LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

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 Justice and Community Safety Bill 2022

Submission Number: 002

Date Authorised for Publication: 14 December 2022

ACT Office of the Director of Public Prosecutions

Submission by the Office of the Director of Public Prosecutions, to the Inquiry into Justice and Community Safety Legislation Amendment Bill 2022 (No 2).

This office supports the amendments to the *Evidence (Miscellaneous Provisions) Act 1991.* We are, however, concerned by proposed insertion of sections 69 (2A) and (2B) *Evidence (Miscellaneous Provisions) Act 1991* that, whilst purporting to protect a complainant's rights, run a disproportionate risk of actually diminishing them. Further, the proposed insertion of subsections 2A and 2B appears unsupported by logic, and in ignorance of the actual criminal justice system cycle or court procedures.

Recording of a complainant's evidence

All courts have recording services that both without exception and without consent record audio of all proceedings and store those recordings. This is currently done in the ACT by contract with a company called EPIQ who upon request provide either the audio recordings or transcripts to a party at a cost.

The basis for recording proceedings is that court proceedings are conducted transparently and open, so all courts serve as a court of record. Without recording court proceedings there would be no accurate record of the court proceedings for review, appeal, or retrial.

In certain circumstances, these recordings can be admitted as evidence in subsequent proceedings, for example if a witness becomes unavailable a recording may be admitted as an exception to the hearsay rule under section 65 *Evidence Act 2011*.

A tribunal of fact will rely on a number of indicia to most accurately assess a witness' credibility such as facial expression, physical reaction to questions etc, so such evidence will be of greater value if a tribunal of fact can also see the vision of the witness giving evidence in addition to the audio. For this reason, for recorded evidence that is routinely used as trial or hearing evidence, such as Evidence in Chief Interviews, pre-recorded evidence or sexual assault complainant evidence in earlier proceedings, the automatic recording of audio is supplemented by automatic recording of video of the witness.

The presumption of the use of the evidence of a sexual assault complainant in any subsequent proceedings under section 69(3) *Evidence (Miscellaneous Provisions) Act 1991* accordingly, should always carry with it the presumption of video recording to supplement the presumption of audio recording, as its purpose is to serve constitute evidence in a subsequent proceeding to facilitate such credibility assessments.

CCTV in the court room

It is further worth noting that all court rooms have security CCTV that is back to base and recorded for security purposes, and this is done without consent of any party in the court room.

Subsections 2A and 2B

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.

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.

Reason for insertion of s2A and s2B

The reason for inserting the qualifications at s2A and s2B remain a mystery, given it is the recording of evidence in an open court, meaning the evidence could in many circumstances

be viewed in real time in any event. Further, as outlined the evidence is automatically audio recorded in any event, further is automatically video and audio recorded from the AVL room, so the provision applies only to the video element of evidence in the court room.

It is unclear of exactly what if any human right is sought to be protected by this limitation. Assuming it is relying on section 12 *Human Rights Act 2004*, given trials and hearings are conducted in open court, there is no inherent right to privacy attached to an appearance in court.

We again invite the removal of subsections 2A and 2B from the proposed amendments.

Shane Drumgold SC
Director - ACT Director of Public Prosecutions