LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

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SOCIAL POLICY SCRUTINY COMMITTEE

Public Briefing Transcript

Evidence and Other Legislation Amendment Bill 2019

11.30 am, Monday 23 September 2019
Litchfield Room, Level 3, Parliament House, Darwin

Members: Ms Ngaree Ah Kit MLA, Chair, Member for Karama
Mrs Lia Finocchiaro MLA, Member for Spillett
Mr Chansey Paech MLA, Member for Namatjira
Mrs Kate Worden MLA, Member for Sanderson

Witnesses: ***Department of the Attorney-General and Justice***
Jenni Daniel-Yee: Director Legal Policy
Leonique Swart: Principal Policy Lawyer

EVIDENCE AND OTHER LEGISLATION AMENDMENT BILL 2019

Department of the Attorney-General and Justice

Madam CHAIR: Good morning everyone, thank you for joining us. I am Ngaree Ah Kit the Member for Karama and Chair of the Social Policy Scrutiny Committee.

On behalf of the committee I welcome everyone to this public briefing on the Evidence and Other Legislation Amendment Bill 2019.

I acknowledge my fellow committee members in attendance today, Member for Sanderson, Kate Worden, Member for Spillett, Lia Finocchiaro and via teleconference Member for Namatjira, Chansey Paech.

I welcome to the table to give evidence to the committee, from the Department of the Attorney-General and Justice: Jenni Daniel-Yee, Director, Legal Policy; and Leonique Swart, Principal Policy Lawyer. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee applies. This is a public hearing which is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website.

If, at any time during the briefing, you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private.

I will ask each witness to state their name for the record and the capacity in which they appear. I will then invite you to make an opening statement before proceeding to the committee's questions.

Could you please each state your name and capacity in which you are appearing?

Ms DANIEL-YEE: Jenni Daniel-Yee, Director, Legal Policy, Department of the Attorney-General and Justice.

Ms SWART: Leonique Swart, Principal Policy Lawyer, Department of the Attorney-General and Justice.

Madam CHAIR: Ms Daniel-Yee, would you like to make an opening statement?

Ms DANIEL-YEE: I will ask Leonique to provide that statement.

Ms SWART: Thank you very much. I thought I would provide an overview of the bill. Hopefully to provide a bit more information about the various amendments the bill comprises.

The main purpose of the Evidence and Other Legislation Amendment Bill is to expand the use of videoconferencing in courts in the Territory and to enhance protections for vulnerable witnesses in sexual and domestic violence proceedings.

The main amendments are to three pieces of legislation, namely the *Evidence Act 1939*, *Domestic and Family Violence Act 2007* and the *Sexual Offences (Evidence and Procedure) Act 1983*.

There are five main amendments or groups of amendments. The first is to allow a recorded statement of a complainant to be used in domestic violence order proceedings. The second is to introduce a new model of cross-examination of a vulnerable witness by unrepresented defendants to make the model consistent across three acts for domestic and family violence matters, criminal matters, civil matters, as well as criminal proceedings involving sexual offences. The third group of amendments is to introduce a presumption in criminal trials that the evidence of a vulnerable witness is to be given via videoconference. The fourth is to clarify that the general power of a court to order the use of videoconferencing in proceedings and to provide a list of factors to guide the use of that power. The fifth is to create a presumption that the evidence of an expert or the corroborating evidence of a police officer is to be given via videoconference.

I will now provide a bit more of a detailed overview of each of these elements.

The first group of amendments to permit the use of recorded statements in domestic violence order applications is affected by clause 10 of the bill. This makes amendments to the *Domestic and Family Violence*

Act to enable the recorded statement of a complainant to be adduced as evidence-in-chief in a proceeding for a domestic violence order. At the moment, recorded statements are obtained through what we call body worn video. As a contemporaneous or near contemporaneous statement from the complainant it can only be used in criminal proceedings for domestic violence offences under the *Evidence Act*. It is such a thing as assaults but at the moment it cannot be used in civil proceedings for domestic violence order applications.

