

## **Explanatory Notes**

### **FOR**

## **Amendments to be moved during consideration in detail by the Honourable Yvette D’Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence**

### **Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024**

#### **Objectives of the Amendments**

The objectives of the amendments to the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill (Bill) to be moved during consideration in detail are to:

- respond to Recommendation 3 of the Community Support and Services Committee (Committee) Report No. 46, which included, among other matters, to undertake a review of the persons listed in proposed section 210A(3) of the Criminal Code at clause 8 of the Bill;
- respond to stakeholder concerns about the new provisions concerning tendency evidence and coincidence evidence by ensuring they align with interstate laws, particularly those in New South Wales;
- clarify the scope of the Criminal Code offence of choking, suffocation and strangulation in a domestic setting (strangulation offence) to ensure that it operates as intended; and
- address technical issues in the Bill.

#### **Achievement of the objectives**

##### **Persons taken to have a child under their care, supervision or authority**

Amendments 2 to 4 relate to provisions in the Bill which introduce new ‘position of authority’ offences at sections 210A (Sexual acts with a child aged 16 or 17 under one’s care, supervision or authority) and 229B(1A) (Repeated sexual conduct with a child) of the Criminal Code.

Clause 8 of the Bill inserts new section 210A of the Criminal Code. Subsection (3) provides that, without limiting subsections (1) or (2), certain persons are taken to have a child under their care, supervision or authority. As stated in the Explanatory Notes for the Bill, this is intended to operate as an evidentiary provision that relieves the prosecution of proving that such persons had the relevant child under their care, supervision or authority. The adults captured in the list at section

210A(3) are prohibited from relying on a ‘similar-age’ defence that is otherwise provided in the offence provisions. This list operates in respect of both the offences at section 210A(1) and (2) and 229B(1A).

The Committee recommended a review of the persons listed in section 210A(3) following stakeholder submissions, which:

- noted that the term ‘health practitioner’ was not defined; and
- observed the potentially broad ambit of proposed section 210A(3)(g), which captured a ‘person employed or providing services at a child accommodation service where the child lives’.

There was otherwise stakeholder feedback emphasising the importance of certainty in the list in section 210A(3).

Amendments 2 to 4 will provide clarity and certainty about who is included in the list of persons at section 210A(3), and specifically subsections 210A(3)(e) and (g).

Section 210A(3)(e) provides that a health practitioner is taken to have a child under their care, supervision, or authority if the child is their patient. The amendments will provide a definition of ‘health practitioner’ to mean a person registered under the Health Practitioner Regulation National Law to practise in a health profession, other than as a student.

Further, the amendments will amend the scope of section 210A(3)(g) so that it only captures ‘a person associated with a residential care service that provides accommodation where the child resides’. The amendments provide that a ‘residential care service’ means ‘a service whose main purpose is to provide accommodation to children who are in the custody, or under the guardianship, of the chief executive (child safety) under the *Child Protection Act 1999*’.

The amendments define ‘associated’, in relation to a residential care service, to mean:

- ‘(a) owns, or is involved in the management or control of, the service; or
- (b) is employed or engaged by the service; or
- (c) works as a volunteer for the service.’

This would capture, for example, a contracted service provider providing services to the residential care service.

### **Amendment of strangulation offence**

Amendment 5 amends the strangulation offence to clarify that to choke, suffocate or strangle another person includes the application of pressure to that person’s neck that completely or partially restricts the other person’s respiration or blood circulation, or both.

### **Tendency evidence and coincidence evidence**

Amendment 7 omits and replaces clause 40 of the Bill. Clause 40 of the Bill, as introduced, established a framework in the *Evidence Act 1977* (Qld) (Evidence Act) for the admission of tendency evidence and coincidence evidence in criminal proceedings.

During its inquiry into the Bill, stakeholders informed the Committee about the desirability and importance of closely aligning this framework with the law relating to tendency evidence and coincidence evidence operating in Uniform Evidence Law (UEL) jurisdictions such as New South Wales.

In response, clause 40 of the Bill is omitted and replaced with a revised framework that more comprehensively adopts the provisions of Part 3.6 (Tendency and coincidence) of the *Evidence Act 1995* (NSW) (NSW Evidence Act).

