



24 August 2017

**Proposed Amendments to the Criminal Procedure Code and Evidence Act:  
AWARE's submissions to the government consultation**

Through our Helpline and the Sexual Assault Care Centre (SACC), the Association of Women for Action and Research (AWARE) has assisted thousands of women with experiences of gender-based violence, including sexual violence. We welcome the efforts to improve victims' experiences of the criminal justice system. Only with adequate support can victims effectively and safely engage with the processes for holding offenders legally accountable.

At the same time, the criminal justice process must have due regard for the rights of suspects. Victims of gender-based violence seek fairness and accountability in the criminal process. In many cases, the perpetrator is someone previously known to them. A perception that criminal investigations are unduly harsh on suspects can deter victims from reporting. It is in everyone's interest that criminal investigations respect the rights of suspects.

Our submission consists of two sections. Section A offers comments on several of the proposed amendments, and Section B offers further recommendations to achieve a more victim-centric criminal justice process.

**Section A: Comments on Proposed Amendments**

S/N	Proposed Legislative Changes	Relevant Section or Part in the CPC
<b>A. Powers of Investigators</b>		
<i>Making Greater Use of Technology in Investigations</i>		
1.	<b>Introducing Video Recording of Interviews</b>  I. <u>Video recording of suspects and witnesses during police interviews</u>  a. We welcome the proposal to make the video-recording of suspects' and witnesses' statements compulsory. Video recordings produce the most complete documentation of the interview process. Moreover, they protect the interests of both interviewees and police by providing an objective record for reference should there arise any allegations of misconduct at the interview and statement-taking stages.  b. As every suspect and defendant has the right to due process, we recommend	<b>Part IV</b>

that the video-recording of interviews with suspects eventually be made compulsory for all offences, subject to the reasonable exemptions that have been proposed.

- c. Similar considerations apply to witnesses who are not complainants.

## II. Video-recording of sexual assault complainants during police interviews

- a. As we understand it, there are two motivations for this proposal: (i) to have the fullest and most objective record of the victim's account and (ii) to reduce the need for the victim to recount traumatic experiences multiple times. However, in our view, such recordings would not be effective at serving either aim.
- b. In principle, a video recording would provide the fullest and most objective record of what is said during police interviews. However, in reality, many victims of sexual assault are reluctant to speak about their experiences due to fear, embarrassment and trauma. The knowledge that they are being filmed would make the process even more intimidating. Many will become even less willing to share sensitive details and render a full account. Moreover, the biological impact of trauma can affect a survivor's account of the story right after the assault, which could lead to a lot of cross-examination at the trial stage.<sup>1</sup> For this reason, we believe video recording would be counterproductive, as it will hinder investigation and the collection of evidence.
- c. Moreover, the proposal is for the video-recording to be used in place of the victim's oral evidence-in-chief in court. This will do little to reduce the need for multiple conversations during the investigative phase, which affects most sexual assault survivors negatively. In our experience, cases sometimes get assigned to multiple officers during the course of investigation. When thorough notes are not passed on, the victim has to repeat their story. The current proposal does not address this.
- d. We recommend instead the use of a brief statement of facts summarising key relevant information about the incident reported, e.g. where and when the assault took place, the nature of the assault, what injuries were observed. This can be passed, with the victim's consent, to relevant officers and departments (e.g. hospitals) handling the case, so the victims need not repeat their full stories multiple times to different persons. Further questions can be asked of them on a more informed basis.
- e. We are also concerned that the videos may be leaked or misused, worsening

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<sup>1</sup> <http://time.com/3625414/rape-trauma-brain-memory/>

