

Women's Legal Centre ACT

Submission in response to the *Sexual and Violent Offences Legislation Amendment Bill 2008*

-Creating balance for victims of sexual and violent crime –

30/07/08

General Comments

The Women's Legal Centre is pleased to have the opportunity to comment on the *Sexual and Violent Offences Legislation Amendment Bill 2008*. The amendments have the potential to impact a great many of our clients and we are pleased to see a movement toward further recognising the trauma experienced by victims, many of whom are women and children, of sexual and violent crime. The amendments, in our view, go further than simply recognising the experience of victims of sexual and violent crime, they are a genuine attempt to minimise the harm suffered by these victims when they engage with the criminal justice system. The Women's Legal Centre recognises that these measures must be balanced against the rights and interests of the accused to ensure that the integrity of the criminal justice system is maintained. In our view, the Bill finds that balance.

We believe that there is a keen awareness, especially amongst women, of the types of negative treatment that victims of sexual and violent offences can experience at the hands of the criminal justice system. This awareness is especially heightened in relation to sexual assault and in our view is a contributing factor to the notorious under-reporting of that type of crime.

The proposed legislation goes some way to alleviating many of the concerns victims of sexual and violent crime and their families might have in relation to their role in the criminal justice system. In our experience, many victims of these types of crimes feel unable to cooperate or participate fully in the prosecution of their alleged offender because of how the system currently dictates their role. It is not difficult to imagine the stress and anxiety that goes with being a witness in a criminal prosecution. This is especially so in situations where witnesses are called upon to recount intensely personal information.

For some time the ACT has been behind the initiatives of other jurisdictions in this area. Publication of the SARP report in 2005 provided an excellent opportunity for the ACT Government to seize the momentum against the background of general support for many of the recommendations contained in that report at the time, and catch up with other initiatives. In our view the full, safe and genuine participation of victims of crime in the criminal justice system is equally as important as safeguarding the rights of the accused. An improved approach, whereby victims of sexual and violent offences are more sensitively considered in the prosecution process, will not only increase the confidence the community has in the criminal justice system's ability to effectively deal with these types of offences, but hopefully result in more victims feeling able to come forward and report sexual and violent crimes perpetrated against them. We believe that the public has a very strong interest in perpetrators of crime being properly convicted. A victim or witness to crime being able to give their evidence to the best of their ability is a significant factor in holding perpetrators of crime to legal

account. These measures will enable victims of and witnesses to sexual and violent crime to better provide their evidence to the court.

The proposed measures have been desperately needed to restore balance to the criminal justice system, especially in relation to these particularly traumatised and vulnerable victims. This restoration of balance sees both the accuser and accused on a more equal footing in terms of the prosecution process, whereas in the past the victims, for a whole variety of reasons, were also effectively 'on trial'. This movement toward an equal footing, in our view, allows the prosecution to focus on finding the truth of the matter rather than unfairly scrutinising the victim. It will be especially beneficial in situations where victims may have difficulty effectively communicating their evidence while facing their alleged perpetrator in the confines of the courtroom.

The Women's Legal Centre anticipates that there will undoubtedly be some resistance to the proposed measures from predictable circles, perhaps most especially in relation to the extension of some of the measures to victims of violent offences. We will no doubt see some of this resistance from criminal defence practitioners who would wish to remain in the dark ages where, typically in prosecutions involving sexual or violent crime the victim, their behaviour and their prior statements was the smoking gun in the defence arsenal. We see this movement toward restoring balance as recognition that these types of practices are no longer acceptable in a modern criminal justice system. Some might say that defence practitioners may have to begin 'playing the ball not the man' and might have to develop a new arsenal that does not, for instance, rest on tying a victim in knots over the numerous prior versions of events he or she has had to give in the lead up to a trial. We see this as the standard our community expects of their modern day justice system.

This attempt to properly restore balance will hopefully result in prosecutions where those actually guilty of a sexual or violent crime are successfully prosecuted. Low conviction rates for sexual assault offences illustrate the particular difficulty associated with prosecuting these types of offences. Restoring the balance will hopefully go some way toward overcoming the hurdles associated with these types of prosecutions, and with increased prosecutorial success should encourage more victims to come forward and report.

We struggle to understand any resistance to measures that will ultimately see the criminal justice system operate in a fairer and more balanced fashion, recognising that victims of sexual and violent crime require particularly sensitive treatment. This treatment should be so regardless of whether the accused is in fact guilty of the offence. This treatment should be so on the basis that victims of sexual and violent crime, by the very nature of those crimes, suffer harm and trauma, and the criminal justice system should not further contribute to that. A fairer, more balanced criminal justice system benefits us all and is a reflection of the community we wish to live in and the way we would like people who have suffered trauma or harm to be treated.

