

2019

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

Evidence and Other Legislation Amendment Bill 2019

SERIAL NO. 102

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Evidence and Other Legislation Amendment Bill 2019 will expand the use of video conferencing in court and enhance the protections for vulnerable witnesses in sexual and domestic violence proceedings.

The features of this Bill are to:

- allow a ‘recorded statement’ of complainants to be used in domestic violence order proceedings;
- introduce a new model of cross-examination of vulnerable witnesses by unrepresented defendants and harmonise the existing provisions under *Domestic and Family Violence Act 2007* and *Sexual Offences (Evidence and Procedure) Act 1983*;
- create a statutory presumption that the evidence of vulnerable witnesses is to be given via video conferencing;
- clarify the general power of courts to order the use of video conferencing and provide a list of factors to guide the use of that power; and
- create a statutory presumption that the evidence of vulnerable witnesses and experts and the corroborative evidence of a member of the police force is to be given via audiovisual link.

The Bill also makes consequential amendments to the *Bail Act 1982*, *Police Administration Act 1978* and *Sentencing Act 1995* to make sure the current statutory requirements for physical appearance before the court under this legislation are satisfied by the use of communication link.

The Evidence and Other Legislation Amendment Bill 2019 will give effect to one of the core Guiding Principles to Improve Protection of Vulnerable Witnesses developed by the Family Violence Working Group under the Council of Attorneys-General and which were endorsed by the Council of Attorneys General on 23 November 2018.

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 *Evidence and Other Legislation 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 Bail Act 1982

Clause 3. Act amended

Clause 3 identifies the Act that is amended by Part 2, namely the *Bail Act 1982*.

Clause 4. Section 33 amended (Review)

Clause 4 inserts a note into subsection 33(4) of the *Bail Act 1982* to clarify that the requirement to bring a person before the Local Court is satisfied by the use of a communication link.

Part 3 Amendment of Domestic and Family Violence Act 2007

Clause 5. Act amended

Clause 5 identifies the Act that is amended by Part 3, namely the *Domestic and Family Violence Act 2007*.

Clause 6. Section 4 amended (Definitions)

Clause 6 inserts definitions of 'audiovisual link', 'complainant', 'domestic violence offence', 'recorded statement' and 'vulnerable witness' in section 4 of the Act.

Clause 7. Section 104 amended (Definitions)

Clause 7 seeks to address an error in section 104 of the Act by substituting 'Division' with 'Part'. Clause 7 also clarifies the definitions of 'recorded statement' and 'vulnerable witness' in the Act.

Clause 8. Section 106 amended (When Court to be closed)

Clause 8 inserts the words 'including in cross-examination' into section 106(1)(b) to ensure that court will remain closed when a vulnerable witness gives evidence or is being cross-examined. The same words are inserted into section 106(3) of the Act to ensure that the court retains the power to order a person to leave the courtroom while a witness gives evidence or is being cross-examined.

Clause 9. Section 109 amended (No cross-examination of child)

Clause 9 provides that the new model of cross-examination as introduced by the new sections 114, 114A and 114B in the Act does not change the existing prohibition against cross-examination of any child witness whether or not the defendants are legally represented.

Clause 10. Chapter 4, Part 4.1, Division 4A inserted

Clause 10 inserts new Part 4.1 Division 4A into the *Domestic and Family Violence Act 2007*. New sections 113A to 113C provide for a recorded statement of a complainant to be adduced as evidence-in-chief in a proceeding for a domestic violence order.

The new provisions will apply if all of the three conditions are met under the new section 113B. Once these conditions are met, Part 3A of the *Evidence Act 1939* will apply which includes the prerequisites for the use of a recorded statement, the procedures to follow before a recorded statement is used and the requirements for the recorded statement not to be edited without consent or to be published. This will ensure necessary safeguards are in place to protect the privacy of the complainants and the defendant's rights to a fair trial under the current framework in Part 3A of the *Evidence Act 1939*.

These new sections are modelled on section 81K of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT).