It is often the case that a single incident of domestic violence might give rise to criminal proceedings for an assault or something more serious, for example, and there will be a corresponding application for a domestic violence order. It involves the same people, so the complainant in the offence situation as well as the domestic violence order application and the same defendant. Under those circumstances this bill will allow for the evidence obtained through the body worn video to be used in domestic violence order applications.

Therefore, it alleviates the need for the complainant in the domestic violence order application to have to give evidence again, or at all if the pre-recorded statement was used in evidence, in a criminal proceedings. Usually what happens is the criminal proceedings will go first and then there would be a contested domestic violence order application afterwards.

Mrs FINOCCHIARO: Can I ask a question? Do you mind if we ask as we go, then maybe we can stick to each topic. It might be …

Madam CHAIR: Sure, happy for that to happen.

Mrs FINOCCHIARO: Would that happen automatically, or will it be up to the complainant whether the complainant wants the body worn to be the evidence or whether the complainant is happy—I mean, I do not have intricate knowledge of how that works, but if you are a complainant of you would prefer to give your evidence-in-chief in person, is that a matter for you or is it …

Ms SWART: Do you mind if I refer to the legislation because the bill is picking up the procedures that already exist in the Evidence Act and applying it in the context of the domestic violence civil proceedings. I will have a look at the legislation, if you do not mind.

Mrs FINOCCHIARO: No, no. I understand the point is not having to make the victim go through it over and over again, but perhaps they want to. I do not know.

Ms SWART: It might be simpler for me to provide the long answer to this on notice because at the moment I am quickly scanning the legislation. First of all, there needs to be consent from the complainant to obtain the pre-recorded statement in the first place and then it is discretionary as to whether the court will admit it. I cannot see, in my quick reading of the legislation, that there is something which permits the complainant to override that. What would ordinarily happen—I am speaking off the top of my head at the moment—is they would speak to the complainant first before making a decision to admit the pre-recorded statement.

It would be unusual for a complainant to say ‘no, I want to give it myself’ but it certainly can happen and it can happen under other provisions and the vulnerable witness provisions as well. I might get bogged down in reading the legislation to answer the technicalities of that but it might easier as a question on notice and I can step you through it.

Mrs FINOCCHIARO: Thank you.

Ms SWART: So new section 113B of the *Domestic and Family Violence Act* will set up three preconditions for the recorded statement. The pre-recorded statement has to have already been used in relation to an alleged domestic violence offence. The person who is applying for the domestic violence order and is seeking to rely on the pre-recorded evidence is the complainant from who the pre-recorded statement is taken and the defendant is the same defendant in the criminal proceedings.

New section 113C will import the protections and the procedures of part 3A of the *Evidence Act* into the *Domestic and Family Violence Act.* The difference between the two acts, I should say at the outset, is that the *Domestic and Family Violence Act* sets up procedures for civil proceedings for domestic violence order applications whereas the *Evidence Act* contains the provisions for vulnerable witnesses, in general, for criminal proceedings. Civil and criminal proceedings have different formats and different protections for witnesses.

Obviously domestic violence orders, being civil, and still involve vulnerable witnesses so that is why there are two sets of procedures.

The second group of amendments relates to a new model for cross-examination of vulnerable witnesses or sexual offence complainants by unrepresented defendants. By an unrepresented defendant, I mean a defendant in a criminal proceeding or domestic violence order proceeding who is not represented by a lawyer. Currently there are provisions which protect complainants of indictable sexual offences and vulnerable witnesses in certain domestic violence order civil proceedings from being cross-examined directly or in-person by an unrepresented defendant.

But there is no protection with respect to complainants in domestic violence offence criminal proceedings under part 3A of the *Evidence Act.* There are also differences in the way you can cross-examine for different proceedings in the legislation. The bill is attempting to harmonise the model for cross-examination of all vulnerable witnesses by an unrepresented defendant and will have the same model apply in the *Domestic and Family Violence Act* for domestic violence order applications, the *Evidence Act* for criminal proceedings and the *Sexual Offences (Evidence and Procedure) Act* for sexual offences. This is done in a number of clauses in the bill because it is amending a number of acts and is in clauses 11, 18 and 28 of the bill.

