



**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 Justice and Community Safety Bill 2022

**Submission Number: 005**

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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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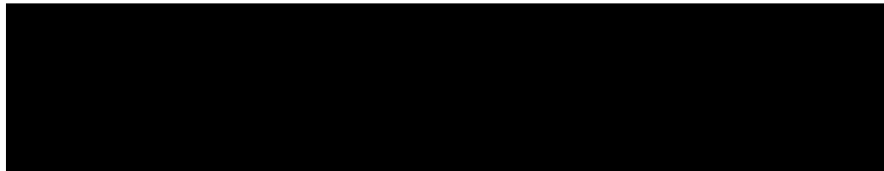
Dear Committee Secretary,

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

Thank you for the opportunity to make a submission in relation to the Standing Committee's Inquiry into the Justice and Community Safety Legislation Amendment Bill 2022 (No 2) (the 'Inquiry').

We request that this submission be published in full.

Yours sincerely



Dr Helen Watchirs OAM  
President and Human Rights Commissioner

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:
  - i. the President and Human Rights Commissioner;
  - ii. the Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner;
  - iii. the Public Advocate and Children and Young People Commissioner (PACYPC); and
  - iv. 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 Human Rights Commissioner and the VOCC are interested in the law reform work being undertaken to strengthen the ACT's justice system responses, including consideration of the human rights of victim-survivors in court processes.

## **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:
  - i. advocating for the interests of victims;
  - ii. monitoring and promoting compliance with victims rights;
  - iii. consulting on and promoting reforms to meet the interests of victims; and
  - iv. 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 on and promoting reforms to meet the rights and interests of victim-survivors, including in the context of their participation in justice processes.

## Preliminary remarks

6. The Human Rights Commissioner and VOCC have previously expressed support for the proposed amendment to section 69 of the *Evidence (Miscellaneous Provisions) Act 1991* ('EMPA') in the Justice and Community Safety Legislation Amendment Bill 2022 (No 2) ('the Bill'). We note we have worked collaboratively to provide input on the development of this amendment.
7. We support, in-principle, the intent of the proposed amendment. This is because the proposal seeks to bolster procedural protections afforded to complainants in criminal justice proceedings to limit, insofar as possible, the propensity for re-traumatisation through the re-giving of evidence where a proceeding needs to be re-litigated before the Court. We consider, however, that the proposed Bill merits further amendment to better realise this protective intent. In this context, we also recommend consideration of a consequential amendment to the *Victims of Crime Act 1994* to support victim-survivor access to timely information about their rights in a justice process.

## Justice and Community Safety Legislation Amendment Bill 2022 (No 2)

### Section 69 and the Royal Commission into Responses to Institutional Child Sexual Abuse

8. In 2017, the *Royal Commission into Responses to Institutional Child Abuse's Criminal Justice Report* (the 'Royal Commission Report') recommended that state and territory governments legislate for the audio-visual recording of a complainant's evidence – whether given live in court, via CCTV or pre-recorded hearing – for use in any subsequent trial or retrial.<sup>1</sup> The ACT Government's formal response, published in June 2018, supported the recommendation's intent by agreeing in-principle. The ACT Government's response indicated that the government had begun consulting about improving special measures for vulnerable witnesses.<sup>2</sup>
9. In 2018, the ACT Government passed the *Royal Commission Criminal Justice Legislation Amendment Act 2018* to give effect to a significant suite of special measures to support the participation of complainants and other vulnerable witnesses in criminal justice proceedings. Section 69 of the EMPA, as amended at that time, only permitted the recording of evidence in a relevant proceeding where that evidence was given by audio-visual link.
10. The Commission understands that it is an unintended oversight that the existing provisions of the EMPA do not allow for the admissibility of video recordings of complainant evidence in related proceedings in instances where that evidence was given in court, given the context of the Royal Commission recommendation agreed to by the ACT Government. In this sense, the amendment subject of this Bill is congruous with the intent of the Royal Commission recommendation and seeks to remedy the legislative gap.

### Need for the section 69 amendment

11. We support the proposed amendment to allow for video recordings of complainant evidence to be played in related proceedings irrespective of how the Court has received the complainant's evidence. The amendment is a logical expansion of the existing provision which allows the same for evidence given by audio-visual link and is congruous with Recommendation 56 of the Royal Commission Report.

12. Criminal justice processes cannot proceed without the evidence of complainants and other witnesses. Yet victim-survivors often report that the process of giving evidence is highly re-traumatising. For example, the victim-survivor voices documented in the December 2021 '*Listen. Take action to prevent, believe and heal*' report highlight the re-traumatising impacts of cross examination, where victims may be subjected to arduous, repetitive questioning over many hours about highly personal and sensitive issues.<sup>3</sup>
13. The proposed amendment to section 69 will further limit the circumstances in which victim-survivors are required to repeat their evidence on a re-trial of the same proceeding, thereby reducing opportunities for further re-traumatisation in court processes. This reform supports the rights of victim-survivors and other vulnerable witnesses in the justice system, as well as acknowledging the public interest in ensuring that the Court can relitigate matters in a way that minimises unnecessary additional trauma for witnesses.

