

Explanatory Statement

SEXUAL OFFENCES (EVIDENCE AND PROCEDURE) AMENDMENT BILL 2019

SERIAL NO 117

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

EXPLANATORY STATEMENT

GENERAL OUTLINE

The purpose of this Bill is to amend the *Sexual Offences (Evidence and Procedure) Act 1983* to enable complainants of sexual offences to consent to being identified in a publication or statement or representation provided that:

- (a) consent is provided in writing;
- (b) the complainant is an adult at the time of giving consent;
- (c) the complainant had capacity to give consent; and
- (d) the proposed publication, statement or representation does not identify, directly or indirectly, another complainant unless that other complainant has also given consent.

The ability to apply to the court for an order permitting publication or the making of a statement or representation is retained, however a new requirement that the court take into account the wishes of the complainant in deciding whether to make the order is included.

The Bill repeals and redrafts sections 6 to 12 of the *Sexual Offences (Evidence and Procedure) Act 1983* and generally maintains the existing policy in those sections, but rationalises the offences in current sections 6, 7, 11 and 11B.

NOTES ON CLAUSES

Part 1 **Preliminary matters**

Clause 1. **Short title**

This is a formal clause which provides for the citation of the Bill.

The Bill, when passed, may be cited as the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*.

Clause 2. **Commencement**

This is a formal clause which provides when the Act will commence.

The Act will commence on a day fixed by the Administrator by Gazette notice.

Part 2 **Amendment of Sexual Offences (Evidence and Procedure) Act 1983**

Clause 3. **Act amended**

This is a formal clause which provides that Part 2 amends the *Sexual Offences (Evidence and Procedure) Act 1983*.

Clause 4. **Sections 6 to 12 replaced**

This clause repeals and replaces the existing sections 6 to 12 of the *Sexual Offences (Evidence and Procedure) Act 1983* (the Act) which prohibit the publication of information that identifies or is likely to lead to the identification of a complainant, or of a defendant in a sexual offence proceeding.

Section 6 Disclosing identity of complainant

New section 6(1) retains the effect of repealed sections 6 and 11B of the Act as they apply to complainants, but will include a new defence to enable a sexual assault survivor (in the Act known as a complainant) to consent to the publication or making of a statement or representation which identifies them or is likely to lead to their identification.

The newly drafted offence in section 6(1) provides that it is an offence to intentionally publish or make a statement or representation that results in the disclosure of a complainant's name, address, school, place of employment, or any other particular likely to lead to the identification of a complainant. The prosecution is required to prove that the person publishing or making the representation or statement was reckless in relation to the result, being the disclosure. The maximum penalty for the offence remains 40 penalty units or six months imprisonment.

New section 6(2) provides that it is a defence to a prosecution for the offence in section 6(1) if, when the statement or representation is published or made, there are no proceedings for the sexual offence pending, and the affected complainant, or if there is more than one affected complainant, each affected complainant, consented in writing and was an adult with capacity to consent when consenting. This means that the publication or statement or representation must not disclose particulars that are likely to identify any other complainant unless that other complainant has also consented in writing to the publication or making of the statement or representation before it was published or made and, when consenting, was an adult and had capacity to consent. Also the publication or statement or representation must not be made until all the proceedings for the sexual offence, including any appeal or re-trial, are finalised.

New section 6(3) provides that the offence in new section 6(1) does not apply to a statement or representation exempted under new section 8.

New section 6(4) defines the concept of an 'affected complainant' and having 'capacity' to consent.

An 'affected complainant' means a complainant whose particular referred to in section 6(1)(b) is disclosed as a result of the publication or making of the statement or representation.

A complainant has 'capacity' to consent if they are capable of freely and voluntarily consenting, and are not, for example, subject to undue pressure, and are not incapable of consenting because of mental impairment as defined in section 43A of the Criminal Code.

Section 7 Disclosing identity of defendant

New section 7(1) retains the effect of repealed sections 7 and 11B of the Act as they apply to defendants. The redrafted offence provides that it is an offence to intentionally publish or make a statement or representation that results in the disclosure of a defendant's name, address, school, place of employment or any other particular likely to lead to the identification of the defendant. The offence is committed if the disclosure occurred before the defendant is committed for trial or sentence upon a charge of having committed the sexual offence to which the statement or representation relates. The prosecution is required to prove that the person publishing or making the representation or statement was reckless in relation to the circumstance of the statement or representation being published or made before the defendant is committed for trial or sentence, and in relation to the disclosure of the particulars.