Clause 10 also inserts the relevant definitions of 'complainant', 'domestic violence offence' and 'recorded statement' from the *Evidence Act 1939* into the new Division 4A of Part 4.1 of the Act. It should be noted that the definition of 'recorded statement' is adopted from section 21G of the *Evidence Act 1939* which is a specific definition for the purpose of Division 4A. In other Divisions

of Part 4.1, the definition of 'recorded statement' in section 104 of the Act should apply.

Clause 11. Section 114 replaced

Clause 11 introduces a new model of cross-examination of certain witnesses by an unrepresented defendant. This new model incorporates the following features:

- general prohibition on cross-examination of a vulnerable witness if the defendant is unrepresented, unless the court grants leave to do so;
- restricted test for the court to grant leave to overcome the prohibition except if the witness is a child or has a cognitive or intellectual impairment;
- requirement for the court to explain to the unrepresented defendant the consequences of the prohibition;
- requirement for the court to provide the unrepresented defendant with an opportunity to obtain legal representation to conduct cross-examination;
- power for the court to order representation despite the defendant's refusal to do so, if it is in the interests of justice to make such an order;
- requirement for the court appointed representative to repeat questions only if the questions are not improper, subject to the court's power to disallow questions;
- requirement for the court appointed representative to act in the best interests of the defendant in the absence of instructions;
- civil and criminal liability immunity for the appointed representatives in relation to acts done or omitted in good faith; and
- specific jury directions.

The new model retains the protections for vulnerable witnesses and witnesses who are in a domestic relationship with the defendant in a proceeding for a domestic violence order.

Clause 12. Section 115 amended (Procedural directions)

This clause provides that the general powers of the court to give procedural directions are subject to the new sections 114A and 114B of the Act.

Clause 13. Chapter 7, Part 7.5 inserted

Clause 13 creates Part 7.5 which includes section 142, being the transitional provision for the *Evidence and Other Legislation Amendment Act 2019*.

It is the intention of the Bill that the amendments apply to proceedings commenced on or after commencement of the *Evidence and Other Legislation Amendment Act 2019*. However, if a hearing commences prior to commencement, the provisions in place before the amendments will continue to apply.

Part 4 Amendment of Evidence Act 1939

Clause 14. Act amended

Clause 14 identifies the Act that is amended by Part 4, namely the *Evidence Act 1939*.

Clause 15. Section 4 amended (Definitions)

Clause 15 adopts the same definition of ‘audiovisual link’ under section 49 of the Act and inserts it into Part 1 Preliminary matters of the Act.

Clause 16. Sections 21AA and 21AB inserted

Clause 16 inserts new sections 21AA and 21AB to provide for all relevant definitions and the meaning of ‘vulnerable witness’ in Part 3 of the *Evidence Act 1939*.

Clause 17. Section 21A amended (Evidence of vulnerable witnesses)

Clause 17 repeals the current section 21A(2) and replaces it with a new subsection (2) to introduce a statutory presumption that the evidence of vulnerable witnesses is to be given via video conferencing. This presumption can be rebutted by either the unavailability of video conferencing or the wishes of the witness to give evidence in the courtroom.

Clause 17 also inserts a new subsection (2AB) into section 21A to require a screen, partition or one-way glass to be placed if the presumption in section 21A(2) is rebutted. This will also be subject to the wishes of the witness and the witness is entitled under new subsection (2AC) to dispense with the use of the screen, partition or one-way glass. The new subsection (2AD) retains the other protective measures which will continue to be available for vulnerable witnesses.

Clause 18. Section 21QA to 21QC inserted

Clause 18 introduces a new model of cross-examination of vulnerable witnesses by an unrepresented defendant in domestic violence offence proceedings under Part 3A of the Act.

