THE CONCEPTION, GESTATION AND BIRTH OF LEGISLATION: THE SEXUAL AND VIOLENT OFFENCE LEGISLATION AMENDMENT ACT 2008 (ACT)

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ABSTRACT

This paper examines the historical antecedents and political processes behind the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT). The process by which this Act came to be provides a fascinating case study of the importance of individuals in institutional law reform. This Act was the product of the work of many ACT government and non-government organisations; however, in the end, what was necessary for these recommendations to translate into law were influential people, with a vested interest in the area of sexual assault law reform. In addition, the process of enactment illustrates how the final product of law reform can differ greatly to the original cognitive conception behind the reforms, which can result in the reforms not achieving their aims.

I INTRODUCTION

The *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT) (*SVOLAA*) took effect on 1 June 2009. This was an important piece of legislation that amended the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) and the *Magistrates Court Act 1930* (ACT).[1] It provided some major modifications to the committal hearing process by allowing a transcript of an audio or visual recording between police and a witness to be admissible as evidence for all sexual assault victims at the committal hearing.[2] The *SVOLAA* also introduced the concept of a 'pre-trial hearing' for non-disabled, adult victims of sexual assault whom are considered as especially vulnerable,[3] thereby proposing to reduce the amount of cross-examination in these cases. Other new sections included the use of CCTV, as well as amendments which restrict the victim's view of the accused,[4] prohibit cross-examination by a self-represented accused,[5] allow support people for witnesses to be present,[6] and ensure closure of the court to the public in certain circumstances.[7]

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[1] Further changes were also effected by the *Crimes Legislation Amendment Act 2009* (ACT) in order to ensure that the changes made by the *Sexual and Violent Offences Legislation Amendment Act 2008* (ACT) operated as intended. See: Revised Explanatory Statement, Crimes Legislation Amendment Bill 2009 (ACT) 2.

[2] *Magistrates Court Act 1930* (ACT), s 33-34.

[3] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 40P(1)(c).

[4] Ibid, s 38C.

[5] Ibid, s 38D.

[6] Ibid, s 38E.

[7] Ibid, s 39.

How did such a major piece of legislative reform come about? 'Policy-making and law reform processes are of course "dynamic and multi-sourced"'.[8] It is recognised that the world of policy and law reform 'is populated by a range of players with distinct concerns, and that policy making is the intersection of these diverse agendas, not a collective attempt to accomplish some known goal':[9] 'there are many players and they are not all reading from the same script'.[10] Law reform is 'shaped by social, institutional, political, [and] economic … contexts',[11] and is 'assessed for [its] emotive fit as much as - and often rather than – against criteria of logic, consistency, intellectual rigour or political coherence.[12] In Australia, there is often a law reform body at the fulcrum of these processes.[13] However, in reflecting upon the nature of law reform, Professor Croucher, current President of the Australian Law Reform Commission, emphasises the 'accident of timing' and the 'power of people' or of specific individuals:

> How law changes, and particularly how new legislation is born, is very much a story of personalities.[14]

Given that in the years leading up to the enactment of the *SVOLAA* there was no law reform body, active or otherwise, operating in the territory, we wondered where the driving force for this piece of law reform lay. We wanted to see if, as in Croucher's view, there was a certain degree of what she refers to as 'serendipity'[15] in what transpired. Were there in fact certain personalities or forces behind what ultimately became the *SVOLAA*? Thus, we aimed to obtain an understanding of the events and processes that preceded its enactment, and to identify some of the 'behind the scenes' activities, timing and players. The overarching goal was to highlight one example of how law reform may be conceived, nurtured and brought forth. In reference to 'brought forth', we wanted to explore the possible diluting effect of the various reform stages, and see to what extent the amendment that was enacted in fact resembled the original cognitive conception.[16] The 'dilution' of policy though various stages of enactment does occur, and is evidenced by the introduction of the *Family Provision Act 1982* (NSW). That Act, as finally passed, was much wider in form than that initially proposed by the Law Reform Commission, and was 'very much the result of confrontation, negotiation and reconciliation between Parliamentary Counsel, the Law Reform Commission and the Department of the Attorney-General'.[17]

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[8] Interview with participant no. 9, victim support worker (Canberra, 2011).
[9] Hal K Colebatch, 'Mapping the Work of Policy' in Hal K Colebatch (ed), *Beyond the Policy Cycle: the Policy Process in Australia* (Allen & Unwin, 2006) 1.
[10] Ibid.
[11] Thomas A Birkland, *An Introduction to the Policy Process: Theories, Concepts, and Models of Public Policy Making* (M.E. Sharpe, 3rd ed, 2011) 4.
[12] Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian Policy Handbook* (Allen & Unwin, 4th ed, 2007) 10-11.
[13] For a thorough study of the history, processes and limitations of law reform commissions, see: David Weisbrot, 'The Future for Institutional Law Reform' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (The Federation Press, 2005) 18. As an example, Rosalind Croucher describes the importance of the New South Wales Law Reform Commission's work in the enactment of *Family Provision Act* 1982 (NSW): Rosalind F Croucher, 'Law Reform as Personalities, Politics and Pragmatics: the *Family Provision Act 1982* (NSW): a case study' (2007) 11(1) (2007) *Legal History* 1.
[14] Rosalind Croucher, 'Introduction: Justice behind the Scenes' (2011) 10(2) *Canberra Law Review* 2, 4.
[15] Ibid, 1.
[16] Our conceptualisation of law reform as conception, nurturance and delivery coupled with the randomness of reform plus the amount of time required to gestate, persuaded us that the metaphor of pregnancy and birth was appropriate for structuring the paper. The metaphor is particularly apt given the last aim: 'The baby is the spitting image of you'.
[17] Rosalind F Croucher, above n 13, 19.

A Methodology

To achieve these aims, we examined in detail ACT Law Reform Committee/Commission Discussion Papers and Reports, as well as the ACT Sexual Assault Response Program (SARP) Report. These provided an excellent chronology of law reform through the 1980s, 1990s and early 2000s. In addition, in order to hear the perspectives of the people who played a role in the law reform process, we invited 25 people from both government and non-government organisations to participate in a qualitative email survey or face-to-face interview.[18] Potential respondents were identified both from the Appendix of submissions to the SARP report[19] and by preliminary talks with a couple of key individuals. Ten people provided responses (40% return rate): nine participants chose to complete the email survey, and one face-to-face interview was conducted using the same instrument. The face-to-face interview was recorded and later transcribed.

The research participants were recruited from the Australian Federal Police (AFP), the ACT Office of the Director of Public Prosecutions (ODPP), the ACT Supreme Court, the Office of the Victims of Crime Coordinator (VoCC), the University of Canberra, Canberra Rape Crisis Centre (CRCC), and ACT Forensic and Medical Sexual Assault Care (FAMSAC). Respondents had been involved in the law reform process as researchers, lobbyists, or members of the SARP reference group, discussed below. The nature and breadth of their experience meant that the participants were in a unique position to provide insight into the history and politics behind the *SVOLAA*. We gathered some basic background information about the participants, which included how they were involved in the development of the legislation. Participants were also asked a series of questions about the original aims and intentions of the reforms and who was involved in lobbying for them. We sought views too on how the Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT) (the Bill) came about, including the lobbying and drafting processes, and its enactment. However, once the survey responses were analysed, it became obvious that there were some questions still unanswered, and so three of the participants whom we believed would have the requisite knowledge were contacted by email again to clarify or expand on their answers.