The maximum penalty for the offence remains 40 penalty units or 6 months imprisonment.

New section 7(2) provides that new section 7(1) does not apply to a statement or representation which is exempted under new section 8.

Section 8 Exempted statements and representations

New section 8 replicates the effect of repealed sections 9 and 12(1) to exempt the publication or making of a statement or representation from the operation of the offence provisions in new sections 6(1) and 7(1) in certain reports relating to court proceedings.

Section 9 Court may authorise disclosure

New section 9 allows a court to order that a person is authorised to publish or make a statement or representation that would otherwise be an offence against new sections 6 and 7. This section will enable a complainant, defendant or other person to make an application to the court for an order. It replicates the effect of repealed section 6, 7 and 12(2) and (3), though the application can be made at any time.

New section 9(2) inserts a new requirement that the court consider the wishes of the complainant when making an order in relation to a statement or representation disclosing any particular that is likely to lead to the identification of a complainant.

New section 9(3) permits the court to make an order subject to conditions which specify the particulars that may be disclosed and the extent to which publication or making of the statement or representation is permitted.

New section 9(4) allows the court, on application by the defendant before the commencement of an examination of witnesses or a trial, to direct that new section 6(1) or 7(1) does not apply. The court must be satisfied that the direction is required for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the examination or trial and the conduct of the defence at the examination or trial is likely to be substantially prejudiced if the direction is not given.

New section 9(5) allows a court to direct that new section 6(1) does not apply, on application by a person who has been found guilty of a sexual offence and who has given notice of appeal against the finding of guilt. The court must be satisfied that the direction is required for the purpose of obtaining evidence in support of the appeal and that the applicant is likely to suffer substantial injustice if the direction is not given.

Section 10 Contravention of order

New section 10 is intended to have the same effect as repealed section 11A. New section 10 provides for the offence of breaching an order made under new section 9(1). A person commits an offence against new section 10 if the person intentionally engages in conduct, the conduct results in contravention of the order and the person is reckless in relation to the result. The maximum penalty for the offence remains 40 penalty units or 6 months imprisonment.

Section 11 Contempt

New section 11 retains the effect of repealed section 11C. New section 11 provides that if a person is charged with or found guilty of an offence against new sections 6, 7 or 10, the court may also deal with the person for contempt of court.

Section 12 Protection additional

New section 12 retains the effect of repealed section 10. New section 12 provides that new sections 6 and 7 do not derogate from any other law directed towards the protection from identification of a witness or other person in an examination of witnesses or trial.

Clause 5. Section 13 amended (Criminal liability of executive officer of body corporate – evidential burden of proof on defence)

This clause amends the definition of **declared provision** in section 13(9) to remove references to the offence provisions in repealed sections 11, 11A and 11B and insert references to new sections 6, 7 and 10.

Clause 6. Part 3, Division 4 inserted

This clause provides for the transitional matters for the new provisions and offences by inserting a new Division 4 and new sections 20 to 22. The relevant offences for these transitional matters are the offences in the *Sexual Offences (Evidence and Procedure) Act 1983*.

New section 20 provides for definitions for new Division 4.

New section 21 will ensure that the repealed offences continue to have effect for the purposes of prosecuting a person for conduct that occurred prior to the commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*.

New section 21 also ensures a person is not guilty of an offence under the new offence provisions, unless all conduct constituting the offence occurs after the commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*. If any of the conduct constituting the offence occurred prior to commencement, provisions under the *Sexual Offences (Evidence and Procedure) Act 1983*, which operated prior to the commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*, will apply.

For consent of the complainant to be a defence to a prosecution for an offence against section 6(1), it must occur after the commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*.

New section 22 ensures that any orders made by a court under sections 6 or 7 or directions under section 12(2) or (3) of the *Sexual Offences (Evidence and Procedure) Act 1983* in force prior to the commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019* continue in force. Additionally, if an application for one of those orders or directions is being considered by the court at the time of commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*, the court has the discretion to use the new provisions.

