

**2023**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**TENTH ASSEMBLY**

**STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY REPORT NO. 10 - INQUIRY  
INTO THE SEXUAL ASSAULT REFORM LEGISLATION AMENDMENT BILL 2022 -  
GOVERNMENT RESPONSE**

**Presented by  
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## Introduction

The ACT Government welcomes the Standing Committee on Justice and Community Safety's (the Committee) Report on the inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022 (the Inquiry).

The Sexual Assault Reform Legislation Amendment Bill 2022 (the Bill) implements some of the recommendations from the Sexual Assault Prevention and Response Program Steering Committee Report, *Listen. Take Action to Prevent, Believe and Heal* (the SAPR Report), which was published in December 2021. The Bill also corrects two unintended consequences arising from the *Crimes (Consent) Amendment Act 2022*.

The Bill will:

- (a) explicitly provide that evidence of prior family violence between parties may be admissible in sexual offence proceedings;
- (b) provide that the presumption of bail does not apply to certain offences;
- (c) amend or omit section 80D of the *Evidence (Miscellaneous Provisions) Act 1991* to require consideration of the reasonableness of a mistaken belief as to consent;
- (d) provide that self-induced intoxication cannot be considered in determining whether the accused person had knowledge, recklessness or a reasonable belief as to consent;
- (e) allow special interim Personal Protection Orders and Workplace Protection Orders to operate for longer than 12 months where there are ongoing related criminal proceedings; and
- (f) amend the definition of "sexual act" in the *Crimes Act 1900* to address unintended consequences.

The Bill was introduced into the Legislative Assembly on 11 October 2022. On 12 October 2022, the Committee resolved to undertake an inquiry into the Bill. Public submissions closed on 7 November 2022 with eight submissions received. A public hearing was not conducted for this Inquiry, but the ACT Government was provided the opportunity to respond to the views in one submission.

The ACT Government acknowledges the value of public discussion about sexual assault, sexual violence and of the amendments proposed by the Bill and has carefully considered each of the Committee's recommendations.

## **Recommendations and Government Response**

Recommendation 1: *The Committee recommends that the ACT Government include a specific reference to people with disability, in care relationships and residential settings, in the proposed legislative changes to make relevant and admissible prior family violence between parties in line with their response to the Listen. Take Action to Prevent, Believe and Heal Report.*

Government Response: *Agreed in principle.*

Recommendation 23 (f) of the SAPR Report provided:

*When evidence of prior family violence between the parties being relevant and admissible in sexual assault cases it should also explicitly apply to people with disability, in care relationships and residential settings, highlighting the findings of the ongoing Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, noting the different dynamics.*

The ACT Government has previously agreed to the recommendation 23 (f) in the SAPR Report. It is also noted that the ACT Government agreed to recommendation 23 (f) and this recommendation is being implemented in the Bill.

As noted in the Government Response to the SAPR Report recommendations, evidence of uncharged acts of violence is already admissible under the uniform evidence legislation and common law as relationship evidence where it is relevant to a fact in issue and not unfairly prejudicial. Specifically, at common law, context evidence explains a pattern of behaviour (such as why there was no response or report following the alleged acts) is admissible: *RG v R* [2010] NSWCCA 173. Evidence is not admissible simply because it proves the relationship between the complainant and the accused: *R v ATM* [2000] NSWCCA 475.

However, the ACT Government noted in its response to the SAPR Report that there may be additional benefit in clarifying in legislation that this type of evidence is admissible in care relationships and residential settings.

During consultation for the Bill, the ACT Government considered including this recommendation as part of the reforms. Some stakeholders raised concerns about a generalised approach to including evidence of prior family violence, stating it could create significant prejudice against an accused. Further concerns were raised about unintended and potentially unfair consequences, such as if a provision were drafted that would apply where an offence was committed by a carer against a dependant but would not apply to an offence by a dependant against a carer. This could also be an unjustifiable limitation on some human rights.

Consultation also highlighted the need to carefully define the 'care relationship' in both the *Family Violence Act 2016* and the *Personal Violence Act 2016*.

Recommendation 23 (f) of the SAPR Report was not included in the Bill as it is necessary to conduct further detailed consultation with stakeholders in the care and disability sector to ensure any reforms fully capture the intent of the recommendation in the SAPR Report.

The Committee's recommendation is to include this change in the proposed legislative changes in the Bill. For the reasons outlined above, the recommendation cannot be included in the Bill. However, the ACT Government maintains agreement to implement Recommendation 23 (f) of the SAPR Report and is currently exploring including this recommendation in upcoming reforms in 2023.

Recommendation 2: *The Committee recommends that the ACT Government consider if the amendments should apply to subsections 62 (1) and 62 (2), and sections 64 and 66 of the Crimes Act 1900 to ensure a consistent approach.*

Government Response: *Agreed.*

Recommendation 23 (i) of the SAPR Report recommends that sections 55, 55A, 56 and 66B of the *Crimes Act 1900* be amended to provide that the presumption of bail does not apply.

As outlined in the Explanatory Statement, section 66B has not been included as it is not a separate offence but merely sets out principles for how child sexual offences may be charged to capture a course of conduct.

The amendment seeks to create legislative consistency in relation to a presumption of bail for serious sexual offences, to improve criminal justice outcomes for victim-survivors and the community, and to reflect that these three offences are aligned with other serious sexual offences to change community attitudes.