The open-ended participant responses were examined qualitatively using an 'open-coding' approach.[20] Because answers were generally short, this process was informal and unstructured, but did involve studying every passage of the surveys and interview transcript to determine what exactly had been said and to label each passage with an adequate code or label. This process helped us to identify the common themes that arose and summarise and observe the patterns in the responses.

[18] The University of Canberra's Committee for Ethics in Human Research approved the project on 2 August 2010. Protecting the anonymity of participants was the main ethical consideration in this project. Before responding to the survey, respondents were asked to read the participant information form and sign a consent form, both of which confirmed that all responses would be de-identified.
[19] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, 'Responding to Sexual Assault: the Challenge of Change' (March 2005).
[20] Matthew Miles and Michael Huberman, *Qualitative Data Analysis:An Expanded Sourcebook* (2nd ed, 1994) 40-43.

II THE 'COURTSHIP': BACKGROUND

This following part of the paper provides a background to the reform process. We look at why there was a perceived need for a more 'just' experience for victim witnesses in sexual assault matters and how the pre-2008 law reforms were limited in providing a safe place for victims' voices.

A Trauma of witnesses

It is recognised in the psychological literature that rape is an extremely personal crime and has been described as an 'ultimate violation of the self, short of homicide, with the invasion of one's inner and most private space, as well as loss of autonomy and control'.[21] Sexual assault 'heightens a woman's sense of helplessness, intensifies conflicts about dependence and independence, and generates self-criticism and guilt that devalue her as a person'.[22]

Following this violation and trauma, victims of sexual assault are often then subject to a long and distressing experience within the criminal justice system. They continue to be subject to traumatic processes and leading, repetitive, aggressive, intimidating and humiliating questions.[23] The trial process is harrowing for all victims, but for victims of sexual assault, it can retrigger the feelings of helplessness associated with the crime and increase their angst. They may experience Rape Trauma Syndrome (RTS)[24] or Post Traumatic Stress Disorder (PTSD) with rape as the stressor.[25] Therefore, given their psychological fragility, there is an enormous potential for re-traumatisation of sexual assault victims through their involvement with the criminal justice system and its processes. Of particular concern is when victims testify and are cross-examined. As the Australian Law Reform Commission recently concluded:

> Evidence issues often arise where the defence is seeking to show that sexual activity was consensual and, in doing so, to undermine the credibility of the complainant. This can sometimes result in unjustifiable trauma to complainants.[26]

It is not surprising, therefore, that the Victorian Rape Law Reform Evaluation Project (RLREP) found that 'complainants frequently were subjected to lengthy cross-examination about matters such as the clothing they were wearing at the time of the alleged rape and the amount of alcohol they had consumed, in order to ... attempt to show that they are the kind of person who was likely to agree to sexual penetration'.[27] Further, a NSW research project, which looked at the effectiveness of legislative provisions to protect the rights of these victims, found that cross-examination of victim-witnesses was often extensive and

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[21] Ann Wolbert Burgess, 'Rape Trauma Syndrome' (1983) 1(3) *Behavioral Sciences & the Law* 97, 101.
[22] Malkah Tolpin Notman and Carol Cooperman Nadelson, 'The Rape Victim: Psychodynamic Considerations' (1976) 133(4) *American Journal Psychiatry* 408, 409.
[23] See: Australian Law Reform Commission, 'Family Violence – A National Legal Response' (114, 2010) 860, 1335.
[24] Described by A W Burgess and L L Holmstrom, 'Rape Trauma Syndrome' (1974) 131 *American Journal of Psychiatry* 981.
[25] See: B J Cling, 'Rape and Rape Trauma Syndrome' in B J Cling (ed), *Sexualized Violence against Women and Children: A Psychology and Law Perspective* (Guilford Press, 2004) 13; Patricia Easteal and Louise McOrmond–Plummer, *Real Rape, Real Pain* (Hybrid Publishers, 2006) 221-234.
[26] Australian Law Reform Commission, above n 23, 1236.
[27] Victorian Law Reform Commission, 'Sexual Offences: Law and Procedure, Discussion Paper' (2001) [5.21].

distressing, on average lasting more than twice as long as examination-in-chief.[28] In 65% of trials there were two or more interruptions to evidence due to the distress of the witness.[29] Victims were routinely implied to be liars, seeking compensation, or vengeful, and were often described as the type of woman who could be expected to consent to sexual advances, or as an inexperienced person who consented and then later regretted her actions.[30]

The experiences that sexual assault victims have in the criminal justice system can compound their trauma and victimisation, resulting in the deterrence of victims from reporting and/or continuing with their case.[31] Accordingly, the 2007 ABS Victims Crime Survey indicates that only 25% of sexual assault offences are reported to police.[32] This low reporting rate is due to a number of barriers including, but not limited to: 'fear of being disbelieved; fear of retribution by the offender or others connected to the offender; feelings of shame; embarrassment; living in an isolated environment; fear of being blamed; lack of confidence or trust in the legal system; and lack of confidence or trust in police'.[33] Further, research suggests that some women are so traumatised as a result of the preliminary hearing that they are either unwilling or unable to follow through with the complaint.[34]

Some of the specific factors that compound the trauma of a trial for sexual assault victim witnesses, and which have resulted in much law reform, include: being able to see the accused in the courtroom; being cross-examined by a self-represented accused; the use of traumatising questions by defence counsel; cross-examination involving an extremely arduous test of complainants' credibility;[35] having to give evidence multiple times; giving evidence in a court open to the public; and the length of the process.

B What protections (provisions) were on offer in the ACT pre-2009?

1 CCTV

In the ACT, child witnesses have been able to give evidence via CCTV since July 1989.[36] The *Evidence (Closed-Circuit Television) Act 1991* (ACT) (now the *Evidence (Miscellaneous*

[28] Department for Women, 'Heroines of Fortitude' (Office for Women: NSW Department of Premier and Cabinet, October 1996).
[29] Ibid, 127-128.
[30] Department for Women, above n 28, 176.
[31] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.
[32] Australian Bureau of Statistics, 'Recorded Crime – Victims, Australia' (4510.0, 2007).
[33] S. Caroline Taylor and Leigh Gassner, 'Stemming the Flow: Challenges for Policing Adult Sexual Assault with Regard to Attrition Rates and Under-Reporting of Sexual Offences' (2010) 11(3) *Police Practice and Research: An International Journal* 240.
[34] See: Department for Women, above n 27; Patricia Easteal and Christine Feerick, 'Sexual Assault by Male Partners: Is the License Still Valid?' (2005) 8(2) *Flinders University Journal of Law Reform* 185.
[35] The Dictionary of the *Evidence Act 1995* (Cth) defines credibility as including 'the witness's ability to observe or remember facts and events about which the witness has given, is giving or is to give evidence'. However, it appears that these are not the only factors that are taken into consideration when assessing a victim's credibility. Victims of sexual assault continue to be regarded as belonging to an unreliable class of witness; hence the complainant's dress, lifestyle, actions, and perceived reaction to the crime are often deemed relevant in determining credibility. See: Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001) 131; Dr Shannon-Caroline Taylor, 'The Legal Construction of Victim/Survivors in Parent-Child Intrafamilial Sexual Abuse Trials in the Victorian County Court of Australia in 1995: A Research Summary' (2001) 10 *Women Against Violence* 57, 58; Department for Women, above n 27, 149.
[36] The Community Law Reform Committee of the Australian Capital Teritory, 'Sexual Assault' (Discussion Paper No. 4, 1997) [368].