Part 3 **Consequential amendment of *Youth Justice Act 2005***

Clause 7. **Act amended**

This is a formal clause which provides that Part 3 amends the *Youth Justice Act 2005*.

Clause 8. **Section 50 amended (Restriction of publication)**

This clause amends section 50 of the *Youth Justice Act 2005* (as amended by the *Youth Justice and Related Legislation Amendment Act 2019*) which provides that a person who publishes any information relating to proceedings in the Youth Justice Court or proceedings in any other court arising out of proceedings in the Youth Justice court that is likely to lead to the identification of the youth is guilty of an offence. This offence could prevent a complainant in a sexual offence matter, where the defendant is a youth, from being publicly identified.

This clause introduces a new exception to the offence in section 50 where a report or information contains particulars of a complainant as defined in the *Sexual Offences (Evidence and Procedure) Act 1983*, and who has consented to the publication in accordance with new section 6(2)(b) of the *Sexual Offences (Evidence and Procedure) Act 1983* as introduced by this Bill.

This means that a complainant in a sexual offence proceeding where the defendant was a youth at the time of the offence may consent in writing to the publication of the report or information provided the complainant is an adult and has capacity to consent. According to new section 50(2)(c)(ii) however, the report or information must not identify the youth offender unless the youth has consented to the publication. According to new section 50(2)(c)(iii) it also must not identify another witness who is a complainant unless that witness has consented in accordance with new section 6(2)(b) of the *Sexual Offences (Evidence and Procedure) Act 1983*.

Clause 9. **Part 17, Division 7 inserted**

This clause provides for the transitional matters for the new defence in section 50(2)(c) by inserting a new Division 7 and new section 239.

The transitional provision provides that the amendments to section 50 made by the *Sexual Offences (Evidence and Procedure) Amendment Act 2019* only apply to reports or information published after the commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*. Additionally, it provides that for consent of the complainant to be a defence to a prosecution for an offence against section 50, it must occur after the commencement of the *Sexual Offences (Evidence and Procedure) Amendment Act 2019*.

Part 4 **Repeal of Act**

Clause 10. **Repeal of Act**

This is a formal clause to provide that the *Sexual Offences (Evidence and Procedure) Amendment Act 2019* is repealed on the day after it commences.

Statement of compatibility with human rights

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

Sexual Offences (Evidence and Procedure) Amendment Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

OVERVIEW OF THE BILL

The proposed Bill will amend the *Sexual Offences (Evidence and Procedure) Act 1983* to provide a new defence to a prosecution for an offence of publishing or making a statement or representation which discloses identifying particulars of a complainant in a sexual offence proceeding, provided that:

- (a) consent is provided in writing, before the publication or making of the statement or representation;
- (b) the complainant is an adult at the time of giving consent;
- (c) the complainant is not incapable of giving consent due to mental impairment; and
- (d) the proposed publication, statement or representation does not identify, directly or indirectly, another complainant unless that other complainant has also given consent.

The new defence will make it possible for a complainant to agree to a media outlet publishing a story that identifies them as a sexual assault complainant or publish their own story without the intervention of a journalist.

The Bill also rationalises and consolidates existing sections 6 to 12 of the *Sexual Offences (Evidence and Procedure) Act 1983*. It retains the offence of publishing or making a statement or representation which identifies or is likely to lead to the identification of a defendant prior to the defendant being committed for trial or sentence.

It also retains the ability to apply to the court for an order permitting the publication or making of a representation or statement which identifies or is likely to lead to the identification of a complainant, or a defendant prior to committal for trial or sentence. However the Bill inserts a new requirement that if the publication, representation or statement will identify a complainant, the court must consider the complainant's wishes when considering whether to make the order.

HUMAN RIGHTS IMPLICATIONS

This Bill engages a number of rights set out in the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) as detailed below.

Right to a fair trial – Article 14(1) of the ICCPR

The right to a fair trial is concerned with procedural fairness, rather than the fairness of a decision of a court or tribunal, and requires (among other things) recognition of the interests of the accused. This right is also concerned with the principle of open justice, that is, the right to a fair and open public hearing. However, Article 14(1) also states that the 'Press and the public may be excluded from all or part of a trial for

reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances would prejudice the interests of justice’.