This new model incorporates the following features:

- general prohibition on cross-examination of a vulnerable witness if the defendant is unrepresented, unless the court grants leave to do so;
- restricted test for the court to grant leave to overcome the prohibition except if the witness is a child or has a cognitive or intellectual impairment;
- requirement for the court to explain to the unrepresented defendant the consequences of the prohibition;
- requirement for the court to provide the unrepresented defendant with an opportunity to obtain legal representation to conduct cross-examination;
- power for the court to order representation despite the defendant's refusal to do so, if it is in the interests of justice to make such order;
- requirement for the court appointed representative to repeat questions only if the questions are not improper, subject to the court's power to disallow questions;
- requirement for the court appointed representative to act in the best interests of the defendant in the absence of instructions;
- civil and criminal liability immunity for the appointed representatives in relation to acts done or omitted in good faith; and
- specific jury directions.

Clause 19. Section 49 amended (Interpretation)

Clause 19 omits the definition of 'audiovisual link' given the same definition has been inserted into section 4 of Part 1 of the Act.

Clause 20. Section 49E replaced

Clause 20 replaces section 49E of the *Evidence Act 1939* to clarify the general power of the court to order the use of video conferencing regardless of the nature of proceeding. In particular, it seeks to clarify that the court has power to direct an offender to appear before the court by communication link for sentencing.

New section 49E(5) provides a list of factors to guide the exercise of the court's discretion in making an order for the use of a communication link.

The set of statutory guiding factors is modelled on section 5BA(6) of the *Evidence (Audio and Audio Visual Links) Act 1998 (NSW)*.

New section 49E(6) creates a new statutory presumption that the evidence of experts and the corroborative evidence of a member of the police force are to be given via communication link, subject to the availability of facilities or the court considering it is in the interests of justice to require the physical appearance of the witness. This is similarly modelled on section 5BAA of the *Evidence (Audio and Audio Visual Links) Act 1998 (NSW)*.

New section 49E(8) makes it clear that any requirement under an Act that a person be present or appear in court is satisfied if the person attends court via communication link.

Clause 21. Part 10, Division 4 inserted

Clause 21 creates Division 4 of Part 10 which includes new section 72, being the transitional provision for the *Evidence and Other Legislation Amendment Act 2019*.

It is the intention of the Bill that the amendments apply to proceedings commenced on or after commencement of the *Evidence and Other Legislation Amendment Act 2019*. However, if a trial, hearing or preliminary examination commences prior to commencement and continues or is adjourned until a day on or after commencement, the amending Act will not apply, and the provisions that were in place before the amendments will continue to apply to that proceeding.

Part 5 Amendment of Police Administration Act 1978

Clause 22. Act amended

Clause 22 identifies the Act that is amended by Part 5, namely the *Police Administration Act 1978*.

Clause 23. Section 133 amended (Application to member for release)

Clause 23 inserts a note into section 133(2) of the *Police Administration Act 1978* to clarify that the requirement to take or bring a person before the court is satisfied by the use of a communication link.

Clause 24. Section 137 amended (Time for bringing person before court generally)

Clause 24 inserts a note into section 137(1) of the *Police Administration Act 1978* to clarify that the requirement to bring a person before a court is satisfied by the use of a communication link.

Part 6 Amendment of Sentencing Act 1995

Clause 25. Act amended

Clause 25 identifies the Act that is amended by Part 6, namely the *Sentencing Act 1995*.

Clause 26. Section 117 amended (Offender to be present when sentence imposed)

Clause 26 amends the heading to section 117 of the *Sentencing Act 1982* to replace the word 'present' to 'before court' and inserts a note into section 117(1) to clarify that the requirement for an offender to be before the court is satisfied by the use of a communication link for the purpose of sentencing.

Part 7 Amendment of Sexual Offences (Evidence and Procedure) Act 1983

Clause 27. Act amended

Clause 27 identifies the Act that is amended by Part 7, namely the *Sexual Offences (Evidence and Procedure) Act 1983*.