Provisions) Act 1991 (ACT)) originally stated that the court had the option of ordering that a child give all or part of their evidence from a place other than the courtroom.[37] However, these orders could only be made where the required facilities were available,[38] and where the court was satisfied that the child would otherwise 'suffer mental or emotional harm', or the 'facts would be better ascertained if the child's evidence' was given in this manner.[39] Furthermore, a court could not make an order under this section if it was of the belief 'that to do so would be unfair to a party to the proceedings'.[40]

In 1994, these provisions were repealed and replaced by the *Evidence (Closed-Circuit Television) (Amendment) Act 1994* (ACT), which inserted a new section 4A into the *Evidence (Closed-Circuit Television) Act 1991* (ACT). This new section provided that where the facilities were available, children were to give evidence from outside the courtroom unless otherwise ordered by the court.[41] The court was restricted from making an order under this section unless it was satisfied that the child preferred to give evidence in the courtroom, that the proceedings would be unreasonably delayed if an order was not made, or that there was a substantial risk that the proceedings would be unfair if an order was not made.[42]

Later that year, these CCTV provisions were extended to adult victims of sexual assault for a trial period, ending on 15 June 1998,[43] by replacing the word 'child' with 'prescribed witness',[44] the definition of which included complainants in sexual offence trials.[45] The extension of these provisions to adult witnesses continued to apply until 2003, when a new Part 4 was inserted into *Evidence (Miscellaneous Provisions) Act 1991* (ACT).[46] The new Division 4.3, entitled 'Sexual offence proceedings—giving evidence from places other than courtrooms', contained a new s 43, which provided for the compulsory use of CCTV facilities for victims of sexual assault where the facilities were available, using the same wording as in the previous provisions.[47]

This s 43 applied to the use of CCTV by adult victims of sexual offences until 2009, when the changes made by the *SVOLAA* came into force.

2 Open/Closed Court

It is a fundamental principle of Australian common law that justice be administered in open court, that is, that the public, including the press, may attend all stages of a trial.[48] This

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[37] *Evidence (Closed-Circuit Television) Act 1991* (ACT), s 5(1) (effective from 21 August 1991).
[38] Ibid, s 6(1).
[39] Ibid, s 6(2).
[40] Ibid, s 6(3).
[41] Ibid, s 4A(1), as amended by the *Evidence (Closed-Circuit Television) (Amendment) Act 1994* (ACT) s 6.
[42] Ibid, s 4A(2).
[43] The Community Law Reform Committee of the Australian Capital Teritory, above n 36, [376].
[44] *Evidence (Closed-Circuit Television) (Amendment) Act (No. 2) 1994* (ACT), s 6.
[45] Ibid, s 5.
[46] Inserted by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* (ACT), s 6. The *Evidence (Closed-Circuit Television) Act 1991* (ACT) was changed to the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) in 2000 by the *Justice and Community Safety Legislation Amendment Act (No 3) 2000* (ACT), sch 1.
[47] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 43 (effective from 22 March 2004).
[48] See: The Community Law Reform Committee of the Australian Capital Teritory, above n 36, [438]; *Scott v Scott* (1913) AC 417, 441; *McPherson v McPherson* [1936] AC 177, 199-203; *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

principle has legislative force in the ACT;[49] however, since 1985, there has been an exception to the open court rule in the ACT in relation to sexual offence proceedings. In 1985, the *Evidence (Amendment) Ordinance (No. 2) 1985* (ACT) inserted a new s 76D into the then *Evidence Ordinance 1971* (ACT).[50] This new section stated that any evidence given by complainants in sexual offence proceedings should, if directed by the court, be given 'in camera', that is, in a courtroom closed to the public.[51]

Section 76D of the *Evidence Act 1971* (ACT) applied until 2003, when it was replaced by the new Part 4 of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).[52] Despite all of these changes, the principle remained the same: Part 4 created 'new' provisions relating to the closure of the court in sexual offence proceedings, s 39 of which provided that the court may order that the court be closed to the public while complainants in sexual offence proceedings give evidence.[53] This section continued to apply until the *SVOLAA* came into force in 2009.

3 Admission of written statements

Since 1974, the *Magistrates Court Act 1930* (ACT) has allowed evidence to be adduced by written statements.[54] Despite this, prior to the 2008 amendments, it was the practice in the ACT for victims of sexual assault to give oral evidence at both the committal hearing and the trial.[55]

In their 1997 Discussion Paper, the Community Law Reform Committee of the ACT raised the issue of victims having to give evidence at the committal hearing and at the trial, and discussed the possibility of paper-based committal proceedings.[56] The Committee questioned whether the rules requiring victims of sexual assault to give oral evidence at committal proceedings should be changed.[57]

In 2001, the newly named ACT Law Reform Commission explored this issue further and came to the conclusion that a purely paper-based committal would not be adequate for many cases.[58] The Commission recommended that the prosecution be required to serve copies of any statements it wished to have admitted to the defence prior to the committal hearing, and the defence then be required to provide written notification of any witnesses it wished to cross-examine.[59] These recommendations were in line with the legislation at the time, and so did not result in any substantial law reform.

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[49] See: *Magistrates Court Act 1930* (ACT), s 310.
[50] The *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 34(4) converted most former Commonwealth ordinances in force in the ACT into ACT enactments. As with most ordinances in force in the ACT, the name of this Ordinance was changed from Ordinance to Act by the *Self-Government (Citation of Laws) Act 1989 No 21*, s 5 on its conversion to an ACT enactment on 1 July 1992.
[51] *Evidence Ordinance 1971* (ACT), s 76D(1), as amended by the *Evidence (Amendment) Ordinance (No. 2) 1985* (ACT), s 4.
[52] Inserted by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* (ACT), s 6.
[53] *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 39, as amended by the *Evidence (Miscellaneous Provisions) Amendment Act 2003* (ACT), s 6.
[54] *Magistrates Court Act 1930* (ACT), s 90AA, inserted by the *Court of Petty Sessions Act 1974* (ACT), s 10.
[55] See: The Community Law Reform Committee of the Australian Capital Teritory, above n 36, [384]; Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.
[56] The Community Law Reform Committee of the Australian Capital Teritory, above n 36, [384 - 402].
[57] Ibid, Issue 50.
[58] ACT Law Reform Commission, 'Report on the Laws Relating To Sexual Assault' (17, 2001) [269].
[59] Ibid, Recommendation 19.

In fact, the legislation surrounding this area was not substantially amended at all prior to 2008, and the legislation as at 2008 stated that the Court could admit a written statement as evidence in preliminary examinations. However, the Court and the prosecution and defence counsel had the power to require the person who made the statement to attend before the court to give evidence and be cross-examined.[60]

3 Cross-examination of victim witnesses by unrepresented defendants

Since its enactment, the *Magistrates Court Act 1930* (ACT) provided a defendant with the right to personally 'examine and cross-examine the witnesses giving evidence … against her or him'.[61] In 1997, the Community Law Reform Committee of the ACT raised the idea of prohibiting an accused from personally cross-examining victims in sexual offence trials, but the discussion did not progress any further than this.[62] Minor changes were added to the section in 2005, but did not result in any modification to the effect of the provision.[63] As a result, prior to the *SVOLAA*, defendants were still able to personally cross-examine victims in sexual offence trials.