While the entirety of clause 40 is omitted and replaced, the amendments re-insert a number of provisions that appeared in the Bill as introduced.

The key differences include:

- clarifying and limiting the application of the framework by making clear it does not apply in relation to: bail or sentencing proceedings; evidence that relates only to the credibility of a witness; or evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, to the extent that the character, reputation, conduct or tendency is a fact in issue;
- making it clear the tendency rule does not apply to: evidence adduced by a defendant to prove that the defendant is a person of good character or to evidence adduced to refute that good character evidence; or to expert opinion evidence about a defendant's character adduced by another defendant or evidence adduced to prove that such evidence should not be accepted;
- making it clear that common law rules limiting the admission of propensity and similar fact evidence, such as the rule in *Pfennig v The Queen* (1995) 182 CLR 461, are not relevant to the application of the framework;
- enabling the notice periods to be prescribed by regulation and allowing a court to dispense with the notice requirement on its own initiative; and
- limiting the rebuttable presumption about the probative value of tendency evidence about a defendant's sexual interest in a child, to children under 16.

### **Addressing technical issues**

The amendments also make technical changes to the Bill including to the commencement provision (to provide that the changes to the strangulation offence commence on assent) and to amend section 590AA of the Criminal Code.

## **Alternative Ways of Achieving Policy Objectives**

There are no alternative ways of achieving these policy objectives.

## **Estimate cost for government implementation**

There will be no cost for government in implementing the amendments.

## **Consistency with fundamental legislative principles**

The amendments have been drafted with regard to the fundamental legislative principles (FLPs) in the *Legislative Standards Act 1992* (LS Act).

An amendment to the tendency and coincidence evidence framework concerns the notice requirements associated with the admission of this type of evidence.

New section 129AG provides that a notice must be given in accordance with any requirement prescribed by regulation. This raises an FLP consideration about whether the Bill has sufficient regard to the institution of Parliament by allowing the delegation of legislative power only in appropriate cases and to appropriate persons (section 4(4)(a) of the LS Act).

The principle provides that the greater the level of potential interference with individual rights and liberties, or the institution of Parliament, the greater will be the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament. This is especially the case where the effect of the power is to delegate to an entity other than Parliament a power to change the application or effect of the legislation and good reasons are therefore required to include the power.

New section 129AG is considered appropriate as it will provide greater flexibility in the requirements for notices and the matters to be prescribed by regulation are largely procedural in nature.

Further, new section 129AH(1)(b) provides that the court may dispense with the requirement to give such notice on the court's own initiative if it considers it appropriate to do so. This raises an additional FLP consideration about whether the Bill allows the subdelegation of a power delegated by an Act only in appropriate cases and to appropriate persons, and if authorised by an Act (section 4(5)(e) of the LS Act). The subdelegation is considered appropriate as a court is best placed to determine if there are particular circumstances that warrant variation of the notice requirements stipulated in regulation.

All other amendments in the Bill are consistent with FLPs, paying sufficient regard to the rights and liberties of individuals and the institution of Parliament.

## **Consultation**

The amendments to the position of authority offences and the tendency evidence and coincidence evidence framework respond to consultation on the Bill undertaken through the Committee's inquiry process.

Consultation was not undertaken in relation to the amendment to the strangulation offence due to the clarifying nature of the amendment.

## **Notes on provisions**

*Amendment 1* amends the commencement provisions in the Bill for amendments to the Criminal Code. Amendments to the Criminal Code to introduce new 'position of authority' offences will commence on a day to be fixed by proclamation. This is not a departure from the Bill as introduced.

The amendments to section 315A of the Criminal Code (Choking, suffocation or strangulation in a domestic setting) will commence on assent.

*Amendment 2* amends the list of persons who are taken to have a child under their care, supervision or authority under new section 210A(3) of the Criminal Code by amending subsection (g) to include a person associated with a residential care service that provides accommodation where the child resides.

*Amendment 3* omits the definition of *child accommodation service* and inserts definitions of the terms *associated*, *chief executive (child safety)* and *health practitioner* into subsection (8) of new section 210A of the Criminal Code to assist with the interpretation of subsections 210A(3)(e) and (g).

*Amendment 4* inserts a definition of *residential care service* into subsection (8) of new section 210A of the Criminal Code to assist with the interpretation of subsection 210A(3)(g).

