



**Legislative Assembly for the
Australian Capital Territory**

Standing Committee on Justice and
Community Safety

Inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022

Legislative Assembly for the Australian Capital Territory
Standing Committee on Justice and Community Safety

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About the committee

Establishing resolution

The Assembly established the Standing Committee on Justice and Community Safety on 2 December 2020.

The Committee is responsible for the following areas:

- ACT Electoral Commission
- ACT Integrity Commission
- Gaming
- Minister of State (JACS reporting areas)
- Emergency management and the Emergency Services Agency
- Policing and ACT Policing
- ACT Ombudsman
- Corrective services
- Attorney-General
- Consumer affairs
- Human rights
- Victims of crime
- Access to justice and restorative practice
- Public Trustee and Guardian

You can read the full establishing resolution [on our website](#).

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About this inquiry

The Sexual Assault Reform Legislation Amendment Bill 2022 was presented in the Assembly on 11 October 2022. It was then referred to the Standing Committee Justice and Community Safety as required by clause 5 of the establishing resolution. This clause allows committees to inquire into and report on bills within two months of their presentation.

The committee decided to inquire into the bill on 12 October 2022.

The Committee thanks everyone who participated in, or otherwise assisted, this inquiry, including those that made submissions, ACT Government Ministers, directorate officials, statutory officers, Members of the Legislative Assembly, and Members' staff.

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Acronyms

Acronym	Long form
ACT	Australian Capital Territory
SAPR	Sexual Assault Prevention and Response Program

Recommendations

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*.

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.

Recommendation 3

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

Recommendation 4

The Committee recommends that the ACT Government amend the explanatory statement to include an explanation of the terms ‘victim’ and ‘victim-survivor’ and the context in which they are used.

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.

1. Introduction

Background to the Bill

- 1.1. The Bill seeks to improve how ACT laws respond to sexual violence with an aim of improving victim-survivors' access to justice and enhancing their safety.
- 1.2. The Bill implements some recommendations from the Sexual Assault Prevention and Response Program (SAPR) Steering Committee report: *Listen, Take Action to Prevent, Believe and Heal* which was published in December 2021, and corrects two unintended consequences arising from *the Crimes (Consent) Amendment Act 2022*.
- 1.3. The Bill will:
 - explicitly provide that evidence of prior family violence between parties may be admissible in sexual offence proceedings,
 - provide that the presumption of bail does not apply to certain offences,
 - 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,
 - provide that self-induced intoxication cannot be considered in determining whether the accused person had knowledge, recklessness or a reasonable belief as to consent,
 - 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
 - amend the definition of "sexual act" in *the Crimes Act 1900* to address unintended consequences.¹
- 1.4. In this report, the term 'victim' or 'victim-survivor' is not intended to imply that accused persons in court proceedings are guilty. It is a general term to describe persons that are in fact victims or victim-survivors.

Legislative Scrutiny

- 1.4. The Bill was considered by the Standing Committee on Justice and Community Safety (Legislative Scrutiny role) in Report 23.
- 1.5. The Scrutiny Report raised the following concerns:
 - Amendments to the *Bail Act 1992* to remove the presumption of bail applying to certain offences in line with other serious offences will increase the likelihood of a person being denied bail limiting their human rights.

¹ Sexual Assault Reform Legislation Amendment Bill 2022, *Explanatory Statement and Human Rights Compatibility Statement*.

- Amendments to the *Crimes Act 1900*, which prevent intoxication being taken into account when determining if the accused's view on consent, will impact on the right to a fair trial and the presumption of innocence.
- Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* to allow evidence of family violence to be admissible, where it provides context for a fact in issue in proceedings, may cause confusion as to when and for what purpose prior family and domestic violence may be adduced, potentially limiting the right to a fair trial and limiting the presumption of innocence.
- Amendments to the *Personal Violence Act 2016*, to extend the period of interim protection orders, potentially limit the right to movement, the right to work, and the right to be tried without unreasonable delay.²

1.6. However, the Scrutiny report also noted that the explanatory statement includes an extensive statement on why these limitations are reasonable in the circumstances. The Scrutiny Committee were satisfied with this approach and did not seek a response from the Minister.

The Inquiry

1.7. On 12 October 2022, the Standing Committee on Justice and Community Safety resolved to inquire into the Bill and called for submissions by 7 November 2022 eight submissions were received. These are listed in Appendix A. The Committee also sought comments from the ACT Government on views expressed in one of the submissions and did not hold public hearings. The Committee met on 7 December 2022 to consider the Chair's draft report, which was adopted on the same day, for tabling.

2. General comments

2.1. Comments in submissions centred primarily around the proposal to use evidence of prior family violence and the presumption of neutral bail.