I will talk about the model in a more global sense. The model is going to be the same across those three acts except for some adjustments to take account for the way that each act is drafted but also for the *Sexual Offences (Evidence and Procedure) Act* which I will get to in a minute. It will provide for restrictions for when and how an unrepresented defendant can cross-examine a vulnerable witness.

The numerous elements of the model are:

- that there is a general prohibition on cross-examination of a vulnerable witness if the defendant is unrepresented by a lawyer, unless the court grants leave to do so

- there is a restricted test for the court to grant leave to overcome that prohibition, that is that the court must not grant leave unless satisfied that the witness's ability to testify in a cross-examination, will not be adversely affected and in deciding whether a witness's testimony will be adversely affected, the court must have regard to any trauma or distress that might be caused by the cross-examination by the unrepresented defendant

- the court is not permitted to grant leave to cross-examine a witness who is a child or who has a cognitive or intellectual impairment; that already exists and it has been maintained

- the court will be required to explain to the unrepresented defendant the consequences of the prohibition under cross-examination if the court does not grant the leave and will provide the defendant with an opportunity to obtain legal representation to conduct the cross-examination.

If the court considers it is necessary and in the interest of justice do so, the court can order that a defendant get legal representation if the defendant refuses to do so. The purpose of that would be for the legal practitioner to conduct the cross-examination of the vulnerable witness for the defendant.

If the court makes the order to appoint a legal practitioner to conduct the cross-examination, the legal practitioner is required to repeat the questions of the defendants. In effect, the defendant will say this is what I want to ask and the practitioner will need to repeat that. The practitioner is required not to ask the questions if they would be improper and the court also has overriding power to prevent the questioning or the putting of certain questions to the vulnerable witness. If the defendant is unable to give instructions to the legal practitioner, the practitioner is required to act in their best interests.

Mrs FINOCCHIARO: In a practical sense is that sitting at the bar table, the lawyer and the defendant and the defendant is literally whispering over…

Ms SWART: Yes, I imagine so.

It is a complicated situation because the defendant does not have legal representation for the entire case. What is happening is the legal practitioner will be stepping in. that is why there are a number of provisions in there to also protect the lawyer from civil and criminal liability for acts done, or omitted to be done, in good faith. Obviously they do not have the overall conduct of the matter.

Also, and this is specific to jury trials, the judge will be required to instruct the jury that the defendant is not to be prejudiced because of the arrangements of having a court appointed lawyer. Those jury directions include that the cross-examination through a court-appointed lawyer is routine practise of the court, that no

adverse inference is to be drawn and the evidence of the witness solicited through this method is to be given no greater or lesser weight than any other evidence just because it happened under that arrangement.

That is to overcome any prejudice that might—that a juror might think against the defendant.

Clause 11 repeals current section 114, which is the current model in the *Domestic and Family Violence Act* and replaces that with a new model. This is covered by sections 114, 114A and new 114B.

Adjustments are made to suit the regime in that act and they are that the general prohibition against cross examination without the courts leave will extend to vulnerable witnesses as defined in that act which include any other witness who is in a domestic relationship with the defendant.

Clause 18 makes the equivalent amendments in the *Evidence Act* and inserts new sections 21QA, 21QB and 21QC. Clause 28 makes similar amendments to the *Sexual Offences (Evidence and Procedure) Act* with new sections 5 and 5A, but there are differences when compared with the equivalent amendments in the *Domestic and Family Violence Act* and the *Evidence Act.* That is that an unrepresented defendant will not be permitted to cross examine a complainant in a sexual assault case. The court does not have power to grant leave to do so. That is to recognise the inherent significant vulnerabilities experienced by victims of sexual violence.

