



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
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Submission Cover Sheet

Inquiry into the Sexual Assault Reform
Legislation Amendment Bill 2022

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ACT Bar Association submission in relation to **Sexual Assault Reform
Legislation Amendment Bill 2022**

The Legislative Assembly Media Release in relation to this legislation touted the bill as:

“A significant bill that makes significant changes to the ACT justice system with the aim of improving victim-survivors’ access to justice and enhancing their safety”.

The Explanatory Statement commences with an identical boast.

It should not be necessary but, unfortunately it appears necessary, to point out that no one is a “victim-survivor” until an offence has been proven.

To talk about improving a “victim-survivor’s” access to justice is to ignore the presumption of innocence and tends to reverse the onus of proof

The removal of the presumption in favour of bail for additional sexual offences is said, in the Explanatory Statement, to promote the right to life “by keeping victim-survivors physically safe”, with the amendment to remove bail presumptions “from some sexual offences”.

This presumption of complainant’s being victims or victim-survivors creates a dangerous undertone about and against which journalist Janet Albrechtsen has recently written at length in The Australian newspaper.

In relation to the right to a fair hearing, the Explanatory Statement asserts:

“This will require the court to exercise a positive responsibility to balance such disadvantage through judicial procedures such as **directing the jury how much weight to give certain evidence**, or explaining the steps in the proceedings to disadvantaged parties” (emphasis added).

Whilst courts regularly give juries guidance concerning their tasks it has never been, and must never become, the duty of a judge to direct a jury

how much weight they are to give certain evidence. The assessment of the quality of the evidence, its acceptability and the weight to be given to various aspects of the evidence is quintessentially a jury function.

The fact that the author of the Explanatory Statement apparently had no understanding in that regard is troubling in the extreme.

The alternative of “explaining the steps in the proceedings to disadvantaged parties” is not a true alternative in any event and in context is a meaningless observation.

The notion that increasingly greater numbers of those alleged to be guilty of crime should perhaps be refused bail ignores the reality of the lack of accommodation at the Alexander Maconochie Centre for remand prisoners and the fact that of recent days remand prisoners have been housed with convicted prisoners serving terms of imprisonment, contrary to Section 19(2) of the **Human Rights Act**.

Section 28 of the **Human Rights Act** provides that a human right may be limited where it can be “demonstrably justified in a free and democratic society.” This qualification has been the subject of ample judicial consideration. The following test was articulated in **R v Oakes** [1986] 1 SCR 103 at [69] – [70]:

“To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves ‘a form of proportionality test’. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important

components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.

There is no explanation how adding these new offences to Section 9B constitutes a reasonable limitation on Section 18(5) when considered in light of **R v Oakes**.

The notion that there should be open slather admissibility of "family violence" seems to betray ignorance of the law relating to Coincidence and Tendency evidence, which is well developed, well understood and well able to cater for evidence concerning an accused's past similar conduct or a tendency to think or act in a particular manner.

Such evidence may relate to a complainant or other persons in like position to the complainant.

Not only does the open slather approach do potentially irreparable damage to "otherwise good character" evidence the terms of the proposed amendment are such as to arguably neuter the judicial discretion set out in 137 of the **Evidence Act** 2011.

At page 4 of the Explanatory Statement reference is made to Section 137 but the statement overlooks or ignores the dampening effect of the proposed Section 74A of the **Evidence (Miscellaneous Provisions) Act** and the very wide description of potentially relevant evidence. Any Judge asked to apply Section 137 would be duty bound to find such evidence even "a single act" as entitled to weight in the weighing exercise under Section 137. By dint of the loose drafting adopted, a Judge may be compelled to regard a concatenation of a number of minor bits of evidence as outweighing the risk of unfair prejudice. Section 137 is concerned with unfair prejudice and not prejudice, *per se* and that is a meaningful distinction.

Perhaps the most troubling aspect of the Explanatory Statement relates to the alleged connection between the limitation on human rights and the purpose said to be achieved by Section 74A in these terms:

“The limitations on the right to be presumed innocent is proportionate because there are many rules of evidence and law that protect against presumptions of guilt including in relation to the admission of prior offences evidence” (Page 12 of the Explanatory Statement).

Section 22 of the **Human Rights Act** clearly provides that “everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law”.

There should be no limitation on the presumption of innocence.