2.2. The Women's Legal Centre also raised concerns that these reforms raised a broader need for specialist legal services for victims:

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

² Standing Committee of Justice and Community Safety (Legislative Scrutiny role), *Report 23*.

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.³

3. Evidence of prior family violence

- 3.1. In line with recommendation 23e) of the SAPR Report, section 74A in Part 4 of the Bill seeks to provide that evidence of prior family violence between parties may be admissible in sexual offence proceedings. The purpose of the reform is to:

...place the offence in the context of the complainant's overall allegations about the accused in order to assist the jury in understanding the pattern of behaviour. This type of evidence may overcome false impressions that the incident occurred in isolation or explain lack of or delay in complaint.⁴

- 3.2. This proposed change received specific support in various submissions:

We welcome the amendments to the Evidence Act (1991) which permit prior, uncharged acts of family violence to be admissible in evidence, in sexual offences, where it provides substantive context to the allegations. Not only does this reform place sexual offending, as it happens between intimate or otherwise domestic partners, within the broader forms of power and violence used to exercise relationship control, but it recognises the cumulative impacts of patterned offending some of which, in the dynamics of an abusive relationship, "may appear trivial" to outsiders (74A(2)).⁵

Understanding the family violence history may give a trier of fact a better understanding on how or why a victim-survivor reacted in a particular way to sexual offending. With this reform, police can better plan their Evidence in Chief Interviews (EICIs) with victim-survivors. Police can ascertain more context on the relationship of the parties involved, knowing that it is relevant to the sexual offence.⁶

Tendency Evidence

- 3.3. However, the Victims of Crime Commissioner did not think the proposed change gave full effect to the recommendation in the SAPR report, and supported a further change to the

³ Women's Legal Centre ACT, *Submission 4*, p 3.

⁴ Sexual Assault Reform Legislation Amendment Bill 2022, *Explanatory Statement*, p4.

⁵ YWCA Canberra, *Submission 2*, p 4.

⁶ ACT Policing, *Submission 5*, p 4-5.

proposed amendment to clarify that prior instances of family or domestic support can be also used as tendency evidence.⁷

Currently, instances of prior domestic and family violence may be admissible either using ‘context’ (or ‘relationship’) evidence, or as being relevant to a particular tendency the accused person might have to engage in certain conduct or have a particular state of mind.⁸

To give effect to the recommendation in full, we consider a further amendment could seek to clarify that prior instances of domestic and family violence may also be used as tendency evidence in a related proceeding for sexual violence in accordance with the ordinary rules of evidence. The matter of *Queen v Pamkal* [2019] NTSC 80 (15 October 2019) is reflective of a type of case where such tendency evidence was used in a sexual offence proceeding that occurred against the backdrop of prior domestic and family violence.⁹

- 3.4. It is noted that this was not included in the law reform recommendations in the SAPR report.

Disability, care relationships and residential settings

- 3.5. Advocacy for Inclusion also submitted that this provision should be more specific for certain groups in line with the SAPR report:

Per recommendation 23 of the *Listen. Take action to prevent, believe and heal* report, the legislation should acknowledge evidence of prior family violence in a way which “explicitly applies 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.” This “acknowledges the specific circumstances of people with disability, including carer and paid support worker relationships, and relationships between residents of residential settings such as group homes.”¹⁰

- 3.6. Advocacy for Inclusion submitted an attachment with views on how a care relationship should be defined.
- 3.7. This recommendation was included in the SAPR report under recommendation 23 f)¹¹ and agreed to in the Government’s response to the report:

As with the previous recommendation, 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

⁷ Victims of Crime Commissioner, *Submission 6*, p 4-5.

⁸ Victims of Crime Commissioner, *Submission 6*, p 5.

⁹ Victims of Crime Commissioner, *Submission 6*, p 6.

¹⁰ Advocacy for Inclusion, *Submission 8*, p 2.

¹¹ The Sexual Assault Prevention and Response Steering Committee, *Listen. Take Action to prevent, believe and heal*, December 2021, P 80.

prejudicial. The ACT Government notes that there may be additional benefit in clarifying in legislation that this type of evidence is admissible in care relationships and residential settings.¹²

- 3.8. The explanatory statement is silent on why this recommendation was not incorporated into the proposed legislative change.

Drafting concerns

- 3.9. The ACT Bar Association submission strongly opposed the proposed section 74A, stating it is incorrect that the change makes clear the current common law position and states the legislation is unworkable due to poor drafting.¹³ There are concerns that proposed section 74A dampens the operation of section 137 of the Evidence Act 2011.¹⁴ The submission goes on to say:

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.¹⁵

- 3.10. In response, the ACT Government provided the following advice:

It is unclear how section 137 of the Evidence Act 2011 is neutered by the new amendment. Section 137 of the Evidence Act 2011 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 Evidence Act 2011 be rendered negatory by the introduction of section 74A.

