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

SEXUAL ASSAULT REFORM LEGISLATION AMENDMENT BILL 2022

REVISED EXPLANATORY STATEMENT

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SEXUAL ASSAULT REFORM LEGISLATION AMENDMENT BILL 2022

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SEXUAL ASSAULT REFORM LEGISLATION AMENDMENT BILL 2022

The Sexual Assault Reform Legislation Amendment Bill 2022 (the Bill) is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

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. The Bill implements some recommendations from the *Listen. Take Action to Prevent, Believe and Heal* Report (the SAPR Report) which was published in December 2021 and corrects two unintended consequences arising from the *Crimes (Consent) Amendment Act 2022*.

The SAPR Report was prepared by the independent Sexual Assault Prevention and Response Program (SAPR) Steering Committee. The SAPR Report makes 24 wide-ranging recommendations including two overarching recommendations and 18 law reform proposals to improve how the ACT prevents and responds to sexual violence in the community as part of a longer-term strategy. This Bill is the first tranche of a phased law reform program and includes amendments to implement five law reform proposals as outlined in Recommendation 23 of the SAPR Report.

The Bill will:

- a) explicitly provide that evidence of prior family violence between parties may be admissible in sexual offence proceedings (recommendation 23 (e) of the SAPR Report);
- b) provide that the presumption of bail does not apply to offences in sections 55 (2), 55A and 56 of the *Crimes Act 1900* (recommendation 23 (i) of the SAPR Report);
- 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 (recommendation 23 (k) of the SAPR Report);
- 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 (recommendation 23 (l) of the SAPR Report);
- e) allow special interim Personal Protection Orders and Workplace Protection Orders which will operate for longer than 12 months where there are ongoing related criminal proceedings (recommendation 23 (n) of the SAPR Report); and

- f) amend the definition of “sexual act” in the *Crimes Act 1900* to address unintended consequences.

The Bill also contains 2 schedules consisting of consequential and technical amendments and has been structured to assist the transparency of the amendments made by it.

The use of the terms “victim” and “victim-survivor” is consistent with the aim of the Bill. The use of these terms within the Bill and the Explanatory Statement does not displace the presumption of innocence or reverse the onus of proof.

Use of the terms “victim” and “victim-survivor” maintains consistency with the language of the SARP Report. This terminology also aligns with the Charter of Rights for Victims of Crime in part 3A of the *Victims of Crime Act 1994*. As per equivalent mechanisms in all Australian states and territories, the ACT Charter conceptualises individuals as victims of crime – and confer rights to individuals on that basis – at each stage of their engagement with justice agencies, including prior to the laying of charges and/or the commencement of criminal proceedings.

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 cannot or choose not to access a formal justice pathway, including individuals who express fear that accessing the criminal justice system will increase risks to their personal safety. As stated in the SAPR Report, many victim survivors of sexual violence do not report to police or do not pursue their matter through the legal process, citing harmful and hurtful experiences of delay, failures in communication, and being disbelieved or disrespected.¹

While the technical term to refer to a person bringing a criminal complaint may be “complainant”, the Bill’s use of the terms “victim” and “victim-survivor” are considered more inclusive, respectful and trauma informed. They do not confer or imply specific legal outcomes in a criminal justice context.

CONSULTATION ON THE PROPOSED APPROACH

Significant consultation with key sector stakeholders within the ACT and members of our community was undertaken by the SAPR Steering Committee as part of developing the SAPR Report.

The amendments in the Bill were developed in consultation with key justice stakeholders, and amendments were circulated to the following stakeholders:

- A Gender Agenda;

¹ *Listen. Take Action to Prevent, Believe and Heal* Report, p 4.

- Aboriginal Legal Service;
- Aboriginal and Torres Strait Islander Elected Body;
- ACT Bar Association;
- ACTCOSS;
- ACT Corrective Services;
- ACT Courts and Tribunal;
- ACT Director of Public Prosecutions;
- ACT Human Rights Commission;
- ACT Law Society;
- ACT Policing;
- Advocacy for Inclusion;
- Canberra Community Law;
- Canberra Health Services;
- Chief Minister, Treasury and Economic Development Directorate (CMTEDD);
- Canberra Rape Crisis Centre;
- Domestic Violence Prevention Council;
- Justice Reform Branch (JACS);
- Human Rights and Social Policy Team (JACS);
- Legal Aid ACT;
- Meridian;
- Office for Aboriginal and Torres Strait Islander Affairs;
- Office for the Coordinator-General for Family Safety (CSD);
- Office for Disability;
- Office for Multicultural Affairs;
- Women's Legal Centre;
- Women with Disabilities ACT; and

- YWCA Canberra.

SUMMARY OF AMENDMENTS

Evidence of prior family violence

Recommendation 23 (e) of the SAPR Report recommends reform to make clear that evidence of prior family violence between parties is relevant and admissible in sexual assault cases, provided this evidence is not unfairly prejudicial to the defendant.

The Bill provides that evidence of family violence would encompass current and historical family violence involving intimate/domestic relationships and children who are exposed to domestic and family violence as a ‘family member’, drawing on the definition of family member in section 9 of the *Family Violence Act 2016*.

The Bill legislates an existing common law position and clarifies the application of section 56 of the *Evidence Act 2011*, to encourage normative and practical effects for how police investigate matters and how prosecutors adduce evidence. The Bill provides that evidence of prior uncharged acts of family violence may be relevant and admissible as context evidence. The purpose of context evidence 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: *RG v R* [2010] NSWCCA 173. Evidence is not admissible simply because it proves the relationship between the complainant and the accused but must be capable of providing context to the allegations, as it otherwise is irrelevant or proves a tendency: *R v ATM* [2000] NSWCCA 475.

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 amendment should be read in conjunction with section 137 of the *Evidence Act 2011* to provide a safeguard against the adducing of prejudicial material. It is not intended that section 137 of the *Evidence Act 2011* be rendered negatory by the introduction of this amendment.

