

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.