*Amendment 5* amends section 315A of the Criminal Code by inserting a new subsection (1A).

New subsection (1A) provides that, for the purposes of section 315A(1), a person is taken to choke, suffocate or strangle another person if they apply pressure to that other person's neck that completely or partially restricts the other person's respiration or blood circulation, or both.

New subsection (1A) expressly does not limit section 315A(1).

*Amendment 6* omits clause 39 from the Bill as it is no longer necessary because the definition for the term *relevant child sexual offence* now appears in Amendment 7.

*Amendment 7* omits clause 40 from the Bill and replaces Part 7A of the Evidence Act, as inserted by clause 40 of the Bill.

#### New section 129AA: Application

New section 129AA limits and clarifies the application of the tendency evidence and coincidence evidence framework. Equivalent provisions are provided in sections 94(1) to (5) of the NSW Evidence Act.

New section 129AA(1) provides that new Part 7A applies to criminal proceedings.

New section 129AA(2)(a) provides that the framework does not apply to bail or sentencing proceedings. These categories of criminal proceedings necessarily require the admission of evidence concerning a person's prior conduct. Existing provisions in Queensland's statute book enable courts to receive a range of relevant evidence and information when making decisions regarding a person's bail or in the exercise of the sentencing discretion. The introduction of the framework is not intended to constrain or modify current practices in relation to bail and sentence proceedings.

New section 129AA(2)(b) provides that the framework does not apply to evidence that relates only to the credibility of a witness. For example, the framework will not apply to cross-examination going only to credit.

New section 129AA(2)(c) provides that the framework does not apply to evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, to the extent that the character, reputation, conduct or tendency is a fact in issue. This provision will be pertinent in cases where the character, reputation or conduct of a person is a fact in issue as an element of a charge or a defence (for example, the offence of criminal defamation in the Criminal Code), as distinct from being relevant to a fact in issue.

New section 129AA(3) puts beyond doubt that any principle or rule of the common law that prevents or restricts the admissibility of evidence about propensity or similar fact evidence in a proceeding will not be relevant when applying new Part 7A to tendency evidence or coincidence evidence about a defendant. An equivalent provision is provided for in section 94(4) of the NSW Evidence Act. Unlike New South Wales, the Queensland framework will only apply to criminal proceedings, and it is therefore unnecessary to refer to rules of equity, which are referred to in the New South Wales provision. For clarity, this amendment is not intended to exclude use and reliance on case law developed in UEL jurisdictions concerning tendency evidence and coincidence evidence.

New section 129AA(4) provides that in determining the probative value of tendency evidence or coincidence evidence for the purpose of new Part 7A, it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or contamination. A similar provision was included in the Bill as introduced; however, the amended provision aligns more closely with the approach in New South Wales.

Relevantly, the Bill still omits section 132A (Admissibility of similar fact evidence) from the Evidence Act, which provides that in a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

#### New section 129AB: Definitions for this part

New section 129AB(1) provides definitions of *coincidence evidence*, *probative value*, *tendency evidence* and the *tendency rule*. The definition of *probative value* is consistent with the definition used in the NSW Evidence Act.

New section 129AB(2) clarifies that a reference to an act in new Part 7A includes a reference to an omission. The equivalent provision in the NSW Evidence Act is section 96.

#### New section 129AC: Use of evidence for other purposes

New subsection 129AC(1) provides that evidence that under new Part 7A is not admissible to prove a particular matter, must not be used to prove that matter even if it is relevant for another purpose.

New subsection 129AC(2) provides that evidence that under new part 7A can not be used against a party to prove a particular matter, must not be used against the party to prove that matter even if it is relevant for another purpose.

The intended effect of new section 129AC is that if evidence is admissible in a criminal proceeding, but not as tendency evidence or coincidence evidence, it can not be used as tendency evidence or coincidence evidence, unless the requirements of new part 7A are met.

This recognises that evidence can be admitted for various purposes, including for purposes other than tendency and coincidence reasoning. A party can not use evidence as tendency evidence or coincidence evidence, unless it is admitted under new Part 7A, even when the evidence is admitted for another purpose.

This is intended to ensure that tendency or coincidence reasoning is only adopted in respect of evidence where the prescribed notice requirements and legal thresholds in new Part 7A have been satisfied.

