



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 Sexual Assault Reform
Legislation Amendment Bill 2022

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Attorney-General

Minister for Consumer Affairs

Minister for Water, Energy and Emissions Reduction

Minister for Gaming

Member for Kurrajong

Standing Committee on Justice and Community Safety

Our ref: PRO22/3802

Mr Peter Cain MLA (Chair)

Dr Marisa Paterson MLA (Deputy Chair)

Mr Andrew Braddock MLA

ACT Legislative Assembly

Dear Standing Committee

Thank you for providing me a copy of the ACT Bar Association Criminal Law Committee's (the Criminal Law Committee's) submission in relation to the Inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022 (the Bill) for early comments.

The Criminal Law Committee's comments appear to be in relation to two amendments in the Bill, which seek to:

- a. explicitly provide that evidence of prior family violence between parties may be admissible in sexual offence proceedings (recommendation 23 (e) of the SAPR Report); and
- b. provide that the presumption of bail does not apply to offences in sections 55 (2), 55A and 56 of the *Crimes Act 1900* (recommendation 23 (i) of the SAPR Report).

I note that the Criminal Law Committee has also passed comment on the Explanatory Statement.

I have sought advice from the Justice and Community Safety Directorate (JACS) on the matters raised, and attach a response in relation to the four main categories of issue discussed by the Criminal Law Committee's submission. The table does not address all statements made in the submission as many, such as claims of "woke political correctness in the extreme", are not relevant to the consideration of the merits of the legislation.

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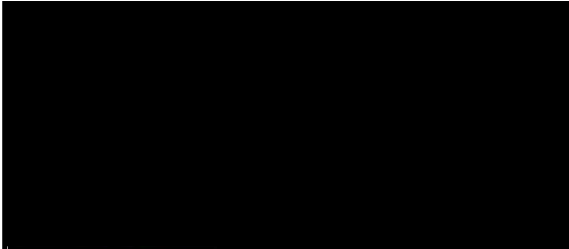
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I would note as a general comment that the Government is committed to addressing sexual violence in our community, including by improving the procedural experience for witnesses and complainants in court proceedings.

I trust that the attached information will be of assistance to you in your consideration of the Bill.



Attorney-General

22/11/22
Encl.

Inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022

Summary of ACT Bar Association Criminal Law Committee’s feedback and response

Issue/amendment	Feedback	Response
References to victim-survivors throughout the Explanatory Statement.	<p>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.</p> <p>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.</p> <p>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.</p>	<p>JACS acknowledges that a person the subject of an allegation of an offence is innocent until proven guilty, and that until the defendant is found guilty of an offence, the appropriate technical term to refer to a person bringing a complaint is a ‘complainant’.</p> <p>Nevertheless, the Explanatory Statement has used this language and references to ‘victim-survivors’ to describe the impact of what we are hoping to achieve, in recognition of the progress we are making in line with the SAPR report recommendations i.e. to improve access to justice for people who ultimately may be found to be victim-survivors if there are appropriate pathways to assist them in navigating the criminal justice system.</p> <p>The references to ‘victim-survivors’ contextualise the amendments. It is important to note that the Bill and its amendments do not ignore the presumption of innocence, nor do they reverse the onus of proof.</p>
Prior family violence between parties may be admissible in sexual offence proceedings and its limits on the	<p>With reference to the following paragraph:</p> <p><i>“This will require the court to exercise a positive responsibility to balance such disadvantage through judicial procedures such as directing the jury how much</i></p>	<p>JACS notes that the sentence referenced by the Bar Association is outlined in the detailed human rights discussion section of the Explanatory Statement where human rights limitations are justified in accordance with section 28 of the <i>Human Rights Act 2004</i>. The full paragraph is set out below:</p>