III … LEADING TO THE CONCEPTION OF THE BILL

Ultimately, the 2008 legislative reforms came about as a result of a report published by the ACT Office of the Director of Public Prosecutions and the Australian Federal Police in 2005 – *Responding to Sexual Assault: The Challenge of Change* (*The Challenge of Change*).[64] However, there was a sequence of research and events prior to this that contributed to the initiation of the research and the introduction of the Bill.

A 1999

A crucial player in the ACT criminal justice system first became interested in the area of sexual assault in 1999 when he saw the *Four Corners* program 'Double Jeopardy', which highlighted an abusive cross-examination that a young boy, aged eight years, had undergone whilst giving evidence in a child sexual assault trial in Queensland.[65] This program played a tape of the cross-examination in which the boy cried whilst being shouted at by defence counsel.[66]

Following that, in 1999, Dr Annie Cossins founded the National Child Sexual Assault Reform Committee (NCSARC), which was made up of some of the nation's leading lawyers, judges and academics, including the ACT Director of Public Prosecutions (DPP). This inspired the DPP and some of his staff to start looking at the reforms in Western Australia and New South Wales for child victims of sexual assault. At that time, one respondent came to the conclusion that the ACT needed to develop its laws further: he felt that Canberra was

[60] *Magistrates Court Act 1930* (ACT), s 90AA (effective to 29 May 2009).
[61] Ibid, s 53(2) (effective from 3 August 1992).
[62] The Community Law Reform Committee of the Australian Capital Teritory, above n 36, [460].
[63] *Statute Law Amendment Act 2005* (ACT) [3.222].
[64] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.
[65] Interview with participant no. 8, judicial officer (Canberra, 2010).
[66] *Double Jeopardy* (1999) ABC: Four Corners <http://www.abc.net.au/4corners/stories/s39718.htm>.

'leading edge' in regards to the use of CCTV for children, but was still behind Western Australia.[67]

B 2001

In 2001, Morgan, Disney & Associates conducted a review of the sexual assault services for children and young people in the ACT for the Department of Education and Community Services.[68] The resulting report identified the need for a 'comprehensive inter-agency model' and 'strongly recommended that a collaborative inter-agency approach be developed for children and young people who have been victims of sexual abuse'.[69]

C 2002

In 2002, Theresa Davis, a prosecutor from the ACT DPP, received a Churchill Fellowship to conduct an international study on the 'innovative practices in the investigation and prosecution of sexual assault offences on adults and children'.[70] Her study included, amongst other things, an investigation into the use of videotaped interviews as victims' evidence-in-chief.[71] Davis recommended that the ACT enact provisions enabling the use of pre-recorded evidence in proceedings involving child victims of sexual assault.[72]

Davis also suggested that the ACT implement a 'one-stop shop' for victims of sexual assault, to facilitate the coordination of the police, prosecution, child protection services, rape crisis counsellors and medical practitioners.[73] However, one survey participant from the AFP indicated that 'despite the experiences and observations of Ms Davis while travelling in England and the United States, the ACT continued to operate disjointedly, with little interaction between key agencies'.[74]

D 2003

That year Christine Eastwood and Wendy Patton did a comparative report on the experiences of child complainants of sexual abuse in the criminal justice system in Western Australia, New South Wales and Queensland, which also came to the attention of the ACT DPP.[75] Their study examined the experiences of child complainants in the criminal justice system as well as the consequences of their involvement in the process.

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[67] Interview with participant no. 8, judicial officer (Canberra, 2010).
[68] See Morgan Disney & Associates, 'Developing a Strong Interagency Approach to Sexual Assault Services for Children and Young People in the ACT: A Report to the ACT Department of Education and Community Services' (2001).
[69] Interview with participant no. 5, police officer (Canberra, 2010); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 71.
[70] Interview with participant no. 5, police officer (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.
[71] Interview with participant no. 5, police officer (Canberra, 2010); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 8.
[72] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 8.
[73] Ibid.
[74] Interview with participant no. 5, police officer (Canberra, 2010).
[75] Interview with participant no. 8, judicial officer (Canberra, 2010). See: Christine Eastwood and Wendy Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002) Criminology Research Council <http://www.criminologyresearchcouncil.gov.au/reports/eastwood.pdf>.

The same year, the ACT DPP together with the AFP, made a budget proposal to develop a Sexual Offences Response Program, which aligned with the Strategic Plan for Criminal Justice 2002-2005 that had been recently approved by Cabinet.[76] The program proposed to: initiate legislative reforms that supported 'fair investigative practices'; employ advances in technology to support the 'detection and investigation of crime'; provide 'advocacy services for persons with specific needs'; quickly and fairly manage cases through the courts; implement 'victim-inclusive practices and policies'; and, review and reform criminal legislation and processes to meet current needs, in particular the needs of victims of sexual assault.[77] The program aligned with the values outlined in ACT Labor's Plan for Justice and Community Safety (2001) including access to information, the development of case management processes within the court system to reduce delays, the improvement of recording of criminal statistics, and better facilities for women and children victims and witnesses in the court system.[78]

As noted during the interviews conducted as part of the research for this paper, '[t]here were significant amendments taking place all over Australia and in the UK in the area of sexual assault'[79] and there was a 'general acceptance by criminal justice agencies (namely ACT Policing and the DPP) that reform was required':[80] '[t]he system wasn't working'.[81] 'Victoria already had their response out and the ACT had to be seen to be doing something'.[82] In addition, there was this 'increasing awareness from empirical research that victim witnesses were having a very difficult time in the Courts'.[83] As one participant from the AFP stated:

> It was my understanding that victims of sexual and violent offences were not being protected adequately during their processing. That is, they were being forced to relive their trauma a number of times during the investigation and Court process.[84]

E 2004-2005

The ACT Government consequently provided funding to the AFP and ACT DPP to conduct some research that would follow up on the study conducted by Davis in 2002.[85] The funding provided funding for the formation of the Sexual Assault Response Program (SARP), the founding members of which were Margaret Jones, a senior prosecutor from the DPP, and Sergeant Anthony Crocker, a member of the ACT Policing Sexual Assault and Child Abuse Team (SACAT). The SARP team conducted research that looked into police, prosecution, and medical and counselling services for victims of sexual assault in the ACT, and compared them to other service models in the rest of Australia and New Zealand. Accordingly, people from many organisations both within the ACT and elsewhere were consulted. Feedback was

[76] Interview with participant no. 5, police officer (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).
[77] Interview with participant no. 5, police officer (Canberra, 2010).
[78] Ibid.
[79] Interview with participant no. 6, victim support worker (Canberra, 2010).
[80] Interview with participant no. 1, police officer (Canberra, 2010).
[81] Interview with participant no. 6, victim support worker (Canberra, 2010).
[82] Ibid.
[83] Interview with participant no. 4, academic/researcher (Canberra, 2010).
[84] Interview with participant no. 2, police officer (Canberra, 2010).
[85] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, 8.

also gathered from individuals who were involved in the prosecution of sexual assault, law reform and victim assistance in other parts of Australia and New Zealand.[86]

This research ultimately resulted in the publication of *The Challenge of Change* in March 2005.[87] This report contained 105 recommendations aimed at improving the criminal justice response to sexual assault in the ACT. The ones pertinent to legislative reform for adult victims of sexual assault were:

- The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings.[88]
- The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a victim, as the victim's evidence-in-chief. The provisions should apply to witnesses aged 18 years or more who are vulnerable as a result of mental or physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played.[89]
- Child witnesses should be permitted to give their evidence at a special pre-trial hearing, and the recorded evidence should be available for use at any re-trial following an appeal or in other proceedings in appropriate circumstances.[90]
- The ACT's *Evidence (Miscellaneous Provisions) Act 1991* (ACT) should specify that the accused is not to be in the view of a complainant giving evidence via closed-circuit television.[91]
- The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused.[92]
- An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses.[93]
- Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.[94]
- Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness.[95]
- A 'one-stop shop' for adult victims of sexual assault should be established with facilities available at the Forensic and Medical Sexual Assault Centre (FAMSAC) for police to meet with the victim and videotape interviews there.[96]

[86] See Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, iv–vi for list of organisations.
[87] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19.
[88] Ibid, Recommendation 6.1.
[89] Ibid Recommendation 6.2.
[90] Ibid, Recommendation 6.5.
[91] Ibid, Recommendation 6.7.
[92] Ibid, Recommendation 6.9.
[93] Ibid, Recommendation 6.11.
[94] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.12.
[95] Ibid, Recommendation 9.4.
[96] Ibid, Recommendation 3.33.

