

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

Statement of Compatibility

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

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the amendments to be moved during consideration in detail (ACiDs) of the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024 (the Bill).

In my opinion, the ACiDs are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The objectives of the ACiDs 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 their correlation with interstate laws, particularly those in New South Wales;
- clarify the scope of the Criminal Code offence of choking, suffocation or strangulation in a domestic setting under section 315A (strangulation offence) to ensure that it operates as intended; and
- address technical issues.

Human Rights Issues

In my opinion, the human rights relevant to the ACiDs are the right to liberty and security of person (section