Neutral bail presumption for certain sex offences

Recommendation 23 (i) of the SAPR Report recommends that sections 55 (2), 55A, 56 and 66B of the *Crimes Act 1900* be amended to provide that the presumption of bail does not apply.

The Bill amends schedule 1 of the *Bail Act 1992* to provide that the presumption of bail does not apply to the offences in sections 55 (2), 55A and 56 of the *Crimes Act 1900*. 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 Bill creates a neutral presumption of bail for the three offences which are similar in nature to other types of sexual offences currently listed in schedule 1 of the *Bail Act 1992* such as sexual intercourse without consent and sexual intercourse with a child under 10 (sections 54 and 55(1) of the *Crimes Act 1900* respectively).

The amendment does not create a presumption against bail and does not subject the decision-maker to be satisfied of the existence of special or exceptional circumstances favouring the grant of bail to a person. The effect of the amendment is that Division 2.2 of the *Bail Act 1992* (presumption for bail) does not apply, however, the decision-maker will continue to retain discretion in assessing a person's suitability for bail against the legislative criteria under Part 4 of the *Bail Act 1992*.

Self-induced intoxication and the accused person's knowledge, recklessness or reasonable belief as to consent

Recommendation 23 (l) of the SAPR Report recommends legislative reform to clarify that in a sexual assault trial, the defendant's level of intoxication is irrelevant to any assessment made by the factfinder as to the defendant's recklessness regarding the element of consent.

The *Crimes Act 1900* provides that, for the offences of sexual intercourse without consent and act of indecency without consent, it is necessary for the prosecution to establish that the defendant either had knowledge that the other person did not consent or was reckless as to whether the other person consented: sections 54 (3), and 60 (3) of the *Crimes Act 1900*.

The *Crimes (Consent) Amendment Act 2022* introduced a third alternative fault element for consent. Section 67 (4) of the *Crimes Act 1900* now states that 'an accused person is taken to know that another person does not consent to an act mentioned in a sexual offence consent provision if any belief that the accused person has, or may have, is not reasonable in the circumstances.'

The Bill clarifies that a person who is intoxicated through self-induced intoxication is to be treated as if they were sober by the trier of fact in determining the fault element of a sexual offence consent provision i.e. whether the accused person had knowledge, was reckless or had a reasonable belief as to consent to a sexual act.

Notably, where a person is intoxicated through self-induced intoxication, that state of intoxication is to be considered in a broader sense for context, and the behaviour of the accused is contrasted with what the accused's mind would have been had they been sober.

All the fault elements will still need to be made out for a person to be convicted and the amendment does not create a presumption that the accused was guilty or culpable just because of self-induced intoxication. This means that if A was so drunk as to be reckless as to whether B was consenting (or so drunk that A formed an

unreasonable belief that B was consenting) it cannot be used as an excuse by A. The trier of fact will consider whether a sober person in the same circumstances would also have been reckless or had such a belief. If the sober person would have realised that B was not consenting, then the fault element would be satisfied for the purpose of possibly finding A guilty. If the trier of fact thinks that a sober person in A's position would still not have realised that B was not consenting due to other relevant circumstances, then the fault element will not be made out.

The amendment is consistent and goes beyond the provisions relating to intoxication in the *Criminal Code 2002*. While section 33 (1) of the *Criminal Code 2002* provides that intoxication may be considered if any part of a defence is based on actual knowledge or belief, new section 67A of the *Crimes Act 1900* provides that self-induced intoxication must not be considered in deciding a person's (the accused person) knowledge or belief, or recklessness, about whether another person consented to an act.

Further section 33 (3) of the *Criminal Code 2002* provides that if any part of a defence is based on reasonable belief, in deciding whether the reasonable belief exists, regard must be had to the standard of a reasonable person who is not intoxicated. This is consistent with new section 67A of the *Crimes Act 1900*.

The amendment models section 61HK (5) (b) of the *Crimes Act 1900* (NSW). Current rules for consideration of involuntary intoxication in establishing an element of a sexual offence are not affected by the amendment. The amendment does not impact on the availability of mental impairment as a defence.

Special interim orders for Personal Protection Orders and Workplace Protection Orders

Recommendation 23 (n) of the SAPR Report recommends amending the *Personal Violence Act 2016* to include the provision of special interim orders for Personal Protection Orders (PPOs) and Workplace Protection Orders (WPOs) to ensure consistency with the provisions in the *Family Violence Act 2016* for Family Violence Orders (FVOs).

The Bill introduces new special interim order schemes in the ACT under the *Personal Violence Act 2016* which mirror the *Family Violence Act 2016* to ensure that interim PPOs and WPOs can remain in force as long as there is a related charge outstanding in relation to the respondent and the offence is against the applicant. The definition of a related charge similarly mirrors that in the relevant provision in *Family Violence Act 2016*. This is because in most conceivable circumstances, a charge against a person for an offence would be relevant to an interim or final order application if the person charged is the respondent to the application and the offence is against the applicant (apart from a contravention of a protection order).

Jury directions about mistaken belief as to consent following amendments arising from the Crimes (Consent) Amendment Act 2022

Recommendation 23 (k) of the SAPR Report recommends amending section 80D of the *Evidence (Miscellaneous Provisions) Act 1991* to ensure that in a sexual offence proceeding, the jury must consider whether the defendant's mistaken belief as to consent was reasonable in the circumstances.

The Bill omits section 80D of the *Evidence (Miscellaneous Provisions) Act 1991* noting it is at odds with the recent amendment to section 67 (4) of the *Crimes Act 1900*, made by the *Crimes (Consent) Amendment Act 2022*.