	<p>the harm done to victims. The proposed safeguards are not consistent with the stated purpose of the video (e.g. is it practicable for doctors to come to the station to view the recording? If not, how does this reduce the need for victims to recount their stories multiple times?). Digital security breaches are of increasing concern and the knowledge that such videos exist could make the police force a target for malicious activity, given the active market trading in sexual assault materials (e.g. upskirt photographs). These concerns would reduce victim confidence in the process and inhibit them from speaking (see b. above).</p>	
	<p><b>B. Court Procedures and Evidence</b></p>	
	<p><i>Protecting the Vulnerable in the Court Process</i></p>	
<p><b>13.</b></p>	<p><b>Enhancing Protection for Complainants of Sexual and Child Abuse Offences During the Court Process</b></p> <p><u>I. The automatic protection of the identity of sexual assault and child abuse complainants from publication from the moment they report the offence</u></p> <p>a. We strongly welcome this as it addresses one of the most common and significant fears of victims when it comes to reporting sexual offences. We recommend that the law clarify that, in cases of non-compliance, the police and/or court will undertaken enforcement action of their own initiative, without further action required on the part of the victim.</p> <p><u>II. The court is to decide on whether to allow a witness to give evidence by video link based on a psychiatrist’s or psychologist’s report on the witness</u></p> <p>a. We welcome the option for victims to give evidence by video link. However, we question whether a psychiatrist’s or psychologist’s report should be made a prerequisite for this in every case. This requirement can be burdensome to meet, and may put the victim at risk of further harm as they may need to recount their experience yet another time.</p> <p>b. In addition, there remains a societal taboo against psychological support. In the absence of a clear explanation of the purpose and context of this requirement, a victim who is directed to see a psychologist or psychiatrist may perceive this as questioning their “sanity” and thus as a form of disbelief or judgment.</p>	<p><b>Parts XII, XIV and Evidence Act</b></p>

- c. We recommend that our courts seek to adopt the approach taken in New Zealand,<sup>2</sup> where a witness can be cross-examined via video link on the request of a party or at the judge's own initiative, based on several grounds, such as the age/maturity of the witness, their physical / intellectual / psychological / psychiatric impairment, or trauma suffered by them. The judge is in the best position to balance considerations of witness protection and the integrity of the court process. They may not always require a psychologists' or psychiatrists' opinion to come to a decision.
- d. If the Ministry decides that reports are needed in all cases, there should be a duty on the part of the AGC to arrange for the psychiatrist's / psychologist's assessment whenever a victim requests to testify by video link. Clear and non-judgmental explanation of the purpose of assessment - i.e. to obtain an expert's understanding of the impact of trauma - should also be provided to the victim.

III. The use of physical screens in court to shield them from direct contact with the defendant

- a. In our experience, survivors of sexual assault can be seriously intimidated and/or traumatised by further contact with their assailants. We therefore welcome this proposal. To ensure accessibility, this should be offered automatically to sexual assault complainants by the court without the need for a specific request on their part.

IV. The automatic use of in camera (closed-door) hearings when victims of sexual and child abuse offences are testifying

- a. We welcome this proposal which will further protect the identities of vulnerable victims and thus increase their confidence in giving their testimony. In our view, a closed-door hearing will not erode due process, since victims are still subject to cross-examination, and defendants continue to enjoy other protections of the law. However, we urge the Ministry to clarify that victim advocates (such as SACC Befrienders) would be permitted to be present in such closed-door hearings.

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<sup>2</sup> <http://legislation.govt.nz/act/public/2006/0069/latest/DLM393936.html>

V. A general prohibition on questions about the sexual history and behaviour of sexual assault victims that do not relate to the charge, including their appearance, unless the court finds that it would be manifestly unjust not to allow such questions

