Evidence and Related Legislation Amendment Bill 2017

Sexual Assault Support Service Inc. (SASS) Submission

June 2017

Sexual Assault Support Service

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Introduction

Sexual Assault Support Service (SASS) is a free and confidential service for people of all ages who have been affected by any form of sexual violence, including intimate partner sexual violence. We also provide counselling to children and young people who are displaying problem sexual behaviour (PSB) or sexually abusive behaviour (SAB), along with support and information for their family members and/or carers.

The range of support options available at SASS includes counselling, case management (including safety planning) and advocacy. We also provide information and support to professionals, and deliver training workshops and community education activities in a range of settings including schools and colleges.

SASS appreciates the opportunity to provide feedback on the *Evidence and Related Legislation Amendment Bill 2017* (the Bill).

Comments on the Bill

SASS is strongly of the position that sexual assault cases involving one perpetrator and multiple complainants should be conducted as joint trials. We note that there are a number of strong public interest reasons for establishing a presumption of joint trial, particularly given the frequency of serial sex offending. We also note and strongly support the reasoning and approach taken by the Tasmanian Law Reform Institute (TLRI) in their 2012 report on this issue.[1]

We express wholehearted support for this Bill, and explain our reasoning for this below.

1. **A presumption of joint trials promotes a fair trial for complainants through the admission of all relevant evidence**

Joinder of sexual assault trials promotes a more equitable and effective justice system for sexual assault victims and for the community as a whole. The Tasmanian Law Reform Institute highlights that the concept of a 'fair trial' encompasses more than the rights of the accused; it must consider what is fair for the complainant, and achieve justice and safety for the community.[2] Separation of trials allows a defendant to conduct their defence within each trial in isolation from other similar charges, thus preventing juries from receiving all relevant information regarding a defendant's behaviour and character. The lack of corroborating evidence from other witnesses enables the defendant to attack each complainant's credibility more convincingly, thus creating a more persuasive argument that the complainant or complainants have fabricated their evidence.

It is well known that convictions for sexual assault charges are difficult to obtain. This is in large part due to the fact that sexual assaults are usually committed in private, without witnesses who can provide corroborating evidence. Therefore, for adult complainants the question usually rests on whether or not there was consent for the sexual act. In cases of child complainants, the trial will usually centre on whether or not the assault happened at all. Sexual assault cases – both adult and child – "frequently turn into a battle of credibility between the complainant and the defendant".[3] Evidence as to the credibility of either is therefore key. The Tasmanian Law Reform Institute has noted that the cross-admissibility of evidence has a key role to play in supporting the credibility of complainants, stating that;

> Knowledge by the jurors of the existence of multiple complainants supports the credibility of each individual complainant and counter-balances the suspicions prevalent within the community about the veracity of sexual assault and child complainants.[4]

Limiting a jury's access to corroborating evidence through the separation of trials can result in such a weakened case that there is no prospect of conviction,[5] conferring a significant advantage on the accused and preventing the achievement of justice.

SASS asserts that in sexual assault cases, justice is best administered by admitting all relevant evidence concerning a defendant's unlawful sexual behaviour. Whilst it is imperative to weigh the advantages of admitting such evidence against the risk of potential prejudice to an accused, this risk can be averted by a direction to the jury – as occurs in Western Australia (see *Criminal Procedure Act* 2004 (WA) s 133(5)).

2. A presumption of joint trials reduces negative impacts on complainants

A second and critically important factor is that the joining of trials reduces the trauma likely to be experienced by complainants as a result of having to give evidence more than once. Supporting this, the Australian Law Reform Commission has cited the lowered risk of trauma to complainants as the main justification in recommending a presumption of joint trials in sexual assault cases.[6] The Director of Public Prosecutions Serious Crime Witness Assistance Unit has also publicly stated that 'in terms of reducing the trauma for witnesses the first thing that could be done is to minimise the number of times a person has to go through their evidence'.[7]

This is a particularly pertinent issue in the case of children. Whilst the amendments to the *Evidence (Children and Special Witnesses) Act 2001* (Tas) do ease the burden on child victims, there are still situations where a child will have to give evidence on multiple occasions over a long period of time. This is likely to increase their trauma from the original assault or assaults, and repeated questioning also risks contaminating their evidence.[8]

The following statement made by a former SASS client demonstrates the impacts that separate trials can have on vulnerable complainants;

> It took all my courage to come forward and report my abuse by my brother. I don't think that I ever would have had it not been for my sister reporting her abuse by him. I felt a sense of relief knowing that we were on this journey together even though I hadn't seen her in over 15 years.
>
> I believed that we had a good chance of getting a conviction against him if we were given the chance to tell our story together. But when the DPP said that our cases would have to be heard separately in court, I was devastated. I felt very isolated and feared that my sister might drop her allegations against him, and then I would be left on my own. We were told by the DPP that we were not to have contact with each other because we might contaminate evidence for each of our cases. Once again my sister and I became isolated from each other. The rest of my family didn't believe that my brother had abused me and my sister. He started sexually abusing me when I was 3 years old and didn't stop until I left home at 18.
>
> I began to have nightmares and was terrified about going outside in case I ran into my brother or other members of my family. This went on for months and I had to have regular counselling to help me cope. As it turned out, the DPP decided to drop the case all together because there wasn't enough evidence. I went through all that trauma for nothing and he still gets away with it.