#### Human rights application to proposed amendment to section 69 of the *Evidence (Miscellaneous Provisions) Act 1991*

14. Requiring the recording of specified witnesses' evidence given in the courtroom would support several rights protected in the *Human Rights Act 2004* (HR Act), including the right to equality and non-discrimination, the rights of children (HR Act, s 11), security of person (HR Act, s 18) and the right to fair hearing (HR Act, s 21). It does so by authorising a reasonable adjustment that enables vulnerable witnesses, including child complainants, to effectively communicate and participate in proceedings on an equal basis as others in a way that minimises the stress, fear and trauma associated with giving evidence in such matters.
15. The draft amendment is not, in our view, likely to unreasonably limit human rights in relation to the rights of the accused person. We understand the proposed measure would not limit the court's discretion to ensure the fairness of proceedings for all parties, which is essential for consistency with the right to fair trial (HR Act, s 21). The proposed measure may be seen as engaging an accused's right in criminal proceedings to examine, or have examined, prosecution witnesses under the same conditions as the prosecution (HR Act, s 22(2)(g)). We note, in this regard, that the proposed measure is available equally to witnesses for both the defence and the prosecution and applies to re-trials in which evidence has already been given and tested in court. Importantly, the proposed measure will not constrain the court's ability to determine whether and how to admit the recorded evidence of a witness in a related proceeding in accordance with the *Evidence Act 2011*, including with appropriate warnings or instructions to the jury.
16. Given these considerations and recognition that the court retains its discretion to assess and remedy any risk of unfairness, including for the accused and vulnerable witnesses, we do not consider that the proposed amendment unreasonably limits rights to a fair hearing or rights in criminal proceedings.

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<sup>1</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse (Criminal Justice Report – Parts VII - X)* (Final Report, 14 August 2017), 92-96 (Recommendation 56); available at: [https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final\\_report\\_-\\_criminal\\_justice\\_report\\_-\\_executive\\_summary\\_and\\_parts\\_i\\_to\\_ii.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/file-list/final_report_-_criminal_justice_report_-_executive_summary_and_parts_i_to_ii.pdf).

<sup>2</sup> ACT Government, Response (Part 2) to the Royal Commission into Institutional Responses to Child Sexual Abuse (Government Response, June 2018), 127; available at: [https://www.act.gov.au/\\_data/assets/pdf\\_file/0006/1210767/Response-Part-2.pdf](https://www.act.gov.au/_data/assets/pdf_file/0006/1210767/Response-Part-2.pdf).

<sup>3</sup> Sexual Assault Prevention and Response Reform Program Steering Committee, *Listen. Take action to prevent, believe and heal* (Final Report, 6 December 2021), 61-62; available at: [https://www.communityservices.act.gov.au/\\_data/assets/pdf\\_file/0006/1915332/CSD\\_SAPR\\_approved\\_WCAG\\_plus.pdf](https://www.communityservices.act.gov.au/_data/assets/pdf_file/0006/1915332/CSD_SAPR_approved_WCAG_plus.pdf).

## Consent requirement

17. We support in principle the requirement at subclause (2A) of clause 11 that evidence given in the courtroom may only be recorded if the victim consents. Whilst the evidence of victim survivors is a crucial part of the criminal justice system, many victims are frustrated at the limited consultation and participation rights available to them in justice processes. Requiring victim consent for the recording of courtroom evidence will support victim rights to participation and promote victim agency.
18. At the same time, there is a concern that subclause (2A) of clause 11 will place an onus on the prosecutor to lead evidence of victim consent to enable the recording of evidence in the courtroom. 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.
19. 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.

## Consequential amendment to the *Victims of Crime Act 1994* (ACT)

20. The ACT Charter of Victim Rights (“the Charter”) contained in the *Victims of Crime Act 1994*, promotes the rights of victims of crime when they engage with justice agencies in the criminal justice system. The Charter places positive obligations on justice agencies to meet the rights of victims of crime at different stages of the justice process.
21. We propose that the *Victims of Crime Act 1994* be amended to include a right for a victim to be informed of their right to “opt out” of having their evidence audio-visually recorded in a relevant proceeding. This would fall squarely within the rights contained in either Division 3A.5 and 3A.6 of the *Victims of Crime Act 1994*, which seek to support the rights of victims in relation to the provision of information about justice processes, including the conduct of their participation in proceedings.
22. This consequential amendment would ensure victim survivors are provided information by justice agencies in a way that empowers them to make informed decisions about their engagement in justice processes.