



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 Sexual, Family and Personal Violence Legislation Amendment Bill 2023

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Standing Committee on Justice and Community Safety

Office of the Legislative Assembly

Via LACommitteeJCS@parliament.act.gov.au

29 November 2023

Dear Standing Committee on Justice and Community Safety,

Submission to the Inquiry into Sexual, Family and Personal Violence Legislation Amendment Bill 2023

Thank you for the opportunity to make a submission in relation to the Standing Committee's Inquiry into the Sexual, Family and Personal Violence Legislation Amendment Bill 2023 (the 'Inquiry').

I request that this submission be published in full.

Yours sincerely

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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:
 - 1.1. the President and Human Rights Commissioner
 - 1.2. the Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner
 - 1.3. the Public Advocate and Children and Young People Commissioner (PACYPC); and
 - 1.4. 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 Commission is engaged in the ongoing law reform work being undertaken to strengthen the ACT's responses to sexual violence and domestic and family violence.

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:
 - 4.1. advocating for the interests of victims;
 - 4.2. monitoring and promoting compliance with victims rights;
 - 4.3. consulting on and promoting reforms to meet the interests of victims; and
 - 4.4. 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 representing the interests of victims and promoting reforms that uphold their rights.

Inquiry into Sexual, Family and Personal Violence Legislation Amendment Bill 2023

6. The Commission supports the Bill, noting the VOCC and President of the Human Rights Commissioner have provided input into the development of the Bill. Further, this work is the product of ongoing consultation with Government and other stakeholders.
7. The VOCC commends the Bill to the Standing Committee. We consider the Bill will have an overall positive impact on the rights of victim-survivors and broadly supports human rights.

Removing the presumption for bail for certain offences

SAPR Report and Government Response

8. The Steering Committee's Final Report '*Listen. Take Action to Prevent, Believe and Heal*' ('the SAPR Report') recognised that the presumption of bail did not apply to specified sexual violence offences against children listed in Schedule 1 of the *Bail Act 1992*, including sexual intercourse without consent and sexual intercourse with a child under 10 (ss 54 and 55 of the *Crimes Act 1900* respectively). However, other similar sexual violence offences were observed as not being included in Schedule 1. Accordingly, the SAPR Report recommended removing the presumption of bail for the following offences:
 - 8.1. Sexual intercourse with a young person under the age of 10 (aggravated offence) – s 55(2)
 - 8.2. Sexual intercourse with a young person under special care – s 55A
 - 8.3. Persistent sexual abuse of child or young person under special care – s 56
9. The Government agreed to this recommendation, noting an amendment would more accurately reflect the severity of the offences. The Sexual Assault Reform Legislation Amendment Act 2023 amended Schedule 1 of the *Bail Act 1992* to provide that the presumption of bail does not apply to offences in sections 55 (2), 55A and 56 of the *Crimes Act 1900*.
10. In the submission to the Standing Committee's Inquiry into the Sexual Assault Reform Legislation Amendment Bill 2022, the VOCC raised that there are other similar sexual offences in terms of gravity or vulnerability of the victim-survivor that warranted consideration to ensure that there is congruence in the offences which are subject to a neutral presumption of bail. These sexual offences were:
 - 10.1. Incest and similar offences – ss 62(1) and (2)
 - 10.2. Using a child for the production of child exploitation material – s 64
 - 10.3. Grooming and depraving young people – s 66

The Bill

11. As a result, the Bill seeks to schedule 1 of the *Bail Act* to provide that the presumption does not apply to the offences in the *Crimes Act 1900*:
 - 11.1. Section 53 (sexual assault in the third degree);
 - 11.2. Section 62 (incest and similar offences);
 - 11.3. Section 64 (using a child for production of child exploitation material); and
 - 11.4. Section 66 (grooming and depraving young children).
12. We support the amendment to introduce a neutral bail presumption for the listed sexual offences. By creating a neutral presumption of bail for serious sexual offences prescribed in ss 53, 62, 64 and 66 of the *Crimes Act 1900*, this amendment brings these offences in line with the approach already taken for similar offences.

Allow an FVO or PPO of a protected person to continue to apply for the life of the original order, even after the protected person turns 18 years old

13. Currently, the *Family Violence Act 2016* and the *Personal Violence Act 2016* are silent as to whether a protection order continues once a protected person turns 18 years of age. This ambiguity has resulted in inconsistent interpretations as to whether the order continues and whether the protected person remains protected or must re-apply for a new protection order.
14. One available interpretation is that orders concerning a young person have no effect when that person reaches 18 years of age. The VOCC considers this may present a risk to young adults in this circumstance, requiring them to take positive steps to apply for a fresh family violence order or personal protection to secure protections that had previously applied.

The Bill

15. The Bill inserts s 44A into the *Family Violence Act 2016* to explicitly provide that a family violence order continues to have effect after a protected person reaches the age of 18. The section would confirm the continuing effect of a family violence order that includes, as a protected person, a child who will reach 18 years of age during the term of the order.
16. The Bill inserts s 38A into the *Personal Violence Act 2016* to similarly provide that a personal violence order continues to be in force even when the protected person attains the age of 18.
17. The VOCC supports the insertion of s 44A into the *Family Violence Act 2016* and s 38A into the *Personal Violence Act 2016* as the amendments explicitly clarify that turning 18 years old does not stop the enforceability of family violence orders and personal protection orders and, in turn, ameliorates the risk caused by the requirement for a young person to re-apply for a protection order.