Section 80D of the *Evidence (Miscellaneous Provisions) Act 1991* provides that in a sexual offence proceeding, the judge must, in a relevant case, direct the jury that, in deciding whether the accused person was under a mistaken belief that a person consented to a sexual act, the jury *may* consider whether the belief was reasonable in the circumstances. This is at odds with section 67 (4) of the *Crimes Act 1900* which provides that the jury *must* (rather than *may*) consider (as part of considering the fault element of consent) whether any belief the accused person has, or may have, that the other person consents to the act is not reasonable in the circumstances.

Redefining 'sexual act' following amendments in the Crimes (Consent) Amendment Act 2022

Section 50C of the *Crimes Act 1900* was introduced by the *Crimes (Consent) Amendment Act 2022*. Section 50C currently provides that a 'sexual act' means sexual intercourse; sexual touching; and any other act in circumstances where a reasonable person would consider the act to be sexual. 'Sexual act' does not include an act carried out for a proper medical purpose or otherwise authorised by law.

While proposed section 50C defines 'sexual touching', reliance on this term and definition may create doubt as to whether 'sexual touching' is intended to include an 'act of indecency' (which relies on a common law definition). There is also a risk of uncertainty as to whether the definition of 'sexual touching' in section 50C (3) is intended to legislatively capture the definition of an 'act of indecency'. This is of particular concern as an act of indecency without consent (section 60) and the defence to an act of indecency with a young person (section 61 (5) (b)) are both considered 'sexual offence consent provisions' in section 67 (6) of the *Crimes Act 1900*.

The Bill amends the *Crimes Act 1900* to substitute 'sexual touching' with 'an act of indecency' in section 50C. Prescribing 'an act of indecency' as an example of a 'sexual act' would clarify that relevant sexual offence consent provisions including those relating to an act of indecency in sections 60 and 61 (5) (b) of the *Crimes Act 1900* must be considered in accordance with section 67 which prescribes the

additional fault element of consent: reasonable belief as to consent. This gives effect to the intent of the recent amendments made by the *Crimes (Consent) Amendment Act 2022* which introduce the principle that consent to a sexual act is informed agreement that must be (a) freely and voluntarily given; and (b) communicated by saying or doing something.

CONSISTENCY WITH HUMAN RIGHTS

During the development of this Bill due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (the HR Act).

Rights Promoted

Sexual violence is a serious and significant issue across the ACT and Australia, with devastating impacts on the victims, their families and communities. The SAPR Report revealed that many victim-survivors feel as though the ACT system has failed them. The recommendations in the Report focus on how the ACT can better respond to victims of sexual assault and sexual abuse, to support better outcomes and promote cultural and society change of views on sexual violence.

Broadly, the Bill engages and promotes the following HR Act rights:

- Section 8 – Right to equality and non-discrimination;
- Section 9 – Right to life;
- Section 11 – Protection of family and children; and
- Section 18 – Right to liberty and security of person.

The Bill introduces amendments that respond to changes in social and cultural norms about sexual violence and that reflect the severity of sexual violence offences and the harm caused to victim-survivors of sexual violence. The amendments introduce measures to support victim-survivors and the general community to feel safe about their participation, and be safe when participating, in a more trauma-informed criminal justice system.

The Bill clarifies the common law position of context evidence in legislation, introduces consistency across ACT legislation and makes amendments to further clarify expectations of consensual sexual activity following recent amendments to ACT consent law. It seeks to promote consistent and clear treatment under the law to improve victim-survivors' engagement with the administration of justice and access to justice.

The right to equality and non-discrimination (section 8 in the HR Act) provides that everyone is entitled to enjoy their rights without discrimination of any kind, and that

everyone is equal before the law and entitled to the equal protection of the law without discrimination. Given women are the main victims of sexual assault, the Bill promotes the right to equality because it seeks to ensure more women will be able to enjoy their other human rights without discrimination or distinction.

The right to life (section 9 of the HR Act) includes a positive obligation on government to take reasonable actions to safeguard life and protect individuals to address specific threats or pre-existing patterns of violence that may give rise to direct threats to life, such as by taking steps to reduce gender-based, domestic and family violence. This right is promoted by a majority of the amendments in the Bill. The Bill promotes the right to life by improving how victim-survivors of sexual violence engage with the administration of justice and access justice. Additionally, the Bill promotes the right to life by keeping victim-survivors physically safe, with the amendment to remove bail presumptions for some sexual offences.

The protection of family and children (section 11 of the HR Act) recognises the importance of the family unit in making up society and the benefits that come from preserving family relations. It also recognises that children have particular vulnerabilities and should be given special protection in addition to other rights. This right is promoted through the amendments relating to the admissibility of evidence of prior family violence in sexual offence proceedings and creating a special interim order scheme for personal protection orders. The Bill protects family and children by making it clear in law that contextual domestic and family violence evidence is relevant in criminal proceedings. The Bill recognises the concept of family as one beyond a traditional nuclear family and aims to keep that family unit safe during sexual offence proceedings, until related proceedings are concluded and alleged offenders are convicted or acquitted.

The right to security of person (section 18 of the HR Act) protects individuals against intentional bodily or mental injury. It imposes a positive obligation on government to take appropriate measures to protect individuals from foreseeable threats to bodily or mental integrity. This includes a requirement to respond appropriately to patterns of violence against categories of victims such as those of sexual violence. The Bill promotes this right by changing community standards to ensure intoxication is never an excuse for sexual violence, creating consistency in bail applications for serious sexual offences, and creating special interim order schemes in the *Personal Violence Act 2016* for personal protection orders and workplace protection orders.

Rights Limited

Broadly, the Bill engages and limits the following HR Act rights:

- Section 13 – Freedom of movement;
- Section 18 - Right to liberty;

- Section 21 – Right to a fair hearing;
- Section 22 – Rights in criminal proceedings; and
- Section 27B – Rights to work.

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of protecting victims of sexual assaults (particularly those who are of domestic and family violence) and the community as a whole.