- a. We strongly support this. Previous sexual history and behaviour is usually irrelevant to the facts relating to a charge. Questions of this nature may stem from a false and illogical view that consent to sexual activity (especially casual sex) on one or more occasions can be probative as to consent on other occasions, a view borne solely out of prejudicial stereotypes about women's "purity". Such intrusive questions cause victims shock, humiliation and embarrassment, with the risk of secondary victimisation.
- b. Presently, the court can stop inappropriate questioning as an abuse of process, but if this is only done after the question is asked, the harm will already have occurred (such as in the case of Edmund Wong Sin Yee in 2016).<sup>3</sup> For this reason, we called in 2011 for the implementation of Rape Shield Laws, and we are pleased to see them introduced here.<sup>4</sup>
- c. However, we seek greater clarity on the guiding principles as to when the prohibition would be "manifestly unjust". Such questions would very rarely be appropriate, since prior sexual history and behaviour generally has no logical relationship to a particular instance of alleged sexual assault. Questions on these matters should only be permissible where: (i) they are clearly relevant to a material question of fact; (ii) they are strictly limited in scope to establishing only relevant facts; and (iii) they are not unduly intrusive or detailed. For example, the fact of a pre-existing sexual relationship with the defendant may be relevant to interpreting communications between the parties, but this would not in itself justify detailed questioning about the details of their sexual history or sexual behaviour. The victim's previous sexual history or behaviour in connection with other people is extremely unlikely to be relevant in most circumstances.
- d. We recommend that, just as in other jurisdictions such as the United Kingdom and Canada, the judge must consider particular factors in determining if such questions can be allowed, such as: (i) the interests of justice, including the right of the accused to make a full answer; (ii) society's interest in encouraging the reporting of sexual assault offences; (iii) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; (iv) the need to remove from the fact-finding process any discriminatory

<sup>3</sup><http://www.straitstimes.com/singapore/courts-crime/lawyer-who-focused-on-molest-victims-breast-size-rapped-by-judge>

<sup>4</sup> <http://www.aware.org.sg/2011/11/section-157d-of-evidence-act-repeal-it/>

	<p>belief or bias; (v) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury (<i>this can be modified in Singapore's context</i>); (vi) the potential prejudice to the complainant's personal dignity and right of privacy; (vii) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and (viii) any other factor that the judge considers relevant. Having a set of guiding principles in place can increase the transparency of the court's decision-making, strengthening the credibility of its decisions.</p>	
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**Section B: Further Recommendations for More Victim-centric Criminal Justice**

Below we set out further recommendations for improving the sensitivity of the criminal justice process to the needs of sexual assault survivors, with particular reference to the court process.

1. Sexual assault counselling (and other professional) communications should be privileged

- a. Victims of sexual assault may seek support from social workers, counsellors, psychiatrists or other healthcare and social service providers (collectively referred to in this section as “professionals”). This is critical to their recovery, but speaking to another person about the experience can be daunting for victims.
- b. Currently, the law allows professionals to be compelled to give evidence about clients, and for information shared during counselling to be used in court. This is a serious threat to the professional-client relationship. It discourages help-seeking, as victims worry that what they share as part of therapy and other help-seeking may be disclosed without their consent. Moreover, some professionals and lawyers have argued that the purpose of sexual assault victim’s counselling notes is “therapeutic, not investigative or forensic”,<sup>5</sup> and there is therefore no good reason from them to be used in court.
- c. Australia’s Sexual Assault Communications Privilege (SACP) (Criminal Procedure Act 1986 (NSW)) provides a good reference as to how counselling, health and other therapeutic information about a sexual assault victim can be protected from disclosure in court. Importantly, its definition of ‘protected confidence’ is based on three principles:<sup>6</sup>

i.	A counselling communication is covered by privilege even if the sexual assault is only alleged.
ii.	A counselling communication is protected whether it occurred before or after the sexual assault took place.
iii.	A counselling communication is privileged even if it does not mention sexual assault or contain any information about a sexual assault.

<sup>5</sup> <http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/subpoena-survival-guide/sexual-assault-communications-privilege-sacp>

<sup>6</sup> *ibid*

- d. The SACP also covers communications made with health professionals (psychologists, counsellors, doctors, nurses, allied and complementary health practitioners, for example), most welfare workers (including youth workers, refuge workers and financial counsellors) and many other professionals, such as social workers, teachers, school counsellors and government or NGO case workers.<sup>7</sup>
- e. We recommend that sexual assault counselling communications be privileged so that they can only be disclosed in court **with the consent** of the victim, as is the case in Tasmania, Australia.

