAPR Report regarding the use of evidence of prior family violence in sexual offence proceedings.

## **Removing the presumption for bail for certain offences**

### [SAPR Report and Government Response](#)

22. The SAPR Report recognised that, currently, the presumption of bail does not apply to specified sexual violence offences against children listed in Schedule 1 of the *Bail Act 1992*. This includes sexual intercourse without consent and sexual intercourse with a child under 10 (ss 54 and 55 of the *Crimes Act 1900* respectively). However, other similar sexual violence offences were observed as not being included in Schedule 1, meaning that like-offences retain a presumption in favour of bail.
23. The SAPR Report recommended removing the presumption of bail for the following offences:
  - 23.1. Sexual intercourse with a young person under the age of 10 (aggravated offence) – s 55(2)
  - 23.2. Sexual intercourse with a young person under special care – s 55A

23.3. Persistent sexual abuse of child or young person under special care – s 56

24. This proposal was predicated on the basis that it was unclear why such offences were not included in the schedule of offences to which the presumption of bail does not apply, and that they are similar offences to those presently included in schedule 1.
25. The Government agreed to this recommendation, noting an amendment would more accurately reflect the severity of the offences prescribed in ss 55, 55A, and 56 of the *Crimes Act 1900*. The Government also noted s 66B (subject of this recommendation) is not a separate offence, but rather a mechanism through which to charge other offences as part of a ‘course of conduct’.

### The Bill

26. As a result, the Bill seeks to amend schedule 1 of the *Bail Act* to provide that the presumption does not apply to the offences in ss 55(2), 55A and 56 of the *Crimes Act*.
27. We support the amendment to introduce a neutral bail presumption for the sexual offences noted. We note this amendment engages the right to liberty, which generally requires that a person have opportunity to access bail (s 18 (5) of the *Human Rights Act*). However, there are classes of serious offences where the interest in public safety may justify limiting this general presumption for bail, as in this present case.

### Rationalising bail presumptions for like-offences

28. The VOCC further considers there are other like-offences, in terms of gravity or the vulnerability of the victim-survivor giving rise to public interest considerations, that warrant further thought to ensure there is congruence across the provisions in the *Bail Act* and when a neutral presumption for bail ought to apply.
29. The Standing Committee may accordingly wish to consider the Bill in light of other like sexual offences in the *Crimes Act* which directly relate to serious offending on children and young people, including:
- 29.1. Incest and similar offences – ss 62(1) and (2)
  - 29.2. Using a child for the production of child exploitation material – s 64
  - 29.3. Grooming and depraving young people – s 66
30. We also note the Commission’s longstanding view that it does not generally support a piecemeal approach to amending the ACT’s bail laws considering the Supreme Court declaration of incompatibility regarding the presumption against bail in s 9C of the *Bail Act: In the matter of an application for Bail by Isa Islam* [2010] ACTSC 146 (19 November 2010). Such amendments to bail laws should have regard to all like-offences holistically to ensure there is consistency across provisions in the legislation.

## Self-induced Intoxication

### SAPR Report and Government Response

31. Existing ACT laws permit the tribunal of fact to consider a defendant's self-induced intoxication in determining whether they were reckless in deciding the complainant was consenting. While the SAPR Report acknowledged this is not a defence to a sexual offence, the ability for a tribunal of fact to consider self-induced intoxication engenders a circumstance where the law can regard self-induced intoxication as being relevant to, and possibly justifying a belief in, consent.
32. The SAPR Report therefore recommended law reform to ensure self-induced intoxication cannot be considered in determining whether the accused possessed the requisite fault element of the offence. This recommendation highlighted the importance of such reform in the context of community education that self-induced intoxication is not a justifiable basis upon which to hold a belief in consent. The Government agreed in principle to this recommendation. Further, the Government noted it would undertake to implement the recommendation in consideration of the ACT's new affirmative consent laws to ensure congruity across the broader legislative consent framework that had changed since the SAPR Report was published.

### The Bill

33. Accordingly, the Bill proposes to clarify that a person who is intoxicated through self-induced intoxication is to be regarded as if they were sober by the trier of fact in determining the fault element of a sexual offence consent provision.
34. The Bill adapts to the changed legislative landscape for sexual offence laws, following the introduction of an affirmative model of consent in the ACT under the *Crimes (Consent) Amendment Act 2022*. This Act introduced a third fault element in relation to consent, where an accused person is taken to know another person is not consenting to an act if any belief they have, or may have, is not reasonable in the circumstances. The Bill therefore gives effect to the SAPR recommendation in light of later amendments to consent laws more broadly.
35. We support this proposed amendment, and considers it also appropriately adapts the recommendation to align with the *Crimes (Consent) Amendment Act 2022*. We reflect the concerns raised by the SAPR Report that permitting consideration of self-induced intoxication promotes a message that is inconsistent with community values regarding sex and respectful relationships.
36. This amendment draws upon existing like-provisions in New South Wales (s 61HK(5)(b), *Crimes Act 1900*), and would further bring the ACT in line with other jurisdictions that also treat a self-induced intoxicated accused person as sober in sexual offence matters, including Victoria and Queensland.