Detailed human rights discussion

Evidence (Miscellaneous Provisions) Act 1991 - Evidence of family violence may be relevant

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The amendment makes clear that evidence of prior family violence between parties (which includes domestic violence) may be relevant and admissible in sexual assault cases, provided this evidence is not unfairly prejudicial to the defendant. The amendment reiterates the common law position and does not presume that evidence of family violence will always be relevant and admissible.

Section 21 of the HR Act provides that the right to fair hearing is concerned with procedural fairness and encompasses notions of equality in proceedings. The amendment engages and may limit the right to a fair hearing (section 21 of the HR Act). While the amendment codifies common law, prior family and domestic violence that may be relevant and admissible have not always been adduced and the amendment may cause confusion in how such evidence may be relevant and admissible especially in relation to self-represented parties. This will require the court to exercise a positive responsibility to balance such disadvantage through judicial procedures such as directing the jury how much weight to give certain evidence, or explaining the steps in the proceedings to disadvantaged parties.

Section 22 of the HR Act provides that the everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. The right to a presumption of innocence includes that the accused has the 'benefit of the doubt', and that a person should not be punished again for offence for which a person has already been convicted. These rights may be limited by the Bill because

it could create a risk that a decision maker considers that a person is guilty of the present offence because their prior offences were admitted as evidence.

2. Legitimate purpose (s 28 (2) (b))

Evidence of prior family violence between the parties is important in sexual violence proceedings to improve victim-survivors' encounter with the criminal justice system and enforcement of their legal rights and protections.

The SAPR Report noted that 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.

Evidence of prior domestic and family violence between the parties is important in sexual assault trials. As noted in the SAPR Report, available research suggests a significant percentage of victim survivors of sexual assault also experience domestic and family violence. Specifically, ABS data reveals that, in 2020, 37 per cent of sexual assaults reported nationally were related to domestic and family violence, while the figure in the ACT was 27 per cent.

Nevertheless, the SAPR Report noted that while the common law allows parties to apply to adduce prior domestic and family violence evidence where it is relevant and not unfairly prejudicial, this is not widely or consistently understood or practiced.

The amendment can assist the factfinder to better evaluate the true nature of relationships between the parties and why the victim survivor reacted the way as they did, which is vital to counter any misunderstandings of why someone acted in a particular way in response to sexual violence. The amendment seeks to ensure that the common law position is more widely and consistently understood and practiced. This will also encourage normative and practical effects for how police investigate matters and support prosecutors to adduce such evidence in relevant proceedings.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation on the right to a fair hearing and the right to be presumed innocent until proved guilty and the aim of improving a victim-survivors experience with the criminal justice system and the enforcement of their rights and protections under the law.

The amendment would assist in improving criminal justice outcomes for victim-survivors. Clarifying in legislation that prior family violence evidence may be relevant in providing context and can be presented in a proceeding will facilitate the jury's understanding of a pattern of behaviour.

4. Proportionality (s 28 (2) (e))

The limitations on rights are proportionate to the aim of keeping vulnerable members of the community safe and are the least restrictive means possible in the circumstances.

The limitation on the right to be presumed innocent is proportionate because there are many rules of evidence and law that protect against presumptions of guilt including in relation to the admission of prior offences evidence. These protections are not affected by the Bill and effectively safeguard the right. Accordingly, no additional safeguards are required in the Bill.

The limitation on the right to fair hearing is proportionate as evidence of prior uncharged acts of family violence may already be used as context evidence in sexual assault criminal proceedings, provided the evidence is relevant, admissible and not unfairly prejudicial to the accused person.

The amendment does not presume that evidence of family violence will always be relevant and admissible especially in circumstances where the evidence simply proves the relationship between the complainant and the accused. Rather, the purpose of allowing context evidence is to place the offence in the context of the complainant's overall allegations about the accused.

The admissibility of this evidence is still subject to the exclusionary rules in Chapter 3 of the *Evidence Act 2011* to ensure prior family violence evidence cannot be used for an excluded purpose such as to prove tendency or coincidence, which safeguards the arbitrary limit of human rights like the presumption of innocence.

The court also has a general discretion to refuse to admit or to limit the use of evidence if its probative value is substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party. This prevents the section from being arbitrarily applied.

Presumption for bail does not apply in certain sexual offences

The Bill amends the *Bail Act 1992* to provide that a presumption of bail does not apply to the following offences in the *Crimes Act 1900*:

- 55 (2) sexual intercourse with young person under 16 years old
- 55A (1) sexual intercourse with young person under special care
- 56 (1) persistent sexual abuse of child or young person under special care

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The amendment creates a neutral presumption for bail in relation to three additional sexual offences in the *Crimes Act 1900*.

The amendment does not create a presumption against bail and does not subject the decision-maker to be satisfied of the existence of special or exceptional circumstances favouring the grant of bail to a person. The effect of the amendment is that Division 2.2 of the *Bail Act 1992* (presumption for bail) does not apply, however, the decision-maker will continue to retain discretion in assessing a person's suitability for bail against the legislative criteria under Part 4 of the *Bail Act 1992*.

Nevertheless, it is recognised that creating a neutral presumption for bail may result in a greater likelihood in an accused person being refused bail.

Section 13 of the HRA provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. The amendment may also engage and limit the right to freedom of movement (section 13 of the HRA) as an increased likelihood of being refused bail would restrict an accused's freedom of movement as part of bail conditions imposed.

Section 18 of the HRA provides that no-one may be deprived of their liberty, except on grounds and in accordance with law. Subsection 5 provides that persons awaiting trial must not be detained in custody as a general rule. The amendment may limit the right to liberty (section 18) by increasing the likelihood of someone being held on remand in custody while awaiting a trial.

2. Legitimate purpose (s 28 (2) (b))

The amendment will not create a presumption against bail but rather will create a neutral presumption for bail. The amendment seeks to create legislative consistency in relation to a presumption of bail for serious sexual offences such as between sections 55 (2) and 55 (1) of the *Crimes Act 1900*. This will improve criminal justice outcomes for victim-survivors and the community, and to reflect that these three offences are on par with other serious sexual offences to change community attitudes.