## 2. Self-representing defendants should be prohibited from examining the victim

- a. Currently, defendants who represent themselves in court may cross-examine the complainant, which can be especially traumatising for victims of sexual assault.<sup>8</sup> This loophole can undermine and invalidate other measures to minimise direct contact between victims and perpetrators of sexual assault.
- b. In Australia (NSW), Section 294A of the Criminal Procedure Act 1986 prohibits the cross-examination of the complainant by a self-represented defendant in sexual offence proceedings. The court will appoint a person to cross-examine the victim instead.
- c. We recommend that, as in Australia (NSW), cross-examination of the complainant by a self-represented defendant in sexual offence proceedings be prohibited. In such cases, the court should appoint another person to carry out the cross-examination instead.

## 3. Right to accompaniment by victim advocate throughout entire process

- a. Navigating the medical and legal systems alone after a traumatic event can be confusing and difficult. Guidance and support from a victim advocate throughout the various stages can help sexual assault victims and encourage them to stay engaged in the process.<sup>9</sup> A study on rape survivors' experiences with the legal and medical systems showed that those who were supported by an advocate were more likely to file a police report and be treated less negatively by police officers. They also reported less distress after their contact with the legal system.<sup>10</sup>
- b. Currently, SACC Befrienders can accompany a client to hospitals and police stations, sit in on limited police interviews, and accompany them to the court. In addition to providing emotional support, they answer practical questions. Victim Care Officers (VCOs) from

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<sup>7</sup> *ibid*

<sup>8</sup> <http://www.sandiegouniontribune.com/sdut-cross-examine-defendants-pro-per-victims-law-2015may14-story.html>

<sup>9</sup> [https://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf)

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[https://www.researchgate.net/publication/7453682\\_Rape\\_Survivors'\\_Experiences\\_With\\_the\\_Legal\\_and\\_Medical\\_Systems\\_Do\\_Rape\\_Victim\\_Advocates\\_Make\\_a\\_Difference](https://www.researchgate.net/publication/7453682_Rape_Survivors'_Experiences_With_the_Legal_and_Medical_Systems_Do_Rape_Victim_Advocates_Make_a_Difference)

the Singapore Police Force Victim Care Cadre Programme similarly provide emotional support. However, neither is allowed to sit in with the victim during all police interviews.<sup>11</sup>

- c. Not every victim of sexual assault is connected to SACC or a VCO. In our experience, most victims do not know about VCOs, even if they were not already accompanied by an SACC Befriender. Moreover, the VCO can appear to be a separate channel, not support that accompanies other processes. This can appear less useful to victims.
- d. Vulnerable victims need a clear right to be accompanied by a victim advocate or support person during all stages of the criminal justice process, including all police interviews. The Appropriate Adults Scheme for Young Suspects sets a precedent for vulnerable persons to have an appropriate person to sit in with them during police interviews. Victims of sexual assault should also have the same protection.
- e. A number of states in the United States currently have laws stipulating a sexual assault victim's right to a victim advocate or counsellor.<sup>12</sup> In California, law enforcement authorities must inform the victim either orally or in writing their right to a victim advocate or support person of their choice prior to the initial interview.<sup>13</sup> In Wisconsin, hospitals must inform victims of their right to a victim advocate.<sup>14</sup>
- f. We recommend that victims have a legal entitlement to a victim advocate, whether these are provided by the police force (e.g. VCOs) or community (e.g. SACC). Victims should be informed of their right to request for an advocate prior to their first interview with the police, or when they arrive at the hospital for a rape kit examination, whichever happens first. The victim advocate should be able to accompany the victim with their consent throughout the investigation and court processes, including all police interviews, statement-taking, and when the victim gives evidence in court (including in camera).

#### 4. Clarify the scope of "reasonable excuse" in section 424

- a. Section 424 places a duty on those with information about the commission of particular offences (or the intent to commit the same) to provide this information to the police, absent a "reasonable excuse". Failure to do so is punishable under the Penal Code.
- b. To our knowledge, this duty is not enforced. The Ministry may wish to carry out a general review of this law to assess its effects, as well as how and whether it meets its intended purposes. Below we offer more specific comments on its particular application to SACC.

