



6 February 2026

Submission to the Legislative Assembly for the Australian Capital Territory, Standing Committee on Legal Affairs – Inquiry into the Family, Personal and Sexual Violence Legislation Amendment Bill 2025

About Us

With You We Can is a lived-experience led national advocacy organisation demystifying the police and legal systems for victims of sexual violence while working to improve them.

We provide an online education hub promoting equity of access to the law by making justice processes transparent, understandable and navigable for victims and their loved ones, and campaign to replace fragmented advocate services with comprehensive legal assistance throughout criminal proceedings.

In partnership with legal, academic and frontline services, we are calling for improved access to independent legal representation for victims of sexual violence across Australia, including increased government funding for free legal advice and representation services, and legislative reforms to ensure victims and their lawyers have standing to appear in criminal proceedings to protect victims' procedural rights.

Our recent report, 'What No One Told Us' outlines how critical gaps in legal literacy and legal advocacy drive justice failure and democratic erosion, and identifies reforms needed in every state and territory to strengthen the integrity of the system while improving outcomes for victims, including education about justice processes, accessible resources and access to independent legal representation.¹

Executive Summary

We welcome the opportunity to make a submission to the Legislative Assembly for the Australian Capital Territory, Standing Committee on Legal Affairs Inquiry into the Family, Personal and Sexual Violence Legislation Amendment Bill 2025.

Among other reforms, the Bill will amend the Evidence (Miscellaneous Provisions) Act 1991 to improve how ACT laws respond to sexual violence. We are concerned that these reforms do not go far enough to improve how ACT laws respond to sexual violence, and this Bill is a missed opportunity to implement key recommendations of the Australian Law Reform Commission's final report 'Safe, Informed, Supported: Reforming Justice Responses to Sexual Violence', particularly recommendation 10.²

This submission proposes further amendments to the Evidence (Miscellaneous Provisions) Act 1991 to improve protections for victims of sexual offences, particularly in relation to personal, sensitive and confidential material, and to ensure victims and their lawyers have standing during criminal proceedings in relation to those materials.



Recommendations

1. The Bill should amend the Evidence (Miscellaneous Provisions) Act 1991 to:

- Expand the meaning of ‘protected confidence’ to include all of a complainant’s “personal, sensitive, or confidential information”, including counselling records, therapeutic, health and medical records, diaries and journal entries, social media history, phone records, social security and other government, employment and school records.
- Remove the limitation at section 79K which currently provides medical information in relation to a physical examination cannot be a protected confidence.
- Expand the scope of section 79AI to provide that complainants and their lawyers have standing to appear in any proceedings in relation to disclosure, production or admission of documents and evidence of protected confidences.
- Amend section 79E to require the court to give directly to the complainant or their lawyer a written notice of an application for leave in relation to protected confidences, including notice that they have standing to appear in the proceeding under section 79AI.

2. The Explanatory Memorandum to the Bill should be amended to clarify the above recommended changes strike an appropriate balance between the need for confidentiality to reduce significant harm to victims and the right to privacy, and the need for evidence in legal proceedings and the accused’s right to a fair trial.

The need for expanded protections for personal, sensitive and confidential information

The ACT has an opportunity to demonstrate national leadership in responding to sexual violence by strengthening protections for complainants within the criminal legal system.

While the Bill makes some important improvements to the Evidence (Miscellaneous Provisions) Act 1991, it does not adequately address the ways in which complainants’ most personal, sensitive and confidential information continues to be sought, disclosed and used in criminal proceedings, often with little notice, limited safeguards, and without the complainant having any meaningful ability to participate.

Current laws governing protected confidences are narrow, complex, and fail to reflect the realities of how information about victims of sexual violence is routinely accessed and weaponised during investigations and trials. The result is foreseeable and well-documented harm to victims, including re-traumatisation, disengagement from proceedings, and decisions not to report or seek help altogether.

These issues are not hypothetical. They are consistently raised by victims and survivors, advocacy organisations, and law reform bodies, including the Australian Law Reform Commission (ALRC).



Missed opportunity to implement ALRC Recommendation 10

The ALRC's final report, *Justice Responses to Sexual Violence (2025)*, identified the disclosure and use of victims' personal records as one of the most significant systemic failures in justice responses to sexual violence. Recommendations called for jurisdictions to ensure that complainants have standing, access to legal advice and representation, and a meaningful role in proceedings relating to the disclosure and use of their personal, sensitive and confidential records.

ALRC recommendation 10 provides:

"The Commonwealth, states, and territories should amend relevant legislation to provide that independent legal advisers have standing to appear in court on behalf of complainants of sexual violence in applications to subpoena or inspect materials directed to third parties which may contain a complainant's personal, sensitive, or confidential information, including sexual assault counselling communications.

The legislative changes should include a mechanism which ensures the complainant is notified that a subpoena has been sent to a third party to produce personal, sensitive, or confidential information, including sexual assault counselling communications, relating to the complainant."