The *Bail Act 1992* currently provides that there is a presumption for bail for a person charged with an offence contrary to section 55 (2) (Sexual intercourse with young person under the age of 16 years), section 55A (Sexual intercourse with young person under special care) or section 56 (Persistent sexual abuse of child or young person under special care) of the *Crimes Act 1900*. The maximum penalties of these offences range from 10 to 25 years imprisonment.

Offences under these sections are serious sexual offences that attract similar maximum penalties of imprisonment as the other sexual offences already having no presumption for bail in the *Bail Act 1992*. For example, section 51 (sexual assault in the first degree), section 52 (sexual assault in the second degree), section 54 (sexual intercourse without consent, and section 55 (1) (sexual intercourse with young person under 10 years old) all do not have a presumption for bail and attract maximum sentences ranging from 12 to 20 years imprisonment.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation on the right to freedom of movement (section 13 of the HRA) and right to liberty (section 18 of the HRA) and the objective of improving criminal justice outcomes for victim-survivors and the community.

The amendment will create a neutral presumption for bail for three offences and ensure that the decision-maker is considering these offences in a similar light as other serious sexual offences which also have a neutral presumption. This ensures victim-survivors of sexual offences of a similar nature are afforded procedural justice and improved criminal justice outcomes.

The amendment may act as a general deterrence by potential offenders or for the accused to commit further sexual offences, thus improving overall criminal justice outcomes for the community.

4. Proportionality (s 28 (2) (e))

The limitation of rights is proportionate to the aim of creating consistent approaches to bail applications and improving criminal justice outcomes for victim-survivors and the community, and there is no less restrictive means available to achieve the amendment's objective.

The amendment creates a neutral presumption of bail rather than a presumption against bail and does not seek to curb existing discretion held by the decision-maker in their bail determinations. The legislative criteria in the *Bail Act 1992* relating to the granting of bail is not altered by the amendment. The amendment does not impose any limitations on an accused's entitlement to bail in accordance with Division 2.2. including the need to be satisfied of the existence of special or exceptional circumstances favouring the grant of bail to a person.

Self-induced intoxication is not to be considered for determining the fault element of the sexual offence consent provision

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill clarifies that a person who is intoxicated through self-induction is treated as if they were sober by the trier of fact in determining the fault element of a sexual offence consent provision i.e. whether the accused person had knowledge, recklessness or a reasonable belief as to consent to a sexual act. All the fault elements will still need to be made out and the amendment does not create a presumption that the accused was guilty or culpable just because of self-induced intoxication.

The amendment does not change the evidential burden nor the type of evidence which can be adduced, but how that evidence of self-intoxication can be taken into

consideration. The amendment provides that where a person is intoxicated through self-induction, intoxication is considered in a broader sense for context, and the behaviour of the accused is contrasted with what the accused's mind would have been had they been sober.

Section 21 of the HR Act includes the right to equal access to a fair hearing. This means each party must have a reasonable opportunity to present their case i.e. the parties must have access to the same procedural rights, unless distinctions are based on law and can be justified on objective and reasonable grounds, and do not entail actual disadvantage or other unfairness to the parties. This right is engaged and potentially limited as self-induced intoxication cannot be considered in relation to the accused to make out a fault element but can be considered in relation to the complainant when determining whether or not they consent to a sexual act. The amendment requires the trier of fact to ignore the effects of self-induced intoxication and ask what would have been going on in the accused's mind had they not been intoxicated by alcohol and/or drugs as to their knowledge, recklessness or reasonable belief as to whether the victim consented to the sexual act. This is contrasted with the fact that the intoxication of the victim, whether self-induced or not, can be considered in relation to whether they consented to the sexual act.

2. Legitimate purpose (s 28 (2) (b))

The amendment seeks to foster greater protection for victim-survivors of sexual violence. The amendment also seeks to reflect and change the broader community's view about self-induced intoxication, to inform the ACT community that self-induced intoxication is not an excuse for sexual assault, and that it does not permit lowered standards of acceptable conduct.

The SAPR Report noted that legislative reform is required in the ACT to make clear that the defendant's level of intoxication cannot be considered by the jury in their consideration of the defendant's recklessness. Such amendment is also important for community education and messaging. Allowing the defendant's intoxication to be considered when assessing their recklessness regarding consent may promote a public message that intoxication justifies such recklessness. It is important that the law be extremely clear that this is not the case.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation on the right to a fair hearing (section 21 of the HRA) and the objective of fostering greater protection for victim-survivors of sexual violence and the broader community and changing the community's view about self-induced intoxication.

The legislative safeguard introduced by the Bill will foster changes in community standards surrounding self-induced intoxication in relation to consent and protect the community. As the SAPR Report noted, presently, taking intoxication into account in

the assessment of recklessness can be confusing for juries, given intoxication is not a defence and given they do not specifically know the effect of intoxication upon the defendant.

4. Proportionality (s 28 (2) (e))

The restriction on rights resulting from treating self-intoxication differently for an accused and a victim for sexual assault trials is proportionate to the need to foster greater protection for victim-survivors of sexual violence and to change the broader community's view about self-induced intoxication.

The amendment is proportionate because of the many other aspects of law and practice which safeguard the accused's right to a fair trial. Further, the amendment does not result in any unlawful discrimination, as self-intoxication is not a protected attribute. There is no limitation on the 'equality of arms' (the ability of both parties to access the same procedural rights) because the amendment does not unreasonably disadvantage the accused compared with the complainant in relation to procedural rights.

The amendment creates a hybrid subjective/objective test to address situations involving an intoxicated person who may believe, wrongly, that the other person was consenting due to their state of intoxication. The amendment seeks to protect against circumstances where an offender has a distorted or outdated view and belief about sexual consent and appropriate sexual conduct that is inconsistent with the standards expected by the community.