Abolishing the offence of aiding and abetting family violence order breaches

18. Currently, a person listed as a protected person on a family violence order who is found to have aided or abetted the contravention of a family violence order may be criminally liable under the *Family Violence Act 2016* (ACT).

The Bill

19. The Bill amends the *Family Violence Act 2016* to remove the offence of aiding and abetting the breach of a family violence order. Specifically, the Bill inserts new subsection (4) into s 43 to provide that a person listed as a protected person on a family violence order does not commit an offence by aiding, abetting, counselling, procuring or being a party to conduct that contravenes the protection order. Similarly, the Bill would remove subsection 67(2)(d), which provides that on making a protection order, the court must explain to the protected person that if they aid or abet the respondent to commit an offence of contravening a protection order, then the protected person also commits an offence.
20. The VOCC supports the express prohibition of the offence of aiding and abetting the breach of a family violence order. Currently, we note that the ACT is out of step with the approach adopted by other jurisdictions that have legislated express prohibitions of this offence by removing liability for protected persons who engage in the relevant conduct.¹ For instance, New South Wales family violence legislation provides that a victim for whose benefit a protection order is obtained cannot be charged with aiding, abetting, counselling or procuring the breach of a protection order.² Similarly, the Victorian family violence legislation provides that a 'protected person' does not aid, abet, counsel or procure a breach because the protected person 'encourages, permits or authorises conduct by the respondent' that contravenes a protection order.³
21. The Australian Law Reform Commission ('ALRC') in its 2010 report 'Family Violence – A National Legal Response' recommended that relevant state and territory legislation be amended to provide that a person protected by a protection order under family violence legislation cannot be charged with, be or found guilty of, an offence of aiding, abetting, counselling or procuring the breach of such an order. In their reasoning, the ALRC underscored that the ability to charge victim-survivors of domestic and family violence for breaches of a protection order undermined the policy intent of family violence legislation.
22. The experience of Victim Support ACT is that the risk of being charged can operate as a significant disincentive to victim-survivors of domestic and family violence who may otherwise be eligible to apply for a family violence order. Moreover, victim-survivors have frequently reported that the threat or potential of a criminal charge is a technique used by perpetrators to prevent the protected person from reporting breaches of an order. In this way, the potential of a criminal charge acts as a deterrent for victim-survivors reporting breaches for fear of criminal

¹ *Domestic and Family Violence Protection Act 2012* (QLD) s 180.

² *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(7).

³ *Family Violence Protection Act 2008* (Vic) s 125

liability. The VOCC considers that the express prohibition of liability would remove this barrier, ensuring that more victim-survivors receive assistance, while also raising the accountability of respondents through increased reporting of order breaches.

Allowing the court to hear and determine temporary amendments to interim and final family violence orders, and if required, on an *ex parte* basis where ‘special or exceptional circumstances’ apply

23. The VOCC supports the creation of an unambiguous authority and process for the Court to make urgent temporary amendments to an order occurring *ex parte* where special or exceptional circumstances apply. The VOCC understands that human rights law and procedural fairness generally expect that the parties may be present to respond to allegations and factual assertions in proceedings that would affect their rights and obligations. Accordingly, an *ex parte* hearing curbs the opportunity for the respondent to present a case on the same terms as the applicant and hinders their equality of arms in contesting allegations that may impact their human rights.
24. The VOCC considers that there are, however, adequate safeguards in place to ensure that the right to fair trial is not limited by the proposed facility for *ex parte* amendments. These safeguards include the requirement of personal service of the amended protection order upon the other party, the setting down of the matter for a return date as soon as practicable and the fact that the provisional amendment will not be enforceable until it is personally served on the respondent.
25. The VOCC considers that the amendment to allow temporary amendments to family violence orders to be heard on an *ex parte* basis will improve the immediate safety of a victim-survivor, particularly in cases where there is a high risk of violence, coercive control or systems abuse by the respondent. This may occur, for example, where an applicant finds a respondent’s behaviour is exacerbated after an order has been served on the respondent and another immediate condition is needed to ensure their safety. Accordingly, the VOCC considers that the ability of a protected person to apply for an amendment *ex parte* ensures that the court can hastily and appropriately respond to special or exceptional circumstances such as escalating domestic and family violence and afford adequate protection to protected persons at risk of further domestic and family violence.

Providing that a contravention of a protection order as an offence triggers conversion of an interim family violence order into a special interim family violence order

26. Currently, the *Family Violence Act 2016* excludes a contravention of a family violence order from being considered a “related charge” for the purpose of converting an interim protection order into a special interim protection order.
27. The Bill provides that interim protection orders can remain in force while there is a related charge outstanding in relation to the respondent and the offence is against the applicant, including a charge that is for a contravention of the interim order.

28. The VOCC supports the proposed amendment on the basis that it provides protection for an applicant while related charges are being finalised. In circumstances where there is an alleged breach of a protection order, the VOCC considers that the amendment will allow a police investigation into related charges to take its course while affording ongoing protection to the applicant.