Clause 28. Section 5 replaced

Clause 28 replaces the existing model of cross-examination of complainants by unrepresented defendants in indictable sexual offence proceedings. This new model incorporates the following features:

- general prohibition on cross-examination of a complainant if the defendant is unrepresented;
- requirement for the court to explain to the unrepresented defendant the consequences of the prohibition;
- requirement for the court to provide the unrepresented defendant with an opportunity to obtain legal representation to conduct cross-examination;

- power for the court to order representation despite the defendant's refusal to do so, if it is in the interests of justice to make such order;
- requirement for the court appointed representative to repeat questions only if the questions are not improper, subject to the court's power to disallow questions;
- requirement for the court appointed representative to act in the best interests of the defendant in the absence of instructions;
- civil and criminal liability immunity for the appointed representatives in relation to acts done or omitted in good faith; and
- specific jury directions.

Clause 29. Part 3, Division 3 inserted

Clause 29 creates Division 3 of Part 3 which includes new section 19, being the transitional provision for the *Evidence and Other Legislation Amendment Act 2019*.

It is the intention of the Bill that the amendments apply to proceedings commenced on or after commencement of the *Evidence and Other Legislation Amendment Act 2019*. However, if a trial, hearing or preliminary examination commences prior to commencement and continues or is adjourned until a day on or after commencement, the amending Act will not apply and the provisions before amendment will continue to apply to that proceeding.

Part 8 Repeal of Act

Clause 30. Repeal of Act

This is a standard clause which provides that the amending Act ceases to have effect the day after it commences. There is no need for the amending Act to be retained once it has performed its function of amending the other legislation.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Evidence and Other Legislation 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 Evidence and Other Legislation Amendment Bill 2019 seeks to expand the use of video conferencing in court and enhance the protections for vulnerable witnesses in sexual and domestic violence proceedings.

The key features of the Bill include:

- allowing a 'recorded statement' of a complainant to be used in domestic violence order proceedings;
- introducing a new model of cross-examination of vulnerable witnesses by unrepresented defendants and harmonise the existing model under *Domestic and Family Violence Act 2007* and *Sexual Offences (Evidence and Procedure) Act 1983*;
- replacing the current provision with a statutory presumption that the evidence of vulnerable witnesses is to be given via video conferencing;
- clarifying the general power of courts to order the use of video conferencing and providing a list of factors to guide the use of that power;
- creating a statutory presumption that the evidence of experts and the corroborative evidence of a member of the police force is to be given via audiovisual link; and
- consequential amendments to the *Bail Act 1982*, *Police Administration Act 1978* and *Sentencing Act 1995* to make sure the current statutory requirements for physical appearance before the court under these Acts are satisfied by the use of communication link.

HUMAN RIGHTS IMPLICATIONS

This Bill engages with the following rights:

- right to a fair trial and fair hearing (Article 14(1) of the International Covenant on Civil and Political Rights) (ICCPR);
- minimum guarantees in criminal proceedings (Article 14(3)(b), (d) and (e) of the ICCPR).

Right to a fair trial and fair hearing

Article 14(1) of the ICCPR provides for the right to a fair and public hearing and this right should apply to both criminal and civil proceedings. The purpose of the right to a fair hearing is to ensure the proper administration of justice. This right is concerned with procedural fairness rather than the fairness of a decision of a court or tribunal. What constitutes a fair

hearing will require recognition of the interests of the accused, the victim and the community (in a criminal trial) and of all parties (in a civil proceeding). Accordingly, there are some instances where the interests of victims and witnesses are given increased weight resulting in different processes applying in limited circumstances.

Clause 10 of the Bill provides for a recorded statement of a complainant to be adduced as the evidence-in-chief of the complainant in related domestic violence order proceedings. Clause 17 of the Bill replaces the current provision with a statutory presumption that a vulnerable witness is to give evidence using an audiovisual link. There are strong policy reasons to justify these special procedures which include the interests of very vulnerable witnesses such as children or witnesses with cognitive impairment as well as the reluctance of complainants in domestic and sexual violence matters to participate in court proceedings.

These amendments will facilitate vulnerable witnesses and domestic violence complainants to give their evidence in an environment that is less traumatic and intimidating. In fact, these amendments will promote the special right of children and witnesses with a disability to protection (article 24(1) of ICCPR and article 5 of the Convention on the Rights of Persons with Disabilities) given they provide alternative arrangements for them to give evidence which are in their best interests. In proceedings involving domestic and sexual violence where vulnerable witnesses and complainants often have a personal relationship with the defendants, it may not be appropriate to interpret that a fair hearing right will necessarily incorporate the concept that a defendant should be able to 'face their accuser'.