While this amendment adds nuance in the way in which fault elements for serious offences are to be proven, the amendment is crucial noting alcohol and/or drug use is a well-established risk factor for sexual assault.

Allow special interim Personal Protection Orders which will operate for longer than 12 months where there are ongoing related criminal proceedings

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill introduces new special interim order schemes in the ACT under the *Personal Violence Act 2016* which mirrors the *Family Violence Act 2016* to ensure that interim PPOs and WPOs can remain in force as long as there is a related charge outstanding in relation to the respondent and the offence is against the applicant.

Currently the *Personal Violence Act 2016* only authorises interim PPOs or WPOs that are in force for not more than 12 months (plus any extension for non-service on the respondent).

Section 13 of the HR Act states that everyone is entitled to move freely within the ACT, enter and leave the ACT, and has the freedom to choose their own residence.

The amendment may limit the right to freedom of movement as a special interim order is permitted to operate for longer than the general order application of 12 months and may protract the timeframes a respondent is prohibited from going within a certain distance of a specified place, or contacting or going near a specified person.

Section 27B of the HR Act provides that everyone has the right to work, including the right to choose their occupation or profession freely. The amendment may limit the right to work for a respondent if the special interim order prolongs the duration the respondent is prevented from attending their place of work.

Section 22(2)(c) of the HR Act provides that proceedings should take place without unreasonable delay to preserve the expectations associated with the administration of justice. The amendment may limit the rights in criminal proceedings especially the right to be tried without unreasonable delay. It does so by potentially protracting the time a respondent can be heard in relation to the application for a final protection order.

2. Legitimate purpose (s 28 (2) (b))

Special interim orders allow the police investigation into related charges to take its course and avoid unnecessary traumatising for the applicant should a hearing for a final WPO or PPO occur prior to the finalisation of proceedings for related charges. The amendment seeks to protect the applicant of personal and workplace protection orders and vulnerable members of the community from further violence, threats, intimidation, and abuse.

Interim orders for WPO and PPO matters are currently only 12 months in duration. Frequently, it will take more than 12 months for related criminal charges to be finalised. This presents challenges when there are related criminal matters which are unlikely to be finalised before the expiration of the order. For example, applicants or respondents may be required to give evidence under a civil rather than criminal standard. Further, civil matters may be adjourned rather than set for hearing pending the finalisation of the criminal matter, which may lead to the expiry of the order if the criminal matter is not resolved within 12 months.

The amendment avoids these challenges by replicating the scheme for special interim orders for FVOs in relation to WPOs and PPOs. The amendment provides where there are related criminal charges in an application for an WPO and PPO, special interim orders can be made to adjourn the finalisation of the civil matter until after criminal matter is finalised. Except under specific circumstances the court must not decide the application for the final order until all related charges are finalised.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation of rights and the objective of protecting applicants of PPO and WPO from further harm.

The amendment facilitates the physical protection and wellbeing of an applicant by allowing a PPO and WPO to be in force until the finalisation of related charges. Conducting a hearing for a final order prior to the conclusion of proceedings for related charges may also lead to unnecessary traumatisation for the applicant. It also helps stop the accused from contacting or interfering with the victim in the related sexual assault proceeding.

4. Proportionality (s 28 (2) (e))

The limitation on rights is proportionate to the aim of protecting vulnerable people including children who are often applicants of PPOs.

Currently, general interim protection orders can be granted to be in place for a maximum of 12 months to stop orders operating for longer than necessary. In practice, related charges and criminal proceedings can often take longer than 12 months to finalise. Should an interim protection order lapse before the criminal proceedings are finalised, the victim may not be adequately protected, even if there are bail conditions in place.

The Bill does not attempt to change the grounds for granting interim protection orders and all applications will be dealt with on its merits by application to the court. The respondent's rights are also unchanged, and the respondent can apply for the review of a protection order or to amend its conditions. The court would look at this application to amend or review on a case-by-case basis with any new evidence being put to the court for consideration. This prevents arbitrary extensions of interim orders.

The amendment also provides an allowance for when a final protection order can be made before all related charges are finalised, this includes the circumstances where either party is not present at a return of application, or by consent of the parties.

There are further advantages for both the respondent and applicant in having a special interim order where there are related charges. The amendment will allow any police investigation into related charges to take its course. In addition, a hearing for a final PPO or WPO prior to proceedings for related charges may lead to self-incrimination of the respondent and unnecessary traumatisation for the applicant. The amendment will also increase efficiency for the court and parties as the court finalising the related charges may also decide the application for the final protection orders.

Sexual Assault Reform Legislation Amendment Bill 2022

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *Sexual Assault Reform Legislation Amendment Act 2022*.

Clause 2 — Commencement

This clause provides that the Act will commence on the 7th day after its notification day.

Clause 3— Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *following legislation*:

- *Bail Act 1992*
- *Crimes Act 1900*
- *Evidence (Miscellaneous Provisions) Act 1991*
- *Family Violence Act 2016*
- *Personal Violence Act 2016*.

Part 2 – Bail Act 1992

Clause 4 — Offences against the Crimes Act 1990, Schedule 1, part 1.1, new items 7 to 9

This clause inserts three offences in Schedule 1 of the *Bail Act 1992*: sections 55 (2), 55A (1) and 56 (1) of the *Crimes Act 1900*.

Schedule 1 of the *Bail Act 1992* sets out a list of offences to which the presumption for bail does not apply (that is, there is a neutral presumption). The Bill amends the *Bail Act 1992* to provide that there is no presumption for bail in respect of offences against sections 55 (2), 55A (1) and 56 (1) of the *Crimes Act 1900*. This reflects the seriousness of the offences and promotes consistency with the approach to bail for other serious sexual offences such as sexual intercourse without consent and sexual intercourse with a child under 10 (sections 54 and 55(1) of the *Crimes Act 1900* respectively).