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<sup>11</sup> <http://www.singaporenewstribes.com/written-reply-to-parliamentary-question-on-updates-on-victim-care-cadre-programme/>

<sup>12</sup> [https://www.hrw.org/sites/default/files/reports/improvingSAInvest\\_0.pdf](https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf)

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[http://leginfo.legislature.ca.gov/faces/codes\\_displaySection.xhtml?sectionNum=679.04.&lawCode=PEN](http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=679.04.&lawCode=PEN)

<sup>14</sup> <https://docs.legis.wisconsin.gov/2015/related/lcactmemo/act351>

- c. As this covers a number of sexual assault offences, this duty may be engaged when SACC clients relate their experiences to us. However, as explained below, mandatory reporting by us would harm our clients, prevent us from providing appropriate support and ultimately be contrary to the interests of justice. We therefore urge greater clarity in the definition of “reasonable excuse”, to give greater reassurance to civil society groups supporting vulnerable individuals.
- d. Our clients are often reluctant or hesitant to engage with the police. After the traumatic and disempowering experience of sexual assault, it is important to them to recover a sense of autonomy, especially over how their case is handled. Confidentiality is a major concern for many; losing control over disclosures of sensitive information would threaten their psychological safety. In some cases, there is the risk that it would lead to self-harm, including potentially fatal self-harm.
- e. We recognise that in a minority of cases, the client faces a risk of prospective danger, and the need to address this risk may outweigh the considerations above. In these cases, it is our policy to contact the police or other authorities. This may be particularly relevant to minors who are at risk of continuing exploitation by an assailant with whom they remain in contact. (However, the fact that the assailant has not been identified or apprehended does not in itself establish this risk; and in our view, the aim of ensuring the perpetrator’s eventual conviction is better served by maintaining a victim support service as a safe space where clients’ desire for confidential support will be respected.)
- f. We note that most states in the United States do not impose any similar mandatory reporting requirements in relation to offences committed against competent adults. English law imposes no duty to report offences at all.
- g. Based on the above, we urge the Ministry to clarify that there is a “reasonable excuse” where a civil society organisation providing support and assistance to a vulnerable group reasonably determines that: (i) it is necessary to maintain client trust and confidentiality in respect of the information that would otherwise trigger a s424 duty, so as to effectively provide that support and assistance and (ii) the risk of prospective danger to the client or another person is not sufficiently clear or significant as to outweigh the need for trust and confidentiality. (The fact that an assailant has not been identified or apprehended should not by itself be taken to establish such as risk.)
- h. It would also be helpful to clarify what does not constitute a reasonable excuse. In the state of Victoria in Australia, for example, someone does not have a reasonable excuse for failing to disclose sexual abuse “if they are only concerned for the perceived interests of the alleged perpetrator or any organisation”.<sup>15</sup>

*“Perceived interests” includes reputation, legal liability or financial status. For example, a minister’s concern for the reputation of a church where the abuse happened will not be regarded as a reasonable excuse.*

#### 5. Prohibition of the use of polygraph lie-detector tests

- a. We have encountered numerous cases where sexual assault complainants were asked to take a polygraph lie detector test while making a police report. Many of our clients indicate that this caused them anxiety, worsening the traumatic effects of sexual assault.
- b. The results of polygraph lie-detector tests are unreliable. In 2004, the British Psychological Society found that “[Even] in the most favourable circumstances polygraphic lie detection accuracy is not high”. In 2003, the US National Research Council concluded that the reliability of the polygraph is questionable, and neither technological nor methodological advancement was likely to improve that reliability.
- c. There is therefore little justification for subjecting vulnerable victims to this procedure. The unreliability of polygraph tests is even recognised by the fact that their results are inadmissible in court. Police officers should not use them to make decisions about how to handle a complaint.
- d. Many jurisdictions have discontinued the use of polygraph testing on rape and sexual assault complainants. For example, Michigan’s Code of Criminal Procedure bars law enforcement officers, prosecutors, and other government officials from requesting or ordering victims of sexual offenses to undergo examination using a polygraph or other truth-telling device.<sup>16</sup>
- e. We recommend the prohibition of the usage of polygraph lie-detector tests by all law enforcement officers.

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<sup>16</sup> <http://law.justia.com/michigan/codes/mcl-chapters-760-777/mcl-776-21.html>