These measures should not be dressed up as an attempt to ambush or trick an accused. To do so would be to manipulate the heart of the proposals. A person accused of a sexual or violent crime will still be able to comprehensively test the evidence against them and make sure the prosecution appropriately discharges their burden of proof. An accused will still be able to instruct their counsel as to the truth or otherwise of the allegations against them. An accused will still be able to represent themselves should they wish to do so. An accused will still have a right to a fair trial and a

right to be judged by 12 members of the community should they elect to take that path. We do not see the proposals as in any way eroding the fundamental principles that underpin the position of a person accused of a sexual or violent crime.

Victims of Violent Crime

There should be no argument with the proposition that victims of violent crime can be just as traumatised and reluctant to participate in the criminal justice system as victims of sexual assault. If one agrees with the proposition that victims of crimes against the person may struggle to give their evidence to the best of their ability if they have to face their alleged attacker to do so, or be subject to cross examination by them personally, or have to give their evidence over and over again, then whether the crime is sexual or violent in nature should not really matter. A traumatised victim is a traumatised victim. Part of the integrity of the justice system rests on witnesses to and victims of crime telling the truth to the best of their ability. The reality is that some categories of victim and witness find this almost impossible to do when required to do so on repeated occasions, or when having to face the accused, or when significant time has passed since the incident, or in a situation where all three of these factors are at play.

Children and mentally impaired witnesses

The Women's Legal Centre is strongly supportive of the proposals aimed at children and mentally impaired people. It seems only proper that the law would seek to protect those members of our community who might be especially vulnerable in the prosecution process. This seems particularly important when you consider that the current situation can require a child or mentally impaired witness to recount their evidence on numerous occasions, sometimes a significant period of time after an allegation is originally made. If a child or mentally impaired adult is able to give their evidence and be cross examined in a way that avoids long court delays which may erode the quality of their evidence, this can only strengthen the integrity of the system. This also guards against an accused who might wish to expose the vulnerabilities of these particular witnesses by deliberately delaying court proceedings to their own strategic advantage.

The pre-recording of evidence might also guard against those accused who might still have access to or contact with witnesses, whittling away the substance of their evidence through harassment and intimidation. Investing the court with the discretion to look at the needs of witnesses on a case by case basis in our view ensures that only in situations where it is appropriate, where both the prosecution and the defence have the opportunity to make submissions, will the court allow other witnesses to give their evidence at a pre-trial hearing.

Specific comments

The extension to 'violent offences'

We expect that the extension of the measures to 'violent offences' will be somewhat controversial. Whilst we see this extension as a natural recognition of the harm and trauma suffered by victims of violent offences, we anticipate that some might argue these measures should not be available in matters involving, for instance, a minor common assault (section 26A of the *ACT Crimes Act*). We can imagine prosecutions of this nature where the measures proposed may not be necessary. We

would, however, argue strongly that these measures should always be applied in family violence prosecutions, regardless of the whether the charges allege a minor common assault or an aggravated sexual offence (we note in this regard that individual family violence prosecutions can often include a wide range of charges where one act might be categorised as a common assault in the context of an unlawful confinement or act of indecency). Applying these measures to all offences currently categorised as ‘family violence’ under ACT legislation would recognise the power and control dynamics that characterise a domestic relationship where violence is a feature. This of course would safeguard the men, women and children who are victims of family violence in an equal way, regardless of the nature of the charges about which they are giving evidence.

Commonwealth Offences

The Women’s Legal Centre would like to see the amendments drafted in such a way that the definitions of sexual and violent crimes include reference to Commonwealth offences. The human victims of offences against Commonwealth law are becoming greater in number with the introduction of a raft of provisions designed to deal with trans-national crime such as child sex tourism (see Pt 11A of the Commonwealth *Crimes Act 1914*) and the on-line sexual exploitation of children (division 473 of the Commonwealth *Criminal Code*). There are also Commonwealth people-trafficking offences (division 270 and 271 of the Commonwealth *Criminal Code*). Whilst we accept to date the ACT may not have seen a significant number of these types of prosecutions, there may come a time when this is not the case. There may also be the absurd situation where an accused is charged with a combination of ACT and Commonwealth offences that on the one hand see them captured by these proposals and on the other hand not entitled to the protections they offer. There might also be a trial situation with numerous accused with various witnesses who have different protections afforded to them with the real result being that vulnerable witnesses may be left out in the cold because of the Commonwealth status of some or all of the offences alleged to have been perpetrated against them. We can’t imagine that such a result would be in the interests of justice. It would be an injustice for a victim of Commonwealth offending not to have access to the provisions as proposed.