The Bill repeals and re-enacts existing offences which prohibit publication and making of statements or representations which identify or which are likely to identify complainants in sexual offence proceedings, or defendants before committal for sentence or trial. This limits the right to an open and fair trial by preventing publication in the media, for example, of reports on a sexual offence proceeding. It does so only to the extent necessary to avoid prejudicing the interests of justice, and to protect the private lives of the parties, which are appropriate purposes contemplated by Article 14(1).

The rationale for the prohibition on the publication of information that could lead to the identification of sexual assault complainants is to encourage reporting of sexual offences, to protect complainants from harm identification may cause due to the stigma that may attach to sexual assault victimisation, and to protect the privacy of a complainant.

Further, the Bill will provide for the ability of a sexual offence complainant to consent to the publication or making of a statement or representation which discloses their identity. It also retains the ability to apply to the court for an order permitting disclosure. As such, the Bill only limits the rights in Article 14(1) in a manner that is reasonable, necessary, and proportionate to achieving legitimate objectives. Further, these limitations do not go further than the limitations in the equivalent provisions the Bill will repeal and replace.

Right not to be subjected to arbitrary or unlawful interference with privacy, nor to unlawful attacks on reputation – Article 17(1) of the ICCPR

The Bill positively engages Article 17(1) of the ICCPR.

The rationale for the prohibition on the publication of information that could lead to the identification of sexual assault complainants is to protect the privacy, safety and welfare of the complainant. In particular, it is to protect the anonymity of sexual assault complainants in the context of criminal proceedings where the principle of open justice requires that a defendant to sexual assault charges is tried in an open and public forum.

While the Bill permits a sexual assault complainant to consent to publicly identifying as a sexual assault complainant, it provides some checks and balances to ensure that a person’s privacy is not interfered with. Complainants are required to consent in writing and, at the time of consent, be an adult and have capacity to consent.

The Bill also provides for the protection of other non-consenting complainants in cases where there are multiple complainants.

The Bill repeals and re-enacts existing offences which prohibit publication and making of statements or representations which identify or which are likely to identify defendants in sexual offence proceedings before committal for sentence or trial. This is a limited protection of the anonymity of a defendant in the very early stages of sexual offence proceedings to prevent reporting on proceedings before it is established there is sufficient evidence to put the defendant to trial or to be sentenced.

Freedom to impart information orally, in writing or through any other media – Article 19(1) of the ICCPR

The Bill repeals and re-enacts existing offences which prohibit publication and making of statements or representations which identify or which are likely to identify complainants, or defendants before committal for sentence or trial. These provisions limit the right to freedom of opinion or expression.

However, the overall effect of the Bill is to increase the right to freedom of opinion or expression.

The Bill, by allowing a sexual assault complainant to consent to the publication or making of a statement or representation which discloses their identity, gives the complainant a voice, autonomy and control in a situation where control has been taken away from them. The Bill promotes the freedom to impart information by providing a defence that makes it possible for a complainant to publish their story.

The Bill also retains the ability to apply to the court for an order permitting publication or a making of a statement or representation which identifies or is likely to identify a complainant or defendant in a sexual offence proceeding.

While the Bill contains provisions which limit freedom of opinion or expression, these limitations do not go further than existing limitations. The limitations have been retained because they protect the privacy of complainants in sexual assault matters, and protect defendants for a limited period of time until it is established that there is sufficient evidence to commit the defendant for trial or sentence. As such, they are reasonable, necessary, and proportionate limitations on the rights in Article 19(1) in order to achieve legitimate objectives.

Right of children to have their privacy fully respected at all stages of proceedings – Article 40(2)(vii) of the CRC

The Bill promotes the right of children in the determination of criminal matters against them by prohibiting the publication of information identifying a youth offender. While the Bill amends the *Youth Justice Act 2005* to enable a complainant who is an adult, has capacity, and who consents in writing to consent to the disclosure of their identity, this is provided that the disclosure does not identify the youth offender.

CONCLUSION

This Bill engages the following human rights:

- right to a fair trial, contained in Article 14(1) of the ICCPR;
- right to privacy, contained in Article 17(1) of the ICCPR;
- right to freedom of expression, contained in Article 19(1) of the ICCPR; and
- rights of children to privacy during proceedings, contained in Article 40(2)(vii) of the CRC.

However, as outlined in this statement, the introduced bill is compatible with human rights as any limitations imposed are reasonable, necessary and proportionate.