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.

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.¹⁶

¹² Government response to the *Listen. Take Action to Prevent, Believe and Heal* Report, p 20, 25.

¹³ ACT Bar Association, *Submission 7*, p 6.

¹⁴ ACT Bar Association, *Submission 7*, p 4.

¹⁵ ACT Bar Association, *Submission 7*, p 7.

¹⁶ Attorney-General, *Submission 9*, p 6.

Committee Comment

- 3.11. The Committee has considered the views in the submissions and notes the response provided by the ACT Government in response to the concerns expressed by the ACT Bar Association. It is considered that these concerns have been addressed and does not recommend any changes in this regard.
- 3.12. The Committee does however note that in relation to this proposed legislative change the Bill does not include recommendation 23 f) of the SAPR report that there be explicit reference to people with disability, in care relationships and residential settings in the legislation which was agreed to in the 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*.

4. Neutral bail presumption for certain sex offences

- 4.1. In line with recommendation 23i) of the SAPR Report, Part 2 of the Bill seeks to amend the *Crimes Act 1900* to include new sections:
- a) 55(2) sexual intercourse with a young person under 16 years old
 - b) 55A(1) sexual intercourse with a young person under special care
 - c) 56(1) persistent sexual abuse of child or young person under special care.
- 4.2. Section 66B of the *Crimes Act 1900* relates to a course of conduct charge – child sexual offences. The SAPR report, proposed that section 55, 55A, 56 and 66B be included in this particular bail reform.¹⁷ The Government response to that report also agreed to the inclusion of section 55, 55A, 56 and 66B. It is noted in the explanatory statement that Section 66B has not been included in Part 2 of the Bill because ‘it is not a separate offence but merely sets out principles for how child sexual offense may be charged to capture a course of conduct’.¹⁸
- 4.3. The impact of this change will be that the presumption of bail does not apply to the offences in these provisions, therefore creating a neutral presumption of bail similar in nature to other types of serious sexual offences currently listed in Schedule 1 of the *Bail*

¹⁷ The Sexual Assault Prevention and Response Steering Committee, *Listen. Take Action to prevent, believe and heal*, December 2021, p 153.

¹⁸ Sexual Assault Reform Legislation Amendment Bill 2022, *Explanatory Statement*, p 5.

Act 1992 such as sexual intercourse without consent and sexual intercourse with a child under 10.¹⁹

- 4.4. As noted in the explanatory statement, the effect of this amendment is that there is a greater likelihood of an accused person being refused bail.²⁰
- 4.5. This change was supported by ACT Policing, noting that the amendment will offer greater security and safety for victims:

Having a neutral position relating to the granting of bail will reflect the serious nature of sexual assaults, together with providing victims a greater sense of safety that the facts of their matter will be taken into account rather than a presumed position the offender will be granted bail.

ACT Policing notes that in many circumstances bail conditions are not sufficient to mitigate identified risks and bail does not necessarily stop or deter future offending, which places a victim-survivor at further risk and in turn can re-traumatise the victim-survivor.²¹

- 4.6. The change was also supported by the Victims of Crime Commissioner, who noted the bill could have gone further in terms whether it should also apply to other offences including:
- a) Subsection 62(1) and (2) - Incest and similar offences
 - b) Section 64 - Using a child for the production of child exploitation material
 - c) Section 66 - Grooming and depraving young people.²²
- 4.7. The Victims of Crime Commissioner while supporting the change, noted that there should be consistency in approach:

We also note the Commission's longstanding view that it does not generally support a piecemeal approach to amending the ACT's bail laws considering the Supreme Court declaration of incompatibility regarding the presumption against bail in s 9C of the Bail Act: In the matter of an application for Bail by Isa Islam [2010] ACTSC 146 (19 November 2010). Such amendments to bail laws should have regard to all like-offences holistically to ensure there is consistency across provisions in the legislation.²³

- 4.8. The ACT Bar Association raised concerns with the change, in terms of human rights consequences following on from an increased likelihood that an accused person would be refused bail and accommodation concerns at the Alexander Maconochie Centre:

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

¹⁹ Sexual Assault Reform Legislation Amendment Bill 2022, *Explanatory Statement*, p 5, 14.

²⁰ Sexual Assault Reform Legislation Amendment Bill 2022, *Explanatory Statement*, p 13.

²¹ ACT Policing, *Submission 5*, p 5.

²² Victims of Crime Commissioner, *Submission 6*, p 6.

