

# 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 principal 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.