



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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Standing Committee on Justice & Community Safety
ACT Legislative Assembly
GPO Box 1020
Canberra ACT 2601

By email: lacommitteejcs@parliament.act.gov.au

Dear Committee Members

**RE: Sexual Assault Reform Legislation Amendment Bill - Justice and
Community Safety Committee**

Thank you for the opportunity to comment on this important area of law reform. The Women's Legal Centre ACT ('the Centre') applauds the ACT Government for their initiatives to improve the experience of victim-survivors of sexual violence in the legal system, and we support the proposed Sexual Assault Reform Legislation Amendment Bill 2022.

We note one of the objectives of the proposed reforms is to enhance victim-survivor safety in the legal system. We submit legislative reform will only go so far to achieve this. It is well known victim-survivors are often left traumatised by the adversarial criminal justice system, where dedicated legal support for victim-survivors is crucial to mitigate the safety risks this system produces and improve victim-survivors standing in judicial processes.

About the Women's Legal Centre ACT

The Women's Legal Centre is a specialist community legal centre. We serve women who generally cannot access legal advice or support through any other means. Our main legal practice areas are family law, family violence, migration, employment, discrimination, sexual harassment, and victims of crime.

The Centre provides legal assistance across the spectrum of activities, including legal information and referral, legal advice and representation, and litigation. The



Centre provides legal services within a multi-disciplinary and trauma-informed practice model that incorporates social work, cultural supports, and collaborative service models to provide wrap-around support to those most affected by systemic disadvantage and at-risk clients.

The Centre also provides community legal education and input on law and policy development to build government and community capacity to work towards deeper legal and cultural change to redress power imbalances and address violence and gender inequality.

Dedicated Victim-Survivor Legal Services

The current adversarial system offers little protection to victim-survivors to enjoy their full rights in the judicial system. Whilst the Office of the Director of Public Prosecutions (ODPP) represent the community, and the Defence represent the accused, there is no third-party advocate using the legal system to enforce victim-survivor rights or leading the victim-survivor's best interests in judicial processes.

It is presumed the victim-survivor's interests align with the community interests; however, this is not always the case. There is an inherent power imbalance and poor perceptions of access to justice if one party, crucial to the process, does not have access to independent legal representation.

The Centre encourages the ACT Government, as part of this process, to consider the larger legal eco-system in which this proposed legislation will operate and how specialist legal services for victim-survivors would genuinely enhance safety for victim-survivors in adversarial processes.

Whilst therapeutic and some case management supports are currently available for victim-survivors, they do not address legal need for victim survivors. As demonstrated by the women who approach the Centre for assistance, this need includes:

- the need for strategic, trauma-informed legal advice about the legal process, from reporting crimes to participating in civil and criminal judicial processes;
- obtaining best evidence in sexual-assault matters and protecting counselling notes in certain matters. As noted in the SAPR report and referenced in the briefing note, a high proportion of victim-survivors of sexual assault also experience domestic and family violence and suggest that a lack of understanding of the interplay between prior domestic and family violence and sexual assault may result in such evidence not being collected at the initial interview stage of sexual assault reports and subsequently, not being adduced in court. Further, as noted in the briefing note, common law allows parties to adduce this evidence, yet it is not widely understood or practiced. We submit if there a dedicated legal practice developed for victim-survivors, it will increase greater specialisation and technical skill in jurisprudence about laws which specifically apply to victim-survivors. This will increase the integrity



and safety of our systems, and further strengthen the ACT's reputation as a progressive, human rights-based jurisdiction;

- optimising victim-survivors' choice in the process;
- considering the holistic legal needs of the victim-survivor to reduce re-traumatisation from having to share their narrative multiple times;
- enforcing the victim-survivors rights under the Charter of Rights for victims of crime;
- building trust and recognising and advocating for the needs of the victim-survivor, not just community or defendant needs. Section 21 (1) of the *Human Rights Act 2004* (ACT) includes the right to equal access to a fair hearing. This means each party must have a reasonable opportunity to present their case. Currently, defendants have more rights and opportunity to access these rights than victim-survivors.

Evidence

The trial process is notoriously difficult for victim-survivors, who often report that it is as traumatic, or more so, than the initial assault.¹ This is partly because of the difficulty of recounting a sexual assault in a courtroom,² but is largely due to the tactics commonly employed by defence lawyers in an adversarial setting.³ Women feel like they, and not the accused, are on trial.⁴

In recent years, the ACT has introduced a number of procedural reforms intended to make the criminal trial process less traumatic for sexual assault complainants.⁵ There are also long-standing provisions of the *Evidence Act 2011* (ACT) which give the prosecution the power to object to, and the court a duty to disallow, 'improper' questions asked during cross-examination.⁶ The use of such provisions is either at the discretion of the court, or requires an application by one of the parties.⁷

Despite these provisions, evidence shows judicial officers are reluctant to intervene in cross-examination for fear of appearing partial to the prosecution.⁸ Similar concerns limit a prosecutor's ability to advocate for a victim-survivor; a prosecutor's duty is to lay credible evidence before the court, not to obtain a conviction.⁹ Prosecutors may choose not to object to questions where they believe the strength of evidence is improved by allowing them to be asked, even where this is traumatic for the complainant. For example, a prosecutor may choose not to object when a complainant's character is attacked by the defence to build the jury's sympathy for

¹ Braun 821; *Royal Commission Report* (n 1) 5; A Cossins, 'Why her Behaviour is Still on Trial: the Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(2) *UNSW Law Journal* 462; 'Rape on Trial' *Insight* (SBS, 27 February 2018)

² J McCulloch et al, *Victoria Police Trial of Digitally Recorded Evidence in Chief – Family Violence* (Final Evaluation Report, 14 February 2020) 50.

³ *Ibid* 51; *Royal Commission Report* (n 1) 5; Cossins (n 2) 462-3.

⁴ A Cossins, 'Why her Behaviour is Still on Trial: the Absence of Context in the Modernisation of the Substantive Law on Consent' (2019) 42(2) *UNSW Law Journal* 462; *Royal Commission Report* (n 1) 5.

⁵ Including allowing the complainant to give evidence by audio-visual link, allowing the complainant to have a support person with them while giving evidence, and allowing the court to be closed while a complainant gives evidence

⁶ Improper questions include those that are misleading, confusing, 'unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive', and those asked in a tone 'that is belittling, insulting or otherwise inappropriate': *Evidence Act 2011* (ACT) s 41

⁷ *Evidence Act* s 41(4); *EMP Act* s 47, 49, 50, 71.

⁸ T Henning, 'Obtaining the best evidence from children and witnesses with cognitive impairments – "plus ça change" or prospects new?' (2013) 37 *Criminal Law Journal* 155, 159.

⁹ ACT Director of Public Prosecutions, *The Prosecution Policy of the Australian Capital Territory* (at 1 April 2021) 1.4.



the complainant,¹⁰ or to avoid the impression that the complainant is hiding something.¹¹

The Centre would welcome the opportunity to discuss this submission and the Centre's front-line experience with victim-survivors seeking legal advice about judicial processes. Please contact us if you wish to discuss further.

Yours sincerely,



Claudia Maclean

Principal Solicitor



■ K Ask, 'A Survey of Police Officers' and Prosecutors' Beliefs About Crime Victim Behaviours' (2010) 25(6) *Journal of Interpersonal Violence* 1132, 1134.

¹¹ Braun (n 1) 824.