While the offences will attract a neutral presumption regarding bail, the decision-maker will continue to retain discretion in assessing a person's suitability for bail.

Part 3 – Crimes Act 1990

Clause 5 – Meaning of sexual act – pt 3, Section 50C (1)

The clause substitutes the definition of ‘sexual act’ so that a ‘sexual act’ means, (i) sexual intercourse; (ii) an act of indecency or (iii) any other act in circumstances where a reasonable person would consider the act to be sexual; but (b) does not include (i) an act carried out for a proper medical purpose; or (ii) otherwise authorised by law.

The amendment omits ‘sexual touching’ and substitutes it with ‘an act of indecency’. Prescribing ‘an act of indecency’ as an example of a ‘sexual act’ would clarify that relevant sexual offence consent provisions including those relating to an act of indecency in sections 60 and 61 (5) (b) of the *Crimes Act 1900* must be considered in accordance with section 67 which prescribes the additional fault element of consent: reasonable belief as to consent. This gives effect to the intent of the recent amendments made by the *Crimes (Consent) Amendment Act 2022* which introduce the principle that consent to a sexual act is informed agreement that must be (a) freely and voluntarily given; and (b) communicated by saying or doing something.

The clause also includes a note to clarify that pursuant to section 155 of the *Legislation Act 2001*, the definition of ‘sexual act’ under section 50C (1) applies to all of part 3 of the *Crimes Act 1900* unless another provision of part 3 provides otherwise or the contrary intention otherwise appears. This clarifies that the definition of ‘sexual act’ in section 56 of the *Crimes Act 1900* is unaffected by the definition in section 50C.

Clause 6 – Section 50C (3), definition of *sexual touching*

This clause omits the definition of ‘sexual touching’ and is consequential to the amendments in clause 5.

This amendment addresses significant stakeholder concerns that were not previously considered by the *Crimes (Consent) Amendment Act 2022*. The definition created doubt as to whether ‘sexual touching’ previously captured in section 50C (3) was intended to include an ‘act of indecency’ (which relies on a common law definition).

Clause 7 – When a person does not consent to an act, Section 67 (6), definition of *intoxication*

This clause substitutes the definition of ‘intoxication’ with a cross-reference to the definition of intoxication in the *Criminal Code 2002*.

The existing definition the *Crimes Act 1900* notes that ‘intoxication’ means intoxication because of the consumption of alcohol, a drug or any other substance.

This has a similar meaning to the definition in the *Criminal Code 2002* and will not change the substance of the amendment. In the *Criminal Code 2002*, 'intoxication' means intoxication because of the influence of alcohol, a drug or any other substance.

Clause 8 – New section 67A

The clause inserts new section 67A which applies to a proceeding for an offence against a sexual offence consent provision. Section 67 provides that a sexual offence consent provision means any of the following: (a) section 54; (b) section 55 (5) (b); (c) section 60; and (d) section 61 (5) (b).

The amendment clarifies that a person who is intoxicated through self-induced intoxication is treated as if they were sober by the trier of fact in determining the fault element of a sexual offence consent provision i.e. whether the accused person had knowledge, was reckless or had a reasonable belief as to consent to a sexual act. Although self-induced intoxication of the accused is not considered in making a finding as to the fault element, the fact-finder must consider all circumstances of the case in establishing the context for the offending, including what the accused said or did. This amendment does not prevent the intoxication of the victim being considered under section 67 Crimes Act 1900 (ACT) in relation to whether they are capable of consenting to a sexual act.

The amendment is consistent with the position in NSW (section 61HK (5) (b) of the *Crimes Act 1900* (NSW)). Current rules for consideration of involuntary intoxication in establishing an element of a sexual offence are not affected by the amendment. The amendment does not impact on the availability of mental impairment as a defence.

The drafting of this section has been adopted from New South Wales. The *Crimes Act 1900* (NSW) s 61HK (5) (b) states that the trier of fact must not consider any self-induced intoxication of the accused person in making a finding as to whether the person had knowledge, recklessness or reasonable belief as to consent.

The intention of the amendment in ACT is that it would operate in similar fashion to the provision in NSW so that the amendment creates a hybrid subjective/objective test to address situations involving an intoxicated person who may believe, wrongly, that the other person was consenting due to their state of intoxication.

Part 4 – Evidence (Miscellaneous Provisions) Act 1991

Clause 9 – New section 74A

This clause inserts new section 74A which provides that evidence of family violence may be relevant evidence in a proceeding if it provides context for a fact in issue in the proceeding.

The amendment is modelled on section 322J of the *Crimes Act 1958* (VIC) and clarifies that evidence of prior family violence between parties is relevant and admissible in sexual assault cases, provided this evidence is not unfairly prejudicial to the defendant.

The clause provides that evidence of family violence would encompass historical family violence involving a prior intimate/domestic relationship and children who are exposed to domestic and family violence as a ‘family member’ based on the definition of family member in section 9 of the *Family Violence Act 2016*.

Section 74A (3) (a) relates to evidence adduced relating to a particular person while section 74A (3) (b) relates to evidence adduced relating to the general nature and dynamics of family violence, and factors that impact on victims of family violence.

Clause 10 – Directions about mistaken belief about consent, Section 80D

This clause omits section 80D noting it is at odds with the recent amendment to section 67 (4) of the *Crimes Act 1900*, made by the *Crimes (Consent) Amendment Act 2022*.

Part 5 – Personal Violence Act 1996

Clause 11 – Division 3.3

This clause substitutes existing Division 3.3 of the *Personal Violence Act 2016* to incorporate a new special interim order scheme for Personal Protection Orders (PPOs) and Workplace Protection Orders (WPOs) which models the provisions in the *Family Violence Act 2016* for Family Violence Orders (FVOs).

The clause also models the provisions in the *Family Violence Act 2016* for general interim orders and clarifies that a special interim order can be made if there is a related charge outstanding in relation to the respondent and the offence is against the applicant. In all other instances, the relevant interim order is a general interim order.