While the Bill proposes some amendments to the Evidence (Miscellaneous Provisions) Act 1991, it falls short of implementing recommendation 10 in any substantive way. In particular, it does not:

- adequately broaden the definition of protected confidences to reflect the types of personal, sensitive or confidential information most commonly sought in sexual offence matters;
- remove outdated exclusions, including for medical information arising from physical examinations; or
- ensure complainants are notified of, and able to participate in, proceedings that directly affect their privacy, dignity and wellbeing.

Without these changes, the ACT risks perpetuating the very harms the ALRC sought to address.

The need to expand privacy protections for complainants

In practice, complainants' counselling notes are only one category of material sought by defence practitioners. Victims routinely report requests for, or subpoenas seeking, access to:

- medical and therapeutic records beyond counselling;
- diaries and journals created for personal or therapeutic purposes;
- social media, text messages and phone data;
- social security and other government-held records;
- employment, education and school records.



These materials are deeply personal, often created for purposes entirely unrelated to the alleged offence, and frequently contain information that is irrelevant to the issues in dispute. Yet their disclosure can be profoundly intrusive and harmful, reinforcing myths about credibility and inviting invasive scrutiny of a complainant's life rather than the accused's conduct.

These materials are frequently sought not because they are genuinely probative, but because they can be used to distress, intimidate, discredit or humiliate complainants, often by invoking rape myths and stereotypes.³ This practice undermines the purpose of evidentiary protections and exposes complainants to significant secondary harm.

The trauma associated with disclosure of these materials are well documented. Personal records can contain highly sensitive information unrelated to the alleged offence, including mental health diagnoses, reproductive history, childhood trauma, substance use, financial hardship or prior victimisation. Once accessed, this information cannot be "unseen", and even where leave is ultimately refused, the invasion of privacy has already occurred.

Limiting protections to a narrow category of "counselling communications" fails to reflect this reality and leaves complainants exposed to significant harm.

Privacy protections are essential to effective prosecution

Expanded protections are not only necessary to safeguard complainants' wellbeing and dignity; they are essential to the integrity of the trial process itself. Questioning based on marginal, humiliating or irrelevant personal material impairs the clarity of complainant testimony and makes them vulnerable to suggestible defence questioning.⁴ Critically, such questioning also distracts juries from the real issues in dispute and reinforces victim-blaming narratives, increasing the risk of wrongful acquittals and broader community misconceptions about sexual violence.

Reducing the amount of evidence that can be subpoenaed, inspected and adduced, also can have a positive impact on the administration of justice by reducing the number of unnecessary resources, including prosecution, defence and court resources, spent on these analysing these materials. As recognised in the Explanatory Memorandum to this Bill, it is also beneficial for all parties to have clarity – and limiting the scope of information that can be considered relevant by courts would provide further clarity.

Courts have long recognised that a fair trial does not require unlimited access to a complainant's private life. Rather, fairness demands careful limits on what evidence is admitted and how it is used. As international and comparative jurisprudence shows, the accused's right to a fair trial can coexist with strong protections for complainants' privacy and personal integrity.⁵



The exclusion of medical information is particularly harmful

Section 79K currently provides that medical information relating to a physical examination cannot be a protected confidence. This exclusion is difficult to justify in principle or practice – it is inconsistent with contemporary understandings of trauma and privacy.

Medical records arising from physical examinations following sexual assault often contain highly sensitive information that is intensely personal and vulnerable to misuse, including details about injuries, reproductive health, mental health, and disclosures made in the course of seeking care such as prior disclosures of violence. The fact that an examination is “physical” does not reduce the potential for harm arising from disclosure. There is no principled basis for treating these records as less deserving of protection than counselling communications, particularly where their disclosure can cause comparable harm.

Maintaining this exclusion undermines the protective purpose of the regime and is inconsistent with contemporary understandings of trauma-informed justice. Removing this exclusion would align ACT law with the protective purpose of evidentiary safeguards and reduce unnecessary intrusion into complainants’ bodily and psychological integrity.

Victims cannot protect their rights without independent legal representation

The absence of independent legal representation has been identified as a key driver of fear, attrition and disengagement from the criminal justice process.⁶ Victims describe feeling excluded, humiliated and re-traumatised, leading many to withdraw from proceedings or avoid reporting altogether.

At present, we hear reports from victims across the country that they are frequently unaware that applications have been made to access their personal records until after disclosure has occurred. Even where they are aware, they may lack standing or the ability to access a lawyer who can assist them to meaningfully oppose disclosure or make submissions about relevance, necessity or harm.

Prosecutors cannot and do not act as de facto representatives for complainants in these matters. They must balance competing obligations and are primarily focused on advancing the prosecution case. This structural reality means that complainants’ privacy interests are often unarticulated or deprioritised, even where legislation clearly intends to protect them.