I now move to the third group of amendments: the statutory presumption that vulnerable witnesses are to give evidence by video link. Clause 17 makes amendments to the *Evidence Act* which introduces a new statutory presumption that the evidence of a vulnerable witness is to be given by videoconferencing which in the act is termed 'audio-visual link.'

This does so by replacing section 21A(2) of the *Evidence Act* which provides for a number of arrangements for the vulnerable witnesses to choose from in order to give evidence in court at the moment. They are not given any particular priority. They include videoconferencing, the use of a screen or partition to shield the witness from the view of the defendant and vice versa, having a support person present while they give their evidence, and closing the court.

The bill makes the change here by elevating the videoconferencing as a presumption that the vulnerable witness will give evidence by videoconferencing which in practical effect is that the starting point is that the vulnerable witness gives their evidence that way. That can be rebutted if there are no facilities available or the court considers it is in the interests of justice to do so.

The provision is subject to section 21B of the *Evidence Act* which provides for a special procedure for victims of sexual offences and serious violence offences. As I mentioned, the presumption can be rebutted if the videoconferencing facilities are not available or if the witness wishes to give evidence in the courtroom.

I think I may have said that if the court considers it is in the interests of justice to do so; I think that is incorrect. There are two ways the presumption can be rebutted including the witness wishes to give evidence in the courtroom. It then sets up a number of procedures if the witness wants to give evidence in the courtroom, then the screen or partition should be made available. That is again subject to the overriding wishes of the victim. If they want to give their evidence in open court normally like any other witness they can do so.

The fourth group of amendments is the clarification of the court's power to order the use of videoconferencing in criminal proceedings. This does so, by making an amendment to section 49E of the *Evidence Act* which is found in part five of the *Evidence Act* which comprises a set of provisions to enable the use of so-called communication links which is essentially to allow a person to appear before a court, give evidence or make submissions by audio-visual link from any other place outside the court.

Section 49E has been redrafted to clarify the general and broad power of the court to address concerns that the provisions were not that clear or clear enough that the court could conduct any type of proceeding by videoconference where, for example, the defendant is not present physically in the courtroom. Concerns arose generally about criminal proceedings and proceedings such as sentencing and whether or not the defendant needed to actually present in a courtroom.

It is clarified by the insertion of section 49E(3) which provides for the court to direct the use of videoconferencing at any stage of the proceedings, and also a note to clarify that videoconferencing may be used for the purpose of sentencing a defendant, as an example.

Section 49E(5) will now include a non-exhaustive list of matters that the court can take into account to determine whether or not videoconferencing should be used. Those include the safety and welfare considerations in transporting the accused to the courtroom or a place where the court is sitting and the efficient use of available judicial administrative resources.

The fifth group of amendments is the statutory presumption that experts and corroborating police officers will give evidence via videoconference. This is affected by clause 20 of the bill and the insertion of new section 49E(6). Again, it is a presumption to the practical effect of the starting point that an expert or a corroborating police officer—that is, a police officer who is supporting the evidence of say, another police officer—is to give their evidence by videoconference rather than in the court. Again, that presumption can be rebutted if facilities are not available or if the court considers it is in the interest of justice that the witness appear in person.

Finally, the bill makes consequential amendments to a number of acts, including the *Bail Act*, the *Police Administration Act* and the *Sentencing Act* to support the clarification of the power of the court to order videoconferencing and set proceedings.

That concludes my overview, if you have any questions.

Madam CHAIR: Thank you very much. I will go down the line. Member for Namatjira, do you have any questions ion regard to this briefing?

Mr PAECH: No questions.

Madam CHAIR: Member for Sanderson?

Mrs WORDEN: No, that was very comprehensive, thank you.

Madam CHAIR: Excellent. I also have no questions, so thank you very much for sharing that information. That will be very helpful with our inquiry into this bill going forward. Thanks again for taking the time to appear before us this morning.

Ms SWART: Thank you.

The committee concluded.