During the development of the Bill, the ACT Government considered the recommendations of the SAPR Report for the sections 55, 55A, 56 and 66B of the *Crimes Act 1900*. Subsections 62 (1) and 62 (2), and sections 64 and 66 of the *Crimes Act 1900* were not recommended for similar reform by the SAPR Report. The ACT Government acknowledges that these offences are also considered serious sexual offences. It is not clear whether the SAPR Report intended to exclude these sections from recommendations for reform, or if it was an oversight. Regardless, the four sections were not considered for amendment in this Bill

However, the ACT Government notes the purpose of seeking legislative consistency in the presumption of bail for similar serious sexual offences. Therefore, the ACT Government considers it appropriate to exploring and considering if amendments in a future bill should also apply to subsections 62 (1) and 62 (2), and sections 64 and 66 of the *Crimes Act 1900*. This will allow for adequate consultation with stakeholders and to minimise the risk of any unintended consequences from such amendments, noting that the SAPR Report had not made recommendations for these sections to be included in the presumption of bail reforms.

Recommendation 3: *The Committee recommends that the ACT Government monitor and evaluate the impact on perpetrators from Aboriginal and Torres Strait Islander communities.*

Government Response: *Agreed.*

The ACT Government recognises that the reforms in the Bill may impact on Aboriginal and Torres Strait Islander people due to the existing over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, as both victims and offenders.

All recommendations from the SAPR report and their impacts have been considered by the Aboriginal and Torres Strait Islander Consultation Committee. The SAPR report highlights that the under-representation of Aboriginal and Torres Strait Islander people accessing support and justice as victim-survivors of sexual violence also needs to be considered in conjunction with the issue of over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.

The ACT Government will continue to consult with stakeholders representing the Aboriginal and Torres Strait Islander communities on the current and future amendments to ensure the impact on the Aboriginal and Torres Strait Islander communities is appropriately monitored and evaluated. Having the recommendations of the SAPR Report implemented in tranches also allows sufficient time to generate, collate and review data and to seek feedback from stakeholders on the operation and effectiveness of the amendments.

Recommendation 4: *The Committee recommends that the ACT Government amend the explanatory statement to include an explanation of the terms 'victim' and 'victim-survivor' in the context in which they are used.*

Government Response: *Agreed.*

The SAPR Report noted that there needs to be a better understanding of the impacts of sexual violence, and the impacts of going through a criminal proceeding in a sexual violence matter. The SAPR Report also suggested that the experiences and insights of people with lived experience of sexual assault should drive the reforms. As such, the SAPR Report itself adopted the phrase 'victim-survivor' throughout the report.

It was noted in the SAPR report that many victim-survivors had a lack of faith in the way the current legal system works, felt that the current criminal justice system causes further harm,

and it is not trauma-informed. This stops victim-survivors from participating in a process that is intended to help them.

The overarching message of the SAPR Report was that many people may have ultimately been found to be 'victims' or 'victim-survivors' by way of a court verdict had they been given the appropriate support and pathways to navigate the criminal justice system.

As the Bill implements recommendations from the SAPR Report, the ACT Government considered it appropriate to be consistent with the language used in that report, to retain the true intention and purpose of the recommendations being implemented.

Further, the underlying policy reasons for using the term 'victim-survivor' are to acknowledge the inefficiencies of the criminal justice system, the harm that the inefficiencies have caused, that some victims have not achieved justice through the criminal justice system processes.

Limiting the use of the term 'victim' and 'victim survivor' to those who have accessed the criminal justice system is not inclusive of people who will not always choose a criminal justice pathway, or who are not given the choice or opportunity to access a criminal justice pathway.

Therefore, using the term victim-survivor refers to alleged acts of sexual violence in a respectful and trauma informed way, aiming to improve the experiences of victim-survivors when they choose to engage in the criminal justice system process.

Despite the above, the ACT Government acknowledges that concerns were raised in the Inquiry about the use of the term 'victim-survivor' and how it may be thought to change the onus of proof or remove the right to the presumption of innocence.

Clearly, a person who is alleged to have committed an offence is innocent until proven guilty, as outlined under the *Human Rights Act 2004* s 22 (1).

The Bill does not seek to change the onus of proof. Nor does it ignore the presumption of innocence. Rather, the references to 'victims' and 'victim-survivors' are intended to recognise that not all people who experience sexual assault will have a matter finalised by way of a guilty verdict in the criminal justice system. The use of the terms is in accordance

with the work undertaken in line with the SAPR Report, which is to create better and more meaningful access to the legal system for people who disclose experiences of sexual violence.

Nevertheless, the ACT Government acknowledges the concerns that were raised and the merits of making these matters clear. Therefore, the explanatory statement has been updated to include an explanation of the terms 'victim' and 'victim-survivor' in the context of the Bill. The explanatory statement has also been amended to make it clear that the use of these terms does not change the onus of proof and does not ignore the presumption of innocence.

Recommendation 5: *The Committee recommends that after considering and responding to the recommendations in this report, the Assembly pass the Sexual Assault Reform Legislation Amendment Bill 2022.*

Government Response: *Noted.*

The ACT Government welcomes the Committee's recommendation that after considering the ACT Government's response to the recommendations that the Legislative Assembly pass the Sexual Assault Reform Legislation Amendment Bill 2022.