The amendment provides that upon application, the court may make an interim PPO or WPO if satisfied that the order is necessary to ensure the safety of an affected person from violence and/or to prevent substantial damage to an affected person’s property (for a PPO) or to property at a workplace (for a WPO).

In deciding whether an interim order is to be made, the court is still bound to consider the “matters to be considered” outlined in section 11 which is unaffected by the amendment.

There may be situations where the court makes a special interim order when a general interim order could have been made, or the court makes a general interim order when a special interim order could have been made. The amendment clarifies

that when either of these situations occur, the operation of the order is not affected, and the court has the power to set aside an order and make another.

Clause 12 – Interim order sought, New section 41 (2)

This clause inserts new subsection (2) in section 41 which mirrors section 47 of the *Family Violence Act 2016*.

The amendment provides that section 41 (1) (b) continues to apply so that after the hearing for a special interim order, the Magistrates Court must set a return date for a preliminary conference which is as soon as practicable after the hearing and that the court must, as soon as practicable, serve relevant documents on the respondent.

Clause 13 – If no consent order at preliminary conference, New section 45 (c)

This clause inserts new subsection (c) in section 45 which mirrors section 51 of the *Family Violence Act 2016*.

The amendment provides that if a consent order is not made at a preliminary conference in relation to an application for a protection order and a special interim order has been made, the registrar must adjourn the proceeding until all related charges are finalised.

Clause 14 – Service of protection orders, New section 64C (1A)

This clause inserts new subsection 1A in section 64C which mirrors section 70C of the *Family Violence Act 2016*.

The amendment provides that if a special interim order is served on a person, the registrar must also give the person a notice advising that (1A)(a) the respondent may apply to the court for a review of the order and that (1A)(b) a return date for a hearing to decide the application for final order will be held after all related charges are finalised. Subsection (1A)(b) will only apply if a preliminary conference in relation to the application for the protection order is held and a consent order is not made.

Clause 15 – New sections 80A and 80B

This clause inserts new sections 80A and 80B in Part 6 which mirrors sections 87 and 88 of the *Family Violence Act 2016*.

New section 80A provides that the Magistrates Court may, on application by the respondent to a special interim order, give leave to the respondent to apply to the court for review of the order in relation to three matters i.e. (a) the identity of the respondent; (b) an administrative defect or error in the special interim order; and (c) whether or not there are outstanding related charges in relation to the respondent.

New section 80B provides that the Magistrates Court must take any of four actions in relation to the hearing of an application for review under new section 80A including to dismiss the application, confirm the special interim order, revoke the special

interim order and set aside the special interim order and make a new interim order. Subsections (2) and (3) provide further requirements that the Magistrates Court must adhere to should it decide to revoke the special interim order.

Clause 16 – Dictionary, new definition of *general interim order*

This clause inserts a new definition of general interim order which mirrors that in the *Family Violence Act 2016*.

The amendment is a consequential amendment to the introduction of the special interim order scheme in the *Personal Violence Act 2016*.

Clause 17 – Dictionary, definition of *interim order*

This clause substitutes a new definition of interim order which mirrors that in the *Family Violence Act 2016*.

An interim order is now differentiated between a general interim order and a special interim order.

Clause 18 – Dictionary, new definitions

This clause inserts a new definition of ‘related’ in relation to a related charge. This mirrors that in the *Family Violence Act 2016*. The clause also inserts a new definition of ‘special interim order’ which mirrors that in the *Family Violence Act 2016*.

The amendment clarifies that a charge is related to an application for a final order and/or an interim order if the person charged is the respondent to an application; and the offence is against the affected person (other than an offence relating to the contravention of a protection order – section 35).

Schedule 1 – Personal Violence Act 2016 – Consequential amendments

Schedule 1 provides for consequential amendments which are technical and necessitated by the amendments detailed above.

The amendments include updates relating to cross-references, notes, paragraphs, headings and other minor changes.

Clause 1.1 Section 25 (5) (b), note

This clause substitutes the note under section 25 (5) (b) and is consequential to the updated numbering of the provision in relation to the length of a general interim order in clause 11.

Clause 1.2 Section 44, note 2

This clause substitutes the second note under section 44 and is consequential to the updated numbering of the provision in relation to the extension of an interim order by a registrar in clause 11.

Clause 1.3 Section 48, note

This clause substitutes the note under section 48 and is consequential to the updated numbering of the provision in relation to the ending of an interim order as a result of a discontinued or dismissed application for a final order, particularised in clause 11.

Clause 1.4 Section 70 (3)

This clause omits section 19 and substitutes it with section 18, and is consequential to the updated number of the provisions in relation to the grounds for making interim orders in clause 11.

Clause 1.5 Section 101, new note

This clause inserts a new note under section 101 and is consequential to the updated numbering of the provision in relation a special interim order being made when there is a related charge in relation to the respondent, particularised in clause 11.

Clause 1.6 Section 205 heading

This clause substitutes the heading “Extending interim orders” with the heading “Extending general interim orders” and is consequential to the amendments relating to general interim orders in clause 11.

Clause 1.7 Section 205 (1)

This clause omits “an interim order” and substitutes with “a general interim order” and is consequential to the amendments relating to general interim orders in clause 11.

Clause 1.8 Section 205 (2)

This clause inserts the word “general” before the word “interim” to create the phrase “general interim order”. This is consequential to the amendments relating to general interim orders in clause 11.

Schedule 2 – Technical amendments

Schedule 2 contains technical amendments of legislation initiated by the Parliamentary Counsel’s Office.

Each amendment is explained in an explanatory note in the schedule. The amendments include the correction of minor errors, such as typographical errors and outdated cross-references, updating language, updating and omitting notes, omitting redundant provisions, renumbering paragraphs and other minor changes to update or improve the form of legislation.