However, when *The Challenge of Change* was presented to the legislative assembly in 2005, the Chief Minister at the time was perceived by respondents as very unimpressed (he 'mumbled a few words and left the room'[97]) and so no reforms were initiated. In fact, the report was then apparently shelved; purportedly because the Government was not happy with it: '[n]othing good in it for the Government'.[98] As one respondent explained:

> The human rights discourse in the ACT at the time was dominated by civil liberties perspectives (including inside the government) that only saw the accused person's interests for fair trial, privacy and protection of dignity.[99]

IV THE GESTATION - FURTHER DEVELOPMENT OF THE IDEAS FOR REFORM

A 2006-2007

It was not until the following year that the ideas for reform were taken off the shelf. Victim support agencies, Richard Refshauge (ACT DPP), Robyn Holder (VoCC), and Renée Leon (CEO of JACS) had vested interests in the area of sexual assault law reform, and so had continued to actively drive the process.[100] The then new ACT Attorney-General, Simon Corbell, also had a strong interest in the area of sexual assault and victim rights, and when Robyn Holder and the ACT Public Advocate, Anita Phillips, wrote to the Attorney about the *Challenge of Change* and the lack of action, the new Minister resurrected the initiative and asked JACS what was happening.[101]

As a result, a working group, known as the SARP Reference Group, was established both to provide input to the legislative reforms, using *The Challenge of Change* as a foundation, and to oversee a process of implementation.[102] This paper focuses upon the SARP reference group as it had the most stakeholders as participants and it was the most public. There were, however, other groups and submissions feeding into the drafting process: '[t]here were meetings happening all over the place'.[103]

The SARP Reference Group meetings were convened by the ACT Department of Justice and Community Safety (JACS)[104] 'and [were] vaguely modelled on the approach by the ACT FVIP [Family Violence Intervention Program] in that it focused on being broadly inclusive'.[105]

> It is very usual for reports of various kinds to have recommendations circulated internally for agency viewpoints, then the relevant department (in this instance JACS) to advise the Minister either by way of a briefing note or Cabinet submission or both. Certainly the [*Challenge of Change*] recommendations were subject to this process.[106]

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[97] Interview with participant no. 8, judicial officer (Canberra, 2010).
[98] Interview with participant no. 5, police officer (Canberra, 2010).
[99] Interview with participant no. 9, victim support worker (Canberra, 2011).
[100] Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).
[101] Interview with participant no. 9, victim support worker (Canberra, 2011).
[102] Interview with participant no. 1, police officer (Canberra, 2010); Interview with participant no. 3, medical practitioner (Canberra, 2010).
[103] Interview with participant no. 9, victim support worker (Canberra, 2011).
[104] Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 9, victim support worker (Canberra, 2011).
[105] Interview with participant no. 9, victim support worker (Canberra, 2011).
[106] Interview with participant no. 9, victim support worker (Canberra, 2011).

Those involved in the SARP reference group were spokespeople from Canberra Rape Crisis Centre (CRCC), Victim Support ACT, the Office of the Victims of Crime Coordinator (VoCC), ACT Policing (ACTP), the Office of the ACT Director of Public Prosecutions (ACTDPP), Forensic and Medical Sexual Assault Care (FAMSAC), Child at Risk Assessment Unit, Victims Services Scheme (VSS), Victims of Crime Assistance League (VOCAL), Legal Aid ACT, and the ACT Bar Association.[107] They examined the recommendations made in *The Challenge of Change*, which involved dividing them into six key areas: victim support; training and development; court upgrades to technology and facilities; best evidence; law reform; and, interagency governance.[108]

We must note that victim support advocates did have input into this process. One respondent from a victim support organisation explained that her agency was 'actively involved in the reference group as well as engaged in other bi-lateral meetings, developing the wraparound approach for victims and protocols with key agencies such as the AFP [and] SACAT Unit'.[109] The other bi-lateral meetings involved discussion as to the policy and procedure when a sexual assault is reported. The 'wraparound' approach for the victims describes the idea of a 'one-stop shop', where victims can be medically examined and interviewed by police at the same place.[110]

The SARP Reference Group aimed for reform to 'implement a "best practice" model'[111] to:

- 'address the imbalances in the treatment of victims, through the legal process';[112]
- 'provide victims with the support they need, provide protection during the investigation and Court process, and [increase] the conviction rate';[113]
- 'increase the number of cases that go to trial … and hopefully help the plight of victim witness';[114]
- 'make the system easier and less traumatic for victims to navigate';[115] and
- maintain a 'fair system for victims without compromising the fair trial'.[116]

All of the agencies, with the exception of Legal Aid, were lobbying *for* law reform; yet although some members of the group were opposed to some aspects of the reforms, there was no overt opposition to the idea of law reform as a whole as it was widely recognised that reform was inevitable.[117] As one respondent stated:

> Legal Aid [representative] didn't want there to be any changes – he liked the law the way it was – but he realised that the reforms were going to happen regardless, and so made some compromises with the DPP.[118]

[107] Interview with participant no. 1, police officer (Canberra, 2010); Interview with participant no. 2, police officer (Canberra, 2010); Interview with participant no. 3, medical practitioner (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).
[108] Interview with participant no. 3, medical practitioner (Canberra, 2010).
[109] Interview with participant no. 6, victim support worker (Canberra, 2010).
[110] Interview with participant no. 6, victim support worker (Canberra, 2010); Interview with participant no. 8, judicial officer (Canberra, 2010).
[111] Interview with participant no. 1, police officer (Canberra, 2010).
[112] Interview with participant no. 3, medical practitioner (Canberra, 2010).
[113] Interview with participant no. 2, police officer (Canberra, 2010).
[114] Interview with participant no. 4, academic/researcher (Canberra, 2010).
[115] Interview with participant no. 6, victim support worker (Canberra, 2010).
[116] Interview with participant no. 3, medical practitioner (Canberra, 2010).
[117] Interview with participant no. 8, judicial officer (Canberra, 2010).
[118] Ibid.

Therefore, the SARP Reference Group discussions were centred on *how* the law would change.[119] Despite this, as a result of 'having so many different organisations involved and fighting for things they wanted', the discussion and negotiation process was reported to be very drawn out.[120] As one respondent said: '[t]here was a lot of stop starting with the process [and] there was a lot of wasted time with unnecessary or unproductive meetings'.[121]

As a result of 'the new Minister's personal and political commitment',[122] ultimately the application for law reform from the DPP and AFP was accepted, and policy instructions were made.[123] This meant that the government accepted the proposal for reform to the legislation for sexual assault offences, and JACS was instructed to begin the drafting the legislation.