Sexual offence prosecutions depend on victim participation. When victims are exposed to unnecessary harm through the misuse of personal material, the consequences extend beyond individual cases. Reporting rates decline, attrition increases, and offending continues with little accountability. Protecting complainants’ rights is therefore not only a matter of individual justice, but of public safety and system legitimacy.



Why complainants and their lawyers must have standing to appear

Independent legal representation mitigates these harms by providing continuity, legal clarity and a sense of agency. Importantly, it also improves the quality of victim testimony and the overall conduct of trials. Well-prepared, supported complainants are better able to give clear and confident evidence, reducing delays and enhancing the probative value of their testimony.⁷

Providing complainants and their lawyers with express standing under section 79AI in all proceedings relating to the disclosure, production or admission of protected confidences is essential to procedural fairness. These proceedings directly affect the complainant's rights to privacy, dignity and safety. It is neither fair nor reasonable that decisions of this magnitude be made without their participation.

Standing does not equate to control over the prosecution or the outcome of the trial. Rather, it ensures the court is properly informed about the nature of the material, the potential harm of disclosure, and the complainant's perspective – matters the prosecution may not be well placed to fully articulate. Far from compromising fairness, independent legal representation strengthens the prosecution's ability to present its case effectively and supports the community's legitimate interest in holding perpetrators to account. There is a clear relationship between independent legal representation and substantive justice outcomes.⁸

Granting complainants and their lawyers standing to appear in proceedings relating to the disclosure, production or admission of personal and confidential material is therefore essential to give practical effect to existing protections.

Importance of giving direct notice to complainants and their lawyers

Currently, the legislation requires an applicant for leave to disclose a protected confidence to give written notice to the prosecutor in a criminal proceeding, and then the prosecutor must give it to the counselled person who is the subject of the protected confidence (section 79E). Requiring courts to give written notice directly to complainants or their lawyers of applications relating to protected confidences is a practical and necessary reform. Without clear notice, standing is illusory.

Notice should also clearly inform complainants of their right to appear and be heard under section 79AI. While section 79IB provides the court must be satisfied the counselled person is aware of the relevant laws and has had the opportunity to seek legal advice, reforms to these provisions should explicitly state that the court is required to inform the complainant. This is particularly important given the complexity of the legislation and the reality that many complainants are unaware unless they are explicitly informed of their rights.



Balancing victim protections with the right to a fair trial

We acknowledge, and support, the fundamental importance of an accused person's right to a fair trial. However, expanding protections for complainants' personal, sensitive and confidential information, and ensuring they can appear in court, does not undermine this principle.

The recommended amendments preserve judicial discretion and the ability to admit relevant evidence where it is genuinely necessary. They simply ensure that decisions about disclosure are made with a full understanding of the harm that may result, and with informed input from the person most affected. As the ALRC recognised, fair trial rights and victim protections are not mutually exclusive. A system that unnecessarily re-traumatises victims and discourages reporting ultimately undermines justice itself.

Conclusion

The Bill represents a step in the right direction, but it does not go far enough. By adopting the recommendations outlined in this submission, the ACT can meaningfully improve justice responses to sexual violence, reduce harm to complainants, and align its laws with national reform directions.

We urge the Committee to recommend amendments to the Bill and its Explanatory Memorandum to ensure that complainants' personal, sensitive and confidential information is properly protected, and that victims and their lawyers have standing and a meaningful voice in proceedings that directly affect them.

Contact Us

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Footnotes

- 1 Rosenberg, S (2025), What No One Told Us, With You We Can, Available at <<https://withyouwecan.org/>>
- 2 Australian Law Reform Commission (2025) Safe, informed, supported: Reforming justice responses to sexual violence (ALRC Report No. 143). Canberra: Australian Law Reform Commission.
- 3 Burgin, R. and Flynn, A. (2019) 'Women's behaviour as implied consent: male "reasonableness" in Australian rape law', *Criminology & Criminal Justice*, 21(3), pp. 334–352.;
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- 4 Ellison, L. (2001) 'The mosaic art? Cross-examination and the vulnerable witness', *Legal Studies*, 21(3), pp. 353–375.;
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- 5 Braun, K. (2014) 'Legal representation for sexual assault victims: possibilities for law reform', *Current Issues in Criminal Justice*, 25(3), pp. 819–837.;
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- 6 Iliadis, M., Smith, O. and Doak, J. (2021) 'Independent legal representation for rape complainants: lessons from Northern Ireland', *Journal of Law and Society*, 48(2), pp. 250–272.
- 7 Carroll, C.P. (2022) 'Accessing rights and mitigating revictimization: the role of the victim's legal counsel in the Swedish criminal justice system', *Violence Against Women*, 28(1), pp. 255–276.
- 8 O'Connell, M. (2020) 'Improving access to justice: procedural justice through legal counsel for victims of crime', in Groenhuisen, M. (ed.) *An international perspective on contemporary developments in victimology*. Cham: Springer.