The equivalent provision is section 95 of the NSW Evidence Act.

#### New section 129AD: The tendency rule

New section 129AD (previously section 129AB of the Bill as introduced) provides the general rules for admissibility of tendency evidence.

New section 129AD(1) provides that tendency evidence is not admissible unless:

- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
- (b) the court considers that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

New section 129AD(2) provides exceptions to the requirement to give reasonable notice in writing provided in new section 129AD(1)(a). These exceptions include if the evidence is adduced in accordance with any directions made by the court under new section 129AH or the evidence is adduced to explain or contradict tendency evidence adduced by another party.

A note provides that the tendency rule is subject to specific exceptions concerning the character of, or expert opinion about, accused persons (see new section 129AJ). Other provisions of the Evidence Act may also operate as further exceptions.

#### New section 129AE: Admissibility of tendency evidence in proceedings involving certain child sexual offences

New section 129AE (previously section 129AC of the Bill as introduced) provides a rebuttable presumption about tendency evidence in proceedings involving certain child sexual offences.

New section 129AE(1) provides that section 129AE applies in a proceeding in which the commission by the defendant of an act that constitutes, or may constitute, a relevant child sexual offence is a fact in issue.

New section 129AE(2) provides a presumption that the following tendency evidence about the defendant will have significant probative value for the purposes of section 129AD(1)(b) and 129AI(1):

- (a) tendency evidence about the sexual interest the defendant has or had in children, even if the defendant has not acted on the interest;
- (b) tendency evidence about the defendant acting on a sexual interest the defendant has or had in children.

New section 129AE(3) provides that subsection (2) applies whether or not the sexual interest or act to which the tendency evidence relates was directed at a complainant in the proceeding, any other child or children generally.

New section 129AE(4) provides that despite the subsection (2), a court may determine that the tendency evidence does not have significant probative value if it is satisfied there are sufficient grounds to do so.

New section 129AE(5) provides a list of matters which are not to be taken into account when a court is determining whether there are sufficient grounds to conclude that the tendency evidence does not have significant probative value, unless the court considers there are exceptional circumstances in relation to those matters that warrant the matters to be taken into account.

New section 129AE(6) defines *child* and *relevant child sexual offence*.

The equivalent provision is section 97A of the NSW Evidence Act. However, there is one aspect of new section 129AE which differs from its NSW equivalent. This difference arises because the rebuttable presumption provided in new section 129AE will only operate in criminal proceedings where the child is under 16; and where the tendency evidence relates to a sexual interest the defendant has, or acted upon, in relation to a child or children under 16 years of age. The rebuttable presumption in New South Wales has a broader operation and applies to tendency evidence about a sexual interest in a child under 18.

#### New section 129AF: The coincidence rule

New section 129AF (previously section 129AD in the Bill as introduced) adopts section 98 of the NSW Evidence Act in respect of the admission of coincidence evidence.

New section 129AF(1) provides that coincidence evidence is not admissible unless:

- (a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party's intention to adduce the evidence; and
- (b) the court considers that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

New section 129AF(2) provides that to avoid doubt, subsection (1) includes the use of evidence from 2 or more witnesses claiming they are victims of offences committed by a person who is a defendant in a criminal proceeding to prove, on the basis of similarities in the claimed acts or the circumstances in which they occurred, that the defendant did an act in issue in the proceeding.

New section 129AF(3) provides exceptions to the requirement to give reasonable notice in writing provided in new section 129AF(1)(a), if the evidence is adduced in accordance with a court's directions pursuant to section 129AH or if the evidence is adduced to explain or contradict coincidence evidence adduced by another party.



New section 129AG: Requirements for notices

New section 129AG (previously section 129AE in the Bill as introduced) provides requirements for notices.

New section 129AG(1) provides that a notice given under section 129AD(1)(a) or 129AF(1)(a) must be given in accordance with any requirement prescribed by regulation.

New section 129AG(2) provides that, to remove any doubt, it is declared that a regulation may prescribe a minimum notice period for the purpose of section 129AD(1)(a) or 129AF(1)(a).

New section 129AH: Court may dispense with notice requirements

New section 129AH(1) provides that the court may dispense with the requirement to give notice under section 129AD(1)(a) or 129AF(1)(a) as the case may be:

- (a) on the application of a party; or
- (b) on its own initiative if the court considers it appropriate to do so.