From here, one participant from a victim support agency described the process as 'a little problematic'.[124] Because some of the agencies in the SARP Reference Group were non-government organisations, they were 'left out of cabinet-in-confidence processes, which were essentially the drafting of the legislation'.[125] 'This was in spite of the fact that [they] had been assured personally by the Attorney-General that [they] would be included'.[126] There is no direct evidence that this lack of involvement of the NGOs had any effect on the resulting legislation, but one could speculate that it may have contributed to the indeterminacy of the provisions, which is highlighted below. That said, '[the NGOs] were happy with the final outcomes';[127] however, this is not to imply that everyone felt that the 'the [SARP] recommendations [were] uniformly accepted [and] covered all the salient issues'.[128]

V THE BIRTH (OF THE AMENDMENT)

Due to the fact that any interactions between the SARP Reference Group and JACS were made as 'cabinet-in-confidence', it is unclear whether the Group in fact produced another set of recommendations. What we do know, though, is that the Bill contained sections that reflected all but one of the recommendations made in *The Challenge of Change*. Although this sounds promising, most of the recommendations were diluted to some extent in the Bill, as shown below, and because of our limited access to internal information, we can only hypothesise about how or when the 'watering down' of the provisions occurred.

A 2008

> The ACT should enact legislation to prohibit any complainant in sexual offence proceedings from being required to attend to give evidence at committal proceedings.[129]

[119] Interview with participant no. 8, judicial officer (Canberra, 2010).
[120] Interview with participant no. 2, police officer (Canberra, 2010).
[121] Ibid.
[122] Interview with participant no. 9, victim support worker (Canberra, 2011).
[123] Interview with participant no. 8, judicial officer (Canberra, 2010).
[124] Interview with participant no. 6, victim support worker (Canberra, 2010).
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Ibid.
[129] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.1.

Section 33 of the Bill stated that complainants in sexual offence proceedings must not be required to attend and give evidence at a preliminary hearing.[130] This section was derived from this recommendation, and contained almost identical wording.

> The ACT should enact legislation permitting the tendering of an audiotape or videotape of an interview between police and a victim as the victim's evidence-in-chief. The provisions should apply to witnesses aged 18 years or more who are vulnerable as a result of mental or physical impairment. The legislation should also provide that the court is not to view the witness while the tape is being played.[131]

This recommendation was reflected in s 11 of the Bill stating that intellectually impaired complainants in sexual offence trials could have a recording of their police interview admitted as their evidence in chief, and that they must not be visible to anyone in the courtroom when the audio-visual recording is played.[132]

Again, this is almost word for word from the recommendation. However, the section in the legislation also included a subsection providing that 'the court may refuse to admit all or any part of the audiovisual recording'.[133] This was not recommended in the Report and is an example of the way in which the legislation diluted the SARP recommendations by including more judicial discretion in its actual application.

> The ACT's *Evidence (Miscellaneous Provisions) Act 1991* should specify that the accused is not to be in the view of complainant giving evidence via closed- circuit television.[134]

Section 17 of the Bill integrated this recommendation and developed it further. The provision stated that the 'witness must not be able to see *or hear* the accused person' whilst giving evidence via audiovisual link.[135] Although really just a fine detail, this is an example of how the Bill strengthened, to some extent, the recommendation made in the report.

> The legislation should be amended to permit witnesses who choose not to use closed-circuit television to give their evidence with a screen placed between them and the accused.[136]

This recommendation was incorporated into the Bill; however, the provisions included judicial discretion as to their application, which contradicts in part the recommendation to 'permit witnesses' to have a screen. The Bill stated that the judge *may* order that the courtroom be arranged so that the witness cannot see the accused whilst giving evidence, however, it also expanded this recommendation to include 'anyone else the court considers should be screened from the witness'.[137]

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[130] Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 33.
[131] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.2.
[132] Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 11.
[133] Ibid.
[134] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.7.
[135] Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 17 (emphasis added).
[136] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.9.
[137] Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 8.

> An unrepresented accused should be prohibited from cross-examining complainants in sexual offence proceedings and all child witnesses.[138]

This recommendation was integrated into the Bill with only technical changes. The Bill provided that a 'self-represented accused person must not personally cross-examine a witness'; with 'witness' defined to include complainants and children (who may or may not be complainants) in sexual offence proceedings.[139]

> Special measures permitting the pre-recording of evidence should be available to adult complainants who—by reason of age, cultural background, relationship to the other party, the nature of the subject matter of the evidence, or other factors the court considers relevant—are likely to suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence or to give it satisfactorily.[140]

The Bill also incorporated this recommendation, even using some of the wording provided. The provisions in the Bill permitted intellectually impaired victims (which was not specifically recommended) and victims who were likely to 'suffer severe emotional trauma' or 'be intimidated or distressed' to give evidence at a special pre-trial hearing.[141] It also stated that the recording of this evidence would be admissible at any related proceeding.[142]

These eligibility restrictions were drafted despite direct opposition from victim support organisations in the Reference Group. One victim support worker 'argued strongly against [this] provision requiring victim/witnesses to prove severe emotional trauma or distress and intimidation … on the basis that this created an unnecessary and humiliating barrier and hurdle'.[143]

> Legislation should be introduced to provide that, for all victims in sexual offence proceedings and for all child witnesses, a support person approved by the court can be seated close by and within sight of the witness.[144]

This recommendation was included in the Bill; however, the provisions applied only to complainants in sexual offence trials, which excluded other child witnesses as recommended. The Bill provided that the court must order that a complaint have a support person 'in the court close to, and within [their] sight' whilst they give evidence.[145]

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[138] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.11.
[139] Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 8.
[140] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 6.12.
[141] Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 11.
[142] Ibid.
[143] Interview with participant no. 9, victim support worker (Canberra, 2011). This section was made even further restrictive by the *Crimes Legislation Amendment Act 2009* (ACT). The main change in the wording of the provision was the replacement of the word 'must' with 'may'. This change resulted in the section becoming discretionary in nature, which means that even if a witness satisfies the definition of witness under the Division, they may still not be able to give evidence at a pre-trial hearing
[144] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 9.4.
[145] Sexual and Violent Offences Legislation Amendment Bill 2008 (ACT), s 8.