<p>defendant’s right to fair trial.</p>	<p><i>weight to give certain evidence, or explaining the steps in the proceedings to disadvantaged parties</i>”.</p> <p>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.</p> <p>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.</p>	<p><i>“While the amendment codifies common law, prior family and domestic violence that may be relevant and admissible have not always been adduced and the amendment may cause confusion in how such evidence may be relevant and admissible especially in relation to self-represented parties. 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”.</i></p> <p>It is important that the entirety of the paragraph is reproduced to provide context to the emphasised wording. The paragraph provides an acknowledgment of the amendment’s potential to cause confusion and result in a scenario where unreliable evidence may be adduced such as those set out in section 165 of the <i>Evidence Act 2011</i> to the defendant’s disadvantage.</p> <p>Importantly, it is authorised in section 165 (2) of the <i>Evidence Act 2011</i> that if there is a jury and a party requests, the judge must—</p> <ul style="list-style-type: none"> (a) warn the jury that the evidence may be unreliable; and (b) tell the jury about matters that may cause it to be unreliable; and (c) warn the jury of the need for caution in deciding whether to accept the evidence and the weight to be given to it (emphasis added).
<p>Prior family violence between parties may be admissible in sexual offence proceedings</p>	<p>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</p>	<p>The Uniform Evidence Law and the <i>Evidence (Miscellaneous Provisions Act) 1991</i> contains provisions dealing with the admissibility of tendency and coincidence evidence. This is the use of evidence of other acts of misconduct for a propensity</p>

	<p>an accused’s past similar conduct or a tendency to think or act in a particular manner.</p> <p>Such evidence may relate to a complainant or other persons in like position to the complainant.</p> <p>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 <i>Evidence Act 2011</i>.</p> <p>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 <i>Evidence (Miscellaneous Provisions) Act</i> 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.</p> <p>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.</p>	<p>purpose: that is, to reason that because of the accused’s conduct in the past he or she is more likely to have committed the offence(s) charged.</p> <p>Context evidence which the amendment seeks to address is of a similar nature that is not dealt with by the <i>Evidence (Miscellaneous Provisions Act) 1991</i> explicitly. This is evidence which is not being used to prove tendency or coincidence even though it may raise the accused’s past misconduct. It is also sometimes referred to as relationship or background evidence.</p> <p>It is unclear how section 137 of the <i>Evidence Act 2011</i> is neutered by the new amendment. Section 137 of the <i>Evidence Act 2011</i> provides that the court must refuse to admit evidence presented by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant. The new amendment can be read with section 137 of the Evidence Act to provide a safeguard against the adducing of prejudicial material in reliance on new section 74A. It is specified in the Explanatory Statement to the Bill that it is not intended that section 137 of the <i>Evidence Act 2011</i> be rendered negatory by the introduction of section 74A.</p> <p>The judiciary will also be able to discern what is prejudicial and irrelevant material as the amendment provides that the Court is to determine whether family violence is relevant evidence.</p> <p>The amendment does not open floodgates as proposed by the Bar Association as it provides that evidence of family violence including the history of the relationship between a person and a family member is only relevant if it provides context for a fact in issue in the proceeding.</p>
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	<p>The whole proposed subsection is so badly constructed and poorly drawn...</p> <p>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.</p>	<p>The amendment is drafted based on language used in section 322J of the <i>Crimes Act 1958 (Vic)</i>.</p>
<p>Presumption of bail does not apply to offences in sections 55 (2), 55A and 56 of the Crimes Act 1900</p>	<p>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 <i>Bail Act 1992</i>.</p> <p>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 preemptive general deterrent.</p> <p>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.</p> <p>There should be no limitation on the presumption of innocence.</p> <p>There is ample room already for bail to be declined in circumstances where that is appropriate.</p>	<p>JACS agrees that the refusal of bail is not a form of punishment and should not be treated as such. The amendment does not change the existing legislative criteria for considerations in deciding whether or not to grant bail.</p> <p>The right to be presumed innocent until proved guilty according to law may, in accordance with section 28 of the <i>Human Rights Act 2004</i>, be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. While the Bill may limit the right to be presumed innocent, the Explanatory Statement sets out how those limitations meet that threshold. It explains that the limitations have a legitimate purpose, are rationally connected to achieving that purpose, and are no more restrictive than is necessary and proportionate for achieving that purpose. The Bill does not remove the fundamental position that an accused is presumed innocent until proved guilty.</p> <p>A framework for neutral presumptions of bail currently exists and is set out in Division 2.3 and Schedule 1 of the <i>Bail Act 1992</i>. An expansion of the Schedule 1 (which sets out offences to which presumption of bail does not apply) seeks to encourage more careful considerations against the criteria for granting bail.</p>

		<p>As bail is largely a risk assessment exercise, it is appropriate that offences of comparable seriousness (and therefore potential danger to the community) attract similar treatment under bail legislation.</p>
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