Notably, this Bill also retains the protective measure of closing the court which is available to vulnerable witnesses. Allowing the court to exclude the public from the courtroom will ensure that vulnerable witnesses are able to give effective evidence to the court, including by minimising intimidation, additional trauma, fear for their personal safety and undue public embarrassment. If a witness is unable or unwilling to give their testimony, this will undermine the administration of justice. Although the principle of open justice is important, the right of the public to open justice needs to be balanced against the right of participants in the criminal justice system to safety and protection from unnecessary distress or intimidation.

It is also important to clarify that these amendments will not affect the right of the defendant to cross-examine the witnesses, present their own evidence and to be tried by a 'competent, independent and impartial tribunal established by law'.

Similarly, clause 20 of the Bill clarifies the general power of courts to order the use of video conferencing including for sentencing purposes and providing a list of factors to guide the use of that power. The list of factors includes 'any other matters' that the court considers appropriate. It is intended that the court will also consider any unfair disadvantage to the defendant alongside with all relevant factors before exercising its power to order the use of video conferencing. In this regard, the amendment is reasonable, circumscribed and ensures an appropriate balance between competing interests.

Minimum guarantees in criminal proceedings

Article 14(3)(b), (d) and (e) of the ICCPR provides for certain minimum guarantees in criminal proceedings including:

- to have adequate time and facilities to prepare a defence and to communicate with counsel;

- to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; and
- to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Clauses 11, 18 and 28 of the Bill introduce a new model of cross-examination of vulnerable witnesses by unrepresented defendants in the *Evidence Act 1939* and harmonise the existing model under *Sexual Offences (Evidence and Procedure) Act 1983*. The new model imposes restrictions on the right of the defendants to cross-examine certain categories of witnesses in criminal proceedings.

The right to cross-examine prosecution witnesses is qualified by the words ‘unless otherwise provided by law’. This indicates that there are potential sound justifications to depart from the general rule but the limitations of this right should be carefully designed to ensure an appropriate balance between competing interests and should be prescribed by law. The new model recognises the distinct issues which arise in family and sexual violence matters given the potential trauma and embarrassment experienced by the victims as well as the domestic and personal nature of these offences. It is important to note that the new model does not limit the defendant to conduct their own defence personally for other parts of the hearing or trial and legal representation is restricted to cross-examination of specifically defined categories of witnesses. The purpose of the limitation is specific and is to protect vulnerable witnesses from being directly cross-examined by the defendants if they are not represented by a lawyer in court. The new model does not unreasonably limit the defendant’s rights, given there are no less restrictive means of achieving this purpose.

The new model also provides a process for the defendant to engage a legal practitioner, hence not limiting the right of the defendant to prepare a defence with adequate time. The defendant will also continue to be provided with access to documents and other evidence necessary for preparation for his or her defence. The new model also incorporates significant safeguards for the defendant’s rights by requiring the court to provide certain information to the defendant before the hearing or the trial, to appoint a legal practitioner to conduct the cross-examination on the defendant’s behalf, and give a specific direction to the jury to not draw an adverse inference from the accused not being permitted to cross-examine the witness personally. The right to legal assistance does not entitle the defendant to an unrestricted choice of a lawyer provided under legal assistance. As such, the limitation is proportionate to protecting witnesses while maintaining the right of the defendants to minimum safeguards in criminal proceedings.

Clause 20 of the Bill also creates a statutory presumption that the evidence of experts and the corroborative evidence of a member of the police force is to be given via audiovisual link. However, this does not undermine the defendant’s right to cross-examine a police officer or an expert. It has been established that evidence given other than in person, may not violate this right, provided that the reliability and credibility of the witness giving the evidence can still be tested.

CONCLUSION

This Bill is compatible with human rights as any limitations are reasonable, necessary and proportionate.