Section 38C (1)

The Centre would like to see this provision extended to allow a trial judge or presiding magistrate to capture any other witness not contemplated in section 38C(1) (a-d) if the interests of justice require it. The Centre can readily imagine situations where a person may be required to give evidence against an accused where personal cross examination by them will drastically affect the quality of evidence they are able to give. For example, imagine a case in which the former partner of an accused is giving evidence for the Crown in a child sexual assault matter where the victim is the child of that former partner and the accused, and where the accused had been a long-term perpetrator of violence against the former partner. The personal cross examination of the former partner by the self represented accused is not, in our view, what is intended by the narrow definition currently articulated in the proposed measures. In our example, the former partner is exactly the sort of witness who should be afforded the protection provided to vulnerable witnesses in section 38C. Investing the trial judge or presiding magistrate with the power to extend the category of witness in

situations that require it is a sensible way to cater to situations where other types of victims should not be personally cross examined by an accused.

Section 38C (4)

This section is clearly designed to ensure the accused understands the position they find themselves in if they refuse to cooperate with their legal representative or refuse legal representation. Section 38(4) (b) does not go far enough in terms of explicitly outlining the effect of a failure to cross examine a witness. Of course it is true to say that the accused cannot attempt to adduce evidence from another witness about a fact in issue that has not been put in cross examination to the witness whose evidence it might contradict. There are other effects though that should be included in the consequences of failing to cross examine. For example, an accused is limited, by a failure to cross examine, in what can be put to a jury or presiding magistrate in final or closing submissions. The evidence an accused might themselves give may also be affected by a failure to cross examine a witness. As it is currently drafted, we say, with respect, that these consequences are not immediately clear and could be more specifically articulated.

Section 40F

As proposed, this section dictates that an audiovisual recording 'may' be admitted as evidence. In our submission this section should in fact dictate that the audiovisual recording 'must' be admitted as the evidence in chief of the witness, unless the interests of justice require its exclusion. If the intention behind the proposed measures is to genuinely impact the way that victims and witness of these types of offences are dealt with by the court, we can see no reason for the use of these recordings to be discretionary. This discretionary approach, in our view, allows those who might be reluctant to implement these measures to shy away from their use.

Other vulnerable witnesses

In line with our discussion above in relation to section 38C(1), the Centre is of the view that the raft of proposed measures should be extended to include a provision that invests a trial judge or presiding magistrate with the ability to extend the measures to other witnesses who might be vulnerable and are not currently captured in the definitions of persons to whom the measures apply, if the interests of justice demand it. These witnesses might include:

- (i) witnesses from culturally or linguistically diverse backgrounds;
- (ii) witnesses who suffer ill health such that they may not be considered to suffer from a 'mental or physical disability' but are nonetheless unable to give evidence to the best of their ability due to their health status; or
- (iii) witnesses who may have suffered trauma as a victim of, or witness to, crime in the past.

These witnesses may only require one of the measures afforded to them, such as bringing along a support person, giving their evidence from a remote location, or electing not to be personally cross examined. If we are leaving the determination about whether a witness has a 'mental or physical disability' that affects their ability to give evidence to the court, then in our view we ought also

invest the court with the power to determine when, in the interests of justice, the measures should be extended to other witnesses.

Courtroom facilities

The Women's Legal Centre is acutely aware that the current facilities available in the ACT criminal justice system for a witness to give their evidence from a remote location are outdated and unreliable. On many occasions we are aware that this has resulted in prescribed witnesses being in the witness box for extended periods of time because of sound or other logistical difficulties. In fact only very recently, a complainant in a sexual assault case had her evidence postponed entirely because the facilities were not operating. If the ACT Government is seriously committed to the idea of improving the experience of victims of sexual and violent offences who attend court to give evidence then in addition to the proposed measures, a commitment to finance a significant upgrade of the current facilities is additionally required. Without the upgrade to facilities, the proposed measures will not be anywhere near as effective as they could be.

Summary

The Women's Legal Centre thanks the Government for the opportunity to comment on this important bill. We believe the new law will have an extremely significant impact on a great number of our clients, many of whom are the most vulnerable participants in the criminal justice system. If you would like to discuss any aspect of this submission, please contact the Women's Legal Centre on (02) 6257 4377

We look forward to the Government's response and would be glad to hear of any further opportunities for further consultation on this issue.

Kind regards,

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Women's Legal Centre (ACT & Region)