3. A presumption of joint trial lowers case attrition and increases guilty verdicts

Joint trials also help to reduce case attrition. Sexual assault cases are more prone to attrition than other serious criminal offences, and evidence from various Australian jurisdictions (including Tasmania) indicates that the decision to proceed on separate indictments is highly likely to be a significant factor in contributing to this.[9]

Evidence from the Judicial Commission of NSW also indicates that the separation of sexual assault cases results in a higher level of case acquittal. The Commission found that in cases of one trial with multiple complainants, the numbers of guilty and not guilty verdicts were fairly similar, whereas not guilty verdicts resulted from the vast majority of separate trials with the same accused.[10]

It is also worth noting that sexual offences are a grossly under-reported crime. The Victorian Law Reform Commission has highlighted that,

> …current deficiencies in the system contribute to substantial underreporting of sexual offences and discourage people who allege they have been assaulted from giving evidence at committal or trial. Criminal procedures that discourage reporting…may result in some offenders escaping apprehension, which may put more members of the community at risk.[11]

4. A presumption of joint trial reduces the likelihood and occurrence of complainants providing inadmissible evidence

It is also worth mentioning that the joining of trials also lessens the risk of a complainant and/or witness providing inadmissible evidence. When trials are severed complainants may be called to give evidence in more than one trial, but this must be confined to the complaint being heard. The likelihood that a complainant or witness will inadvertently give inadmissible evidence is increased, which can result in the trial being aborted.

5. Additional comments

SASS also notes that there has been strong support for the presumption within other Australian jurisdictions. Victoria and South Australia have established a presumption of joint trials for sexual offence cases involving adult complainants. In Victoria, this presumption stands even where evidence is not cross-admissible, although this does remain a factor in the court's exercise of discretion over whether to order separate trials. In Western Australia, the Court has discretion to order separate trials if they are satisfied that the there is a likelihood of prejudice to the accused, otherwise the decision as to whether there will be a joint trial rests with the prosecution. The legal profession has also demonstrated strong support for the presumption; in its 2010 report into family violence, the Australian Law Reform Commission strongly recommended a national move to a presumption of joint trial, as per Victoria's approach.[12]

Further recommendations

SASS also strongly advocates for legislative reform in this area to incorporate active measures to avoid application of the judgment in *Phillips v The Queen*[13] in Tasmanian courts. We contend, as does the Tasmanian Law Reform Institute, that the reasoning in Phillips that evidence of a complainant of non-consensual sexual intercourse was irrelevant to the issue of consent in relation to another complainant is highly likely to result in great injustice to complainants in sexual assault cases.

We suggest that Tasmania adopts the approach advocated for by the Tasmanian Law Reform Institute to avoid the High Court's decision being applied in a way that restricts admissible evidence of consent. The Tasmanian Law Reform Institute suggests that the evidence of multiple complainants with regard to the issue of consent could be approached "as tendency evidence that reveals the accused's tendency to procure participation in sexual activity by force, threats or intimidation"[14] rather than merely as evidence of the complainants' states of mind.

SASS therefore urges the Government to incorporate into the Bill the following recommendations from the Tasmanian Law Reform Institute (provided in their 2012 report on this issue):

Recommendation

The *Evidence Act 2001*, s 55 should be amended to specify that in a trial of two or more charges of sexual crimes, when consent is in issue, evidence may be admitted under the *Evidence Act 2001*, s97 of a tendency of the accused: (a) to procure participation in sexual acts by force, threats or intimidation; or (b) to engage in sexual acts without an honest and reasonable belief that the sexual acts were consented to.

Recommendation

The Evidence Act 2001, ss 97, 98 and 101 should be amended to specify that in prosecutions for sexual crimes a court is not to rule that evidence the prosecution seeks to adduce under those sections is inadmissible on the basis that the evidence does not have 'striking similarities' with other evidence about the sexual conduct of the defendant.

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[1] Tasmanian Law Reform Institute. (2012). *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases with Multiple Complainants*. Final Report No. 16.

[2] Ibid, p.2.

[3] Hamer 2007, cited by Tasmanian Law Reform Institute (2012), p.27.

[4] Tasmanian Law Reform Institute (2012), p.28.

[5] Office of the Director of Public Prosecutions NSW (2010) submission to the Australian Law Reform Commission. (2010). *Family Violence - A National Legal Response*. ALRC Report 114. Australian Government, Canberra, para 143.

[6] Australian Law Reform Commission (2010), para 152.

[7] Tasmanian Law Reform Institute (2012), p.19.

[8] Ibid, p.19 and p.31.

[9] Australian Law Reform Commission (2010), para 152; and Tasmanian Law Reform Institute (2012), p.25.

[10] Gallagher, P., Hickey J., and Ash, D. (1997). 'Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales during 1994'. Research Monograph 15. Judicial Commission of New South Wales, p.20.

[11] Victorian Law Reform Commission. (2004). *Sexual Offences: Final Report*. Melbourne, 1.10.

[12] Australian Law Reform Commission (2010).

[13] *Phillips v The Queen* (2006) 225 CLR 303.

[14] Tasmanian Law Reform Institute (2012), p.68.