New section 129AH(2) provides that, to remove any doubt, it is declared that an application under subsection (1) may be made before or after the time that notice would otherwise be required to be given.

New section 129AH(3) provides that a direction under subsection (1) may be:

- (a) subject to any conditions the court thinks fit; and
- (b) given at or before the hearing in which the evidence is to be adduced.

New section 129AH(4) provides that without limiting the court's power to impose conditions under this section, those conditions may include 1 or more of the following:

- (a) a condition that the party give notice of its intention to adduce the evidence to a specified party, or to each other party other than a specified party;
- (b) a condition that the party give notice only in respect of specified tendency evidence, or all tendency evidence that the party intends to adduce other than specified tendency evidence;
- (c) a condition that the party give notice only in respect of specified coincidence evidence, or all coincidence evidence that the party intends to adduce other than specified coincidence evidence.

New section 129AH adopts the New South Wales approach, but also allows the court to dispense of the requirements under section 129AD(1)(a) or 129AF(1)(a) on its own initiative. This provision allows the court to take a flexible and tailored approach to notice requirements depending on the circumstances of the case.

New section 129AI: Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

New section 129AI(1) provides that tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution can not be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.

This has the effect of creating a second limb to the test for admissibility of tendency evidence or coincidence evidence.

New section 129AI(2) provides that the section does not apply to:

- (a) tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant; or
- (b) coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

New section 129AI has been modelled on section 101 of the NSW Evidence Act.

New section 129AJL Exceptions to tendency rule – Evidence about character of an accused person

New section 129AJ(1) provides that the tendency rule does not apply to:

- (a) evidence adduced by a defendant to prove, directly or indirectly, that the defendant is, generally or in a particular respect, a person of good character; or
- (b) evidence adduced to refute evidence of the kind referred to in paragraph (a).

New section 129AJ(2) provides that the tendency rule also does not apply to:

- (a) evidence of the defendant's character adduced by another defendant if:
  - (i) the evidence is an opinion about the defendant; and
  - (ii) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and
  - (iii) the opinion is wholly or substantially based on that knowledge; or
- (b) if evidence of the kind referred to in paragraph (a) is admitted, evidence adduced to prove that that opinion evidence should not be accepted.

In New South Wales, a legislative note undertakes a similar function at the conclusion of section 97 of the NSW Evidence Act. This could not be directly replicated in the Queensland context.

Equivalent provisions are sections 110 and 111 of the NSW Evidence Act.

New section 129AK: Standard of proof for tendency evidence or coincidence evidence

New section 129AK(1) provides that tendency evidence or coincidence evidence need not be proved beyond reasonable doubt to the extent that it is adduced as tendency evidence or coincidence evidence unless:

- (a) the court is satisfied that there is a significant possibility that the jury will rely on the evidence as being essential to its reasoning in reaching a finding of guilt; or
- (b) the evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge.

New section 129AK(2) provides that if tendency evidence or coincidence evidence is adduced as both tendency evidence or coincidence evidence and as proof of an element or essential fact of a charge, the evidence need only be proved beyond reasonable doubt to the extent that it is adduced as proof of the element or essential fact.

New section 129AK was included in the Bill as introduced (previous section 129AF). As previously observed in Explanatory Notes to the Bill (as introduced), this provision was modelled on section 161A of the *Criminal Procedure Act 1986* (NSW). As distinct from New South Wales, however, this provision is not framed in terms of how a court may or may not direct a jury.

*Amendment 8* omits the definition of *child sexual offence* from Schedule 3 (Dictionary) as it is no longer necessary.

*Amendment 9* amends the definitions of *coincidence evidence*, *probative value* and *tendency evidence* by referring to the updated section number that in which these terms are now defined.

*Amendment 10* inserts a definition of *tendency rule* in the Schedule 3 (Dictionary) of the Evidence Act.

*Amendment 11* amends section 590AA(2)(1) of the Criminal Code (Pre-trial directions and rulings) to include a reference to new parts 6B and 7A of the Evidence Act. This makes it clear that a direction or ruling under section 590AA(1) of the Criminal Code may be given in relation to these parts.