> A 'one-stop shop' for adult victims of sexual assault: facilities should be available at the Forensic and Medical Sexual Assault Centre (FAMSAC) for police to meet with the victim and videotape interviews there.[146]

This recommendation was the only one relevant to our paper that was not included in the Sexual and Violent Offences Legislation Amendment Bill. The SARP team modelled a 'one-stop shop' on the Victorian system, and this recommendation provided a way in which this could be incorporated into the ACT system. It is not clear as to why the suggestion was completely excluded from the Bill; however, one respondent suggested that it 'was probably an unrealistic expectation for a jurisdiction of this size'.[147] As the one-stop-shop was not legislated for in Victoria, it may also have been seen by the ACT Government as an 'administrative rather than a legislative' issue.[148]

B The Legislative Assembly debate

The ACT Attorney-General at the time, Simon Corbell, first presented the Sexual and Violent Offences Legislation Amendment Bill to the ACT Legislative Assembly on 3 July 2008.[149] The discussion resumed on 21 August 2008, where ACT Liberal MLA Mr Stefaniak began by stating that the opposition would be supporting the Bill.[150] Dr Foskey from the ACT Greens party followed by commending the aim of the legislation; however, she brought attention to some 'very alarmed responses' from various parties, including the Human Rights Commission,[151] Civil Liberties Australia and some prominent ACT legal practitioners.[152] She stated that she was arguing for the 'right to a fair trial for both the complainant and the accused', but that there were aspects of the Bill that undermined 'basic civil liberties' and many aspects of the court process.[153] She asked the Government to reconsider pushing the Bill through, and to postpone its passage until the 'community has been given adequate time to fully consider the impact of the actual proposed changes in this Bill'.[154]

Mr Corbell responded to Dr Foskey by explaining that prior to the drafting of the Bill there was a comprehensive consultation process with stakeholders, which included, at the earliest stage, the Human Rights Office, Legal Aid ACT, the courts and the Australian Federal

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[146] Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, above n 19, Recommendation 3.33.
[147] Interview with participant no. 8, judicial officer (Canberra, 2010).
[148] Ibid.
[149] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 3 July 2008, 2667-2671 (Mr Corbell).
[150] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3506-3510 (Mr Stefaniak).
[151] The Human Rights Commission made submissions relating to the draft Bill, noting the requirement to have regard to the rights in the *Human Rights Act 2004* (ACT) in the development of ACT legislation, drawing attention to relevant provisions in the *Human Rights Act 2004* (ACT), for example, s 22 (Right to a Fair Trial) and drawing attention to the criteria in s 28 relating to the 'reasonableness' test to limitations on human rights. See: email from Nadiah Tarbet to Jessica Kennedy, 25 March 2011; Letter from Dr Helen Watchirs and Linda Crebbin to Simon Corbell, 21 July 2008. For more discussion about the perceived conflict with the accused's right to a fair trial, see: Australian Law Reform Commission, 'Family Violence – A National Legal Response' (114, 2010); Victorian Law Reform Commission, 'Sexual Offences: Final Report' (July 2004).
[152] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3510 - 3511 (Dr Foskey).
[153] Ibid, 3511 (Dr Foskey).
[154] Ibid.

Police.[155] He continued by acknowledging the importance of safeguarding the minimum guarantees for which everyone charged with a criminal offence is entitled to, but stated that protecting the rights of alleged offenders is not the sole purpose of the criminal justice system.[156]

Dr Foskey also suggested a number of amendments to the Bill, which centred on maintaining the discretion of the court to determine witnesses' rights. For example, she proposed that the court have the discretion to order that a complainant is not required to attend and give evidence at a committal proceeding in relation to a sexual offence, instead of the section stating that all complainants are not required to attend.[157] She recommended further that the court have the discretion to prohibit the cross-examination of the victim by a self-represented accused, rather than a mandatory prohibition.[158]

Mr Corbell provided a range of reasons as to why these propositions were not acceptable and stated that the government would not support Dr Fosky's amendments.[159] Mr Stefaniak agreed with the Attorney-General and stated that they would also oppose her amendments.[160] Consequently, they were negatived.[161]

Mr Mulcahy from the Canberra Party also had some concerns of his own for the Attorney-General.[162] He referred to a letter from Ken Archer (former Director of the ACT DPP) to the Attorney General dated 14 August 2008. Mr Archer claimed that the evidentiary provisions of the Bill would lead to an inadmissibility of evidence under the Commonwealth *Evidence Act 1995*, which could not be altered by the ACT Assembly.[163] The effect of this inadmissibility, he said, would be that crucial evidence might become inadmissible, potentially resulting in a guilty offender escaping conviction on the basis of an unintended evidentiary error.[164]

Mr Corbell responded to Mr Mulcahy's claims by stating that the Commonwealth *Evidence Act 1995* allows other ACT legislation to continue unaffected, and that, therefore, the current Bill would operate unaffected.[165] He stated that the claim made by Ken Archer was wrong in this regard.[166] Mr Corbell concluded by saying that he was:

> … confident that the Bill [achieved] the necessary balance between reducing the trauma experienced by victims and other vulnerable witnesses in sexual and violent offence court proceedings and at the same time protecting the human rights of the accused to a presumption of innocence and a fair trial.[167]

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[155] Ibid, 3515 (Mr Corbell).
[156] Ibid, 3516 (Mr Corbell).
[157] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3521 (Dr Foskey).
[158] Ibid, 3526 (Dr Foskey).
[159] Ibid, 3522 and 3527 (Mr Corbell).
[160] Ibid, 3524 (Mr Stefaniak).
[161] Ibid.
[162] Ibid, 3513 (Mr Mulcahy).
[163] Ibid, 3514 (Mr Mulcahy).
[164] Ibid. In particular, Mr Archer claimed that the previously recorded statement may be regarded as inadmissible under the hearsay rule dealt with in part 3.2 of the *Evidence Act 1995* (Cth).
[165] Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 21 August 2008, 3515 (Mr Corbell).
[166] Ibid.
[167] Ibid 3518 (Mr Corbell).

The Sexual and Violent Offences Legislation Amendment Bill was agreed to in principle and passed without change on 21 August 2008.[168] It was notified on 8 September 2008, however, it did not take effect until 1 June 2009.

VI THE AFTERBIRTH: CONCLUSION

Our examination demonstrated that the reforms were a result of a number of years of lobbying, research and consultation with relevant agencies. The result of this hard work was a number of recommendations aimed at reducing the trauma of a trial for sexual assault victim witnesses. In the end, what was necessary though for these recommendations to translate into law were influential people, with a vested interest in the area of sexual assault law reform. This personal commitment by prominent players in the criminal justice system enabled the DPP and the AFP to produce the report *The Challenge of Change*, which in turn resulted in the harnessing of the energies of government and community groups by the SARP Reference Group, and was a major driving force behind the introduction of the *SVOLAA*.

The other element we identified in the initiation of this piece of legislation is what Croucher refers to as the 'happenchance of history', which has also played a crucial part in many other major reforms to the law.[169] She suggests that the most prominent example may be the High Court's decision in *Mabo*.[170] This renowned decision, which resulted in the acknowledgment of native title in Australia and the end of *terra nullius*, was the result of an 'ad hoc' meeting between gardener Koiki or 'Eddie' Mabo and James Cook University academics Professor Noel Loos and Henry Reynolds some 18 years earlier.[171] In our study, the timing of some of the events that precipitated the reforms was accidental, but crucial. For example, the airing of the program 'Double Jeopardy' was a 'happenchance' event that essentially kick-started the whole reform process. Further, without the appointment of the new Attorney-General in 2006, the initiatives may never have been resurrected.

Our concern with the ACT reforms lies with the possible 'afterbirth' events. One of the aims of this study was to see how much (dis)similarity is evident between the original idea for reform and what was enacted. As we have noted above, the amendments contain ample grey areas. These include discretion in: defining who is a vulnerable witness; admitting audio-visual recording evidence; deciding when the accused may be screened from the witness; deciding when it is in the interests of justice for the witness to give evidence in an open court; deciding when the witness may be recalled; and deciding when is it in the interests of justice to order that the witness attend to give further evidence if an application is made by the accused. The judicial discretion in the Act was included despite victim support agencies arguing for none.[172] The indeterminacy of the recommendations in *The Challenge of Change* report was minimal. It is not clear how much of the greyness of the legislation resulted from the input of the SARP reference group or the ACT Parliamentary Counsel's Office (PCO),[173] which provides comprehensive legislative drafting and publishing services for the Territory,

[168] Ibid.
[169] Discussed by Rosalind Croucher, above n 14.
[170] *Mabo & Ors v Qld (No 2)* (1992) 175 CLR 1.
[171] Rosalind Croucher, above n 14, 1.
[172] Interview with participant no. 9, victim support worker (Canberra, 2011).
[173] Rosalind Croucher, above n 13, 22 documents the influence by the NSW counterpart – the Parliamentary Counsel - and how the reform in that case study represented a 'compromise' between that body and the Law Reform Commission.

yet it is evident that the resulting legislation contains much more judicial discretion than was initially recommended.