²³ Victims of Crime Commissioner, *Submission 6*, p 6.

days remand prisoners have been housed with convicted prisoners serving terms of imprisonment, contrary to Section 19(2) of the Human Rights Act.²⁴

- 4.9. The ACT Bar Association also calls into question the appropriateness of a neutral presumption in terms of consideration of evidence:

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.²⁵

- 4.10. The Committee sought a response from the Attorney-General in relation to this concern who noted that the bill will not change the legislative criteria for granting bail, and that an accused person is still presumed innocent until proved guilty:

The amendment does not change the existing legislative criteria for considerations in deciding whether or not to grant bail.

The right to be presumed innocent until proved guilty according to law may, in accordance with section 28 of the Human Rights Act 2004, 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.

A framework for neutral presumptions of bail currently exists and is set out in Division 2.3 and Schedule 1 of the Bail Act 1992. 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.²⁶

Committee Comment

- 4.11. The Committee has considered the views in the submissions and notes the response provided by the ACT Government in response to the concerns expressed by the ACT Bar Association. It is considered that these concerns raised by the ACT Bar Association have been addressed. The Committee notes the views put forward by the Victims of Crime Commissioner as potential future reforms.

²⁴ ACT Bar Association, *Submission 7*, p 3.

²⁵ ACT Bar Association, *Submission 7*, p 5.

²⁶ Attorney-General, *Submission 9*, p 7.

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.

5. Monitoring the impact of the changes

- 5.1. While submissions were generally favourable of the reforms, ACTCOSS submitted that care was needed that legislation protecting victims did not have unintended negative impacts on marginalised communities:

Ensuring that victim-survivors are empowered with all options is an important step in cultivating a system that is trauma-informed and has capacity to hold perpetrators accountable and achieve behavioural change. Further, criminal responses that lead to increased incarceration may not always be appropriate for victim-survivors, or for perpetrators from vulnerable communities or who have themselves experienced significant trauma. We encourage the ACT Government to seriously consider how we can embed restorative justice practices into legislation and actions around family and sexual violence.

We are also concerned by provisions in the Bill that have the impact of widening the criminal justice net, given the likelihood of a disproportionate increase in the incarceration of marginalised communities. Ongoing unconscious bias and discrimination within the criminal legal system in Australia means that changes to legislation aimed at protecting victims can disproportionately impact perpetrators from marginalised backgrounds while other perpetrators continue to evade justice. We would strongly encourage the ACT Government to embed strong monitoring and evaluation of the impact of these legislative changes to ensure that the intended outcomes are being achieved.²⁷

Committee Comment

- 5.2. The Committee has considered the views in the submissions and while submissions are generally supportive, given the changes may impact on perpetrators from Aboriginal and Torres Strait Islander communities, there is value in monitoring the impact on these groups.

Recommendation 3

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

²⁷ ACTCOSS, *Submission 3*

6. Victim-Survivor terminology

6.1. The explanatory statement to the bill uses various terminology when referring to parties:

- a) It includes several references to the term ‘victim-survivor’ or ‘victim’ as well as ‘complainant’, ‘applicant’ and ‘other person’
- b) Alternatively, it uses the ‘accused’, ‘defendant’ and ‘respondent’.

6.2. The ACT Bar Association raised concerns that this leads to a presumption that a complainant is a victim or victim survivor:

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.²⁸

6.3. The ACT Government has responded noting that while the correct term for a complainant in relation to a specific allegation is ‘complainant’, the explanatory statement is also speaking more generally about how the reforms will assist actual victims:

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’.

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.

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.²⁹

²⁸ ACT Bar Association, Submission 7, p 2.

²⁹ Attorney-General, *Submission 9*, p 4.

Committee Comment

- 6.4. The Committee notes the concern with the use of the terms ‘victim’ or ‘victim-survivor’ and how this may imply that the presumption of innocence has been ignored. Noting that this was not the intended implication in the explanatory statement, this could be clarified.

Recommendation 4

The Committee recommends that the ACT Government amend the explanatory statement to include an explanation of the terms ‘victim’ and ‘victim-survivor’ and the context in which they are used.

7. Conclusion

- 7.1. The Committee considers that it was important to conduct this inquiry given the changes to the hearing of evidence, bail, and determining consent and the need to ensure that proceedings are fair.

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.

Mr Peter Cain MLA

Chair

December 2022.

Appendix A: Submissions

No.	Submission by	Received	Published
1	Confidential	22/10/22	
2	YWCA	07/11/22	24/11/2022
3	ACTCOSS	07/11/22	24/11/2022
4	Women's Legal Centre ACT	07/11/22	24/11/2022
5	ACT Policing	07/11/22	24/11/2022
6	Victims of Crime Commissioner	08/11/22	24/11/2022
7	ACT Bar Association	09/11/22	24/11/2022
8	Advocacy for Inclusion	09/11/22	24/11/2022
9	ACT Government	23/11/22	2/12/2022