The apotheosis of the Statement’s attempt to justify the unjustifiable is found in the statement:

“There is a rational connection between the limitation on the right to a fair hearing and the right to be presumed innocent until proved guilty and the aim of improving a victim-survivors experience with the criminal justice system and the enforcement of their rights and protections under the law” (Page 12 of the Explanatory Statement).

In relation to bail, the Explanatory Statement suggests that the proposed amendment to the law creates a “neutral presumption” (whatever that means).

There is either a presumption or no presumption.

The Explanatory Statement does not acknowledge that when matters are first brought before a court there is rarely more than a statement of allegations or assertions (inappropriately described by police as a “Statement of Facts” and no evidence is adduced. The opposition to bail by police is not governed by the rules of evidence and a court may inform itself in such manner as it sees fit and on hearsay and otherwise inadmissible material.

There is ample room already for bail to be declined in circumstances where that is appropriate.

In circumstances where a court is unable to be persuaded that bail should be refused, a presumption in favour of bail is appropriate in accord with human rights in a jurisdiction which prides itself on its human rights legislation.

There is no good justification for the expansion of Schedule 1 Part 1.1 of the **Bail Act** 1992 so as to introduce three further offences to which the presumption in favour of bail does not apply.

The increasing tendency to rail against the availability of bail, whether on a presumptive basis or otherwise, betrays a fundamental misunderstanding of the purpose of bail and the criteria for the granting of bail set out extensively in the **Bail Act** 1992.

Incarceration pending a hearing of any criminal allegation is not meant to be a punishment nor should it be held out as the norm as some sort of pre-emptive general deterrent

Section 18(5) of the **Human Rights Act** 2004 specifically provides:

“(5) Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.

Evidence (Miscellaneous Provisions) Act 1991

The proposed Section 74K is strongly opposed. Section 55 of the **Evidence Act** 2011 defines relevance for the purposes of all evidence.

The proposed Section 74A constitutes ill-advised and unworkable tinkering with the law of evidence which is well understood and requires no such “adjustment”.

It is simply wrong to assert, as the Explanatory Statement does, that the proposed Section 74A “legislates an existing common law position” (Page 4) or “clarifies that common law position of context evidence in legislation” (Page 9) or makes “it clear in law that contextual domestic and family violence is relevant in criminal proceedings” (Page 9) or “reiterates the common law position” (Page 10) or that the “amendment codifies common law” (Page 11).

It would be hard to resist the conclusion that the author or authors of the Explanatory Statement were ignorant of the current law in relation to context evidence except the Explanatory Statement specifically refers to it at page 4.

If the current law was understood then it is incomprehensible that the author or authors should describe the proposed Section 74A as a codification of it, because it is not.

If Section 74A represents the current law, there is no need for Section 74A at all.

The Bar Association commends to the government a consideration of the decision in MM v R [2012] ACTCA 44 which provides a comprehensive discussion of the law on the issue. See also the Victorian Court of Appeal decision in Hollingsworth v The Queen [2021] VSCA 354 which explains clearly why Section 74A is simply unnecessary.

It is curious that the Explanatory Statement does not deal with Coincidence and Tendency Evidence under the Evidence Act 2011, which also regularly results in the admission of evidence of prior acts.

The apparent permissive reception of such evidence by the use of the word “may” in the proposed Section 74A(1) is illusory and the use of the undefined word “context” is meaningless when the proposed Section 74A is read as a whole.

The use of the expression “evidence of family violence” is misleading because it encompasses “history of the relationship between the person and a family member” that may have no violent aspect at all.

In effect, the proposed Section 74A opens the floodgates to any evidence of any description which might fall within the rubric “the history of the relationship” between ‘the person and a family member’ which presumably means between a defendant or accused and a family member whether that family member is a complainant or not.

The whole proposed subsection is so badly constructed and poorly drawn as to suggest that it is the drafting of a person, or perhaps people, who have never conducted a court case in their life and have no understanding of the present rules of evidence nor the frequency with which courts receive “relationship evidence” in sexual offence proceedings so that

allegations of sexual misconduct are not assessed “in a vacuum” by the relevant Tribunal of fact (be that a Magistrate, a Judge alone or a jury).

The convoluted nonsense of the proposed section is amply demonstrated by considering the definition of “evidence of family violence”:

- (b) In relation to family violence generally – any of the following:
 - i. The general nature and dynamics of relationships affected by family violence ...”

The proposed subsection is unworkable, ill-advised, badly drafted and bristling with problems of interpretation and ultimately, application. It is nothing more than an exercise in woke political correctness in the extreme.

9 November 2022
ACT Bar Association Criminal Law Committee