Also indeterminate in the ACT reforms is the lack of direction in the process. The legislation does not provide any detail as to how the special requirements are to be applied for, or by whom, and this is not specified in the prosecutors' guidelines either. One participant informed us that 'certain special measures under the *Evidence (Miscellaneous Provisions) Act* are available on application by the prosecutor. There are [however] no formal guidelines governing when these special measures will be sought'.[174] The guidelines for prosecutors merely state:

> In prosecuting charges of assault, especially sexual assault, there should be particular concern for the position of the victim. Many such people have suffered severe emotional and physical distress as a result of the offence and may be confused and apprehensive at the prospect of having to give evidence. Prosecutors should carefully explain to victims of such offences the role which they play in the prosecution process and, if appropriate, the steps that can be taken to ensure their protection.[175]

This is as far as the guidelines go. There is no mention of when or how prosecutors should take the steps to ensure the victim's protection. This is interesting considering that one of the purposes of establishing a specialist sexual offences unit at the DPP in 2009 was to 'ensure maximum use is made of the special measures provided for as part of the recent legislative reforms'.[176] The introduction of this unit means that all sexual offence prosecutions are allocated to one of three specialist sexual offence prosecutors in the Sexual Offences Unit. These prosecutors deal with the special measures contained in the legislation on a regular basis and will make application for discretionary special measures in appropriate matters after consultation with complainants.[177] For example, one participant stated that through 'early, sustained and appropriate contact with complainants', and with the 'involvement of the Witness Assistant Support officers of the DPP, prosecutors are able to ascertain when it may be appropriate for a witness to give evidence at pre-trial hearing'.[178]

However, it has been suggested that due to the absence of strict guidelines or mandating legislation, these applications for special provisions are not always made.[179] If this is in fact the case, the enactment of the provisions will not have their intended effect, as many victims who could have been further protected will not be.

> … the principle should have been that any member of the public performing a public service in serving the administration of justice should be facilitated and enabled to do so, and not jump through hoops (ie prove vulnerabilities and only for this one and not for that one). Initiation is just another way of talking about access to rights and entitlements and, like any right or entitlement, victims need to be informed and facilitated. This process requires independent advocacy. In my view this is a specific area of responsibility for the statutory advocate. While the police and prosecution can do aspects of this they remain constitutionally focused on their role in relation to the *public* interest.[180]

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[174] Interview with participant no. 10, ACT prosecutor (Canberra, 2011).
[175] ACT Director of Public Prosecutions, *Guidelines for Prosecutors* <http://www.dpp.act.gov.au/Guidelines%20for%20Prosecutors.html>.
[176] ACT Director of Public Prosecutions, *Annual Report 2009-2010* (2010) ACT Director of Public Prosecutions, 16 <http://www.dpp.act.gov.au/pdf/AR2009-2010.pdf> .
[177] Interview with participant no. 10, ACT prosecutor (Canberra, 2011).
[178] Ibid.
[179] Ibid.
[180] Interview with participant no. 9, victim support worker (Canberra, 2011) (emphasis added).

Research has shown that when there are statutory 'grey' areas such as exceptions or lack of clarity, a very broad and diverse interpretation of the statutes ensues. Although discretionary powers are never absolute, they are exercised within a broader legal and social context, one that is susceptible to influence by common societal beliefs. From a feminist perspective, the broader social context and its values and justice-related priorities are understood as being male dominated and therefore permeated with overt, covert, and even unconscious gender biases. This means that the 'guidelines', 'principles' and legal concept signposts do not exist in a legal vacuum and that judicial discretion in interpreting them could be seen as 'shaped by the discriminatory and stereotypical reasoning embedded in the substantive law'.[181] Thus from this vantage point, discretion can be seen as taking place in a legal arena in which these so-called objective standards are in reality not neutral and inevitable, but 'operate in a partial and specifically gendered fashion'.[182] So for instance, despite many changes to consent laws and to the types of questions permissible in cross-examining a victim witness, cross-examinations continue to be focused on the complainant's actions, rather than those of the accused,[183] and evidence of sexual reputation is still being admitted, often without reference to the relevant legislation,[184] with applications for its admission routinely approved.[185]

Most recently, a report published by the Victorian Department of Justice, which assessed the impact of Victorian reforms very similar to those discussed in this paper, found that 'for many, but not all, victims of sexual assault their experience of the criminal justice system is vastly improved'.[186] It is possible though that the reforms may have led to different and subtler ways of harassment in cross-examination:

> Judges said they were seeing a reduction in the use of aggressive tones and overbearing and overly repetitive questions in cross examination. Judges felt that this change in behaviour by defence lawyers was significant and the direct result of the reforms. They noted, however, that the approach of some defence counsel was now more subtle and that intervention was still needed in relation to overly complex questioning and the speed at which questions were fired at the witness.[187]

Further, one of the Victorian reform's main aims was to increase the reporting and conviction rates for sexual assault, and these have proved resistant to change so far.[188] In fact, this study found that there has been a decline in the conviction rate for sexual offence matters in the County Court: the conviction rate is now at its lowest since 2004,[189] sitting at 38%.[190]

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[181] Simon Bronitt, 'No Records. No Time. No Reason' (1996) 8(2) *Current Issues in Criminal Justice* 130, 134.
[182] Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 41.
[183] Bernadette McSherry, 'Constructing Lack of Consent' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 26. See also: Patricia Easteal 'Australia' in Geetanjali Gangoli and Nicole Westmarland (eds), *International Approaches to Rape* (Policy Press, 2011).
[184] See: Department for Women, above n 28; and, Mary Heath, 'The Law and Sexual Offences Against Adults in Australia' (2005) 4 *Australian Centre for the Study of Sexual Assault Issues* 1, 13.
[185] Ibid. See also: Melanie Heenan, 'Reconstituting the "Relevance" of Women's Sexual Histories in Rape Trials' (2002) 13 *Women Against Violence* 4.
[186] Success Works, 'Sexual Assault Reform Strategy: Final Evaluation Report' (Victorian Department of Justice, 2011) 224.
[187] Ibid, 120.
[188] Ibid.
[189] Ibid, 78.
[190] Ibid, 80. Victoria's Chief Crown Prosecutor, Gavin Silbert, SC, believes that the OPP's practice of pursuing weak cases with little prospect of success has led to this drop in conviction rate.

Thus given the greyness in much of the special provisions of the ACT legislation, the question remains: was the enactment actually a 'healthy birth'/delivery or was it perhaps (birth)marked by indeterminacy? Further research is required therefore to see if these provisions are implemented in the spirit of the recommendations and whether the legislation does in fact result in improving victims' safe speaking.[191]

[191] One of the authors is looking at the efficacy of the ACT legislation for her doctoral project.