## Special Interim Personal Protection Orders & Workplace Protection Orders

### SAPR Report and Government Response

37. Recommendation 23(n) of the SAPR Report recommended amending the *Personal Violence Act 2016* to create a framework for special interim orders for Personal Protection Orders (PPOs) and Workplace Protection Orders (WPOs) to ensure consistency with the provisions in the *Family Violence Act 2016* for Family Violence Orders (FVOs). Government agreed to this recommendation to support consistency between the family violence and personal violence frameworks, acknowledging this would increase efficiency for the court and parties.
38. This recommendation reflected the challenges experienced by victim-survivors in seeking PPOs and WPOs when there are related criminal matters that are unlikely or possibly unable to be finalised before the expiration of the order. The SAPR Report noted the concern of applicants or respondents being required to give evidence under a civil rather than criminal standard, and the concern that civil matters may be adjourned pending the finalisation of the criminal matter, which may lead to the expiry of the order if the criminal matter is not resolved within 12 months.

### The Bill

39. The Bill introduces new special interim order schemes under the *Personal Violence Act 2016* which mirror the *Family Violence Act 2016* to ensure that interim PPOs and WPOs can remain in force as long as there is a related charge outstanding in relation to the respondent.
40. We consider the absence of a special interim framework in matters of personal violence is anomalous, given the need to ensure protection order proceedings are not impeded by related criminal matters. The VOCC supports the proposal to create a special interim order framework for PPOs and WPOs, noting that such a proposal may engage rights to presumption of innocence, reputation and the rights to work of a particular employee subject to the untested allegations. We note the existence of a special interim framework for FVO proceedings, and the need to provide a protective framework for an applicant while related criminal charges are on foot.
41. Victim-survivors consistently report significant delays in sexual offence justice responses spanning months and sometimes years. The VOCC notes instances where victim-survivors of sexual violence have lost the safeguard of a PPO that has expired after 12 months because a final order could not be sought while a criminal proceeding was ongoing. Indeed, these delays are impacting the safety of victim-survivors who seek interim protection measures. Equally, we recognise the importance of allowing a special interim order to subsist until such time a criminal matter has finalised, without potentially resulting in a respondent incriminating themselves in contesting a protection order before the criminal charges have been decided.

## Mistaken belief as to consent

### SAPR Report and Government Response

42. The SAPR Report recommended amending section 80D of the *Evidence (Miscellaneous Provisions) Act 1991* to ensure that in a sexual offence proceeding, the jury must consider whether the defendant's mistaken belief as to consent was reasonable in the circumstances.

43. The essence of this recommendation has been effectively implemented by the *Crimes (Consent) Amendment Act 2022* that introduced affirmative consent laws in the ACT. Government agreed to this recommendation noting the impact of the affirmative consent laws.

## The Bill

44. Section 80D of the *Evidence (Miscellaneous Provisions) Act 1991* is now at odds with section 67 (4) of the *Crimes Act 1900*, amended by the affirmative consent legislation, which provides that the jury must (rather than may) consider (as part of considering the fault element of consent) whether any belief the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.

45. The VOCC therefore supports the omission of section 80D given that the introduction of the new section 67(4) of the *Crimes Act 1900* achieves the intention of the SAPR Report recommendation. That provision now places a positive obligation on the finder of fact to consider whether any belief held by an accused person as to consent was reasonable in the circumstances.

## Amend definition of ‘Sexual Act’

### *Crimes (Consent) Amendment Act 2022*

46. Section 50C of the *Crimes Act 1900* was introduced by the *Crimes (Consent) Amendment Act 2022*. Section 50C currently provides that a ‘sexual act’ means sexual intercourse, sexual touching, and any other act in circumstances where a reasonable person would consider the act to be sexual and does not include an act carried out for a proper medical purpose or otherwise authorised by law.

47. While proposed section 50C defines ‘sexual touching’, Government considered reliance on this term and definition may create doubt as to whether ‘sexual touching’ is intended to include an ‘act of indecency’ (which relies on a common law definition). There is also a risk of uncertainty as to whether the definition of ‘sexual touching’ in section 50C (3) is intended to legislatively capture the definition of an ‘act of indecency’.

## The Bill

48. The Bill amends the *Crimes Act 1900* to substitute ‘sexual touching’ with ‘an act of indecency’ in section 50C. The intent of this is to clarify that relevant sexual offence consent provisions including those relating to an act of indecent must be considered in accordance with section 67 which prescribes the additional fault element of consent: reasonable belief as to consent.

49. The VOCC supports the proposal to remove reference to “sexual touching” from the definition of sexual act provided at section 50C(1)(a)(2) of the *Crimes Act 1900*. We accept this would resolve uncertainty as to whether the definition of ‘sexual touching’ in section 50C(3) is intended to legislatively capture the definition of an ‘act of indecency’. We further consider substituting ‘sexual touching’ with ‘an act of indecency’ is congruous with the broader intent of the affirmative consent legislation, and supports the rationale expounded in the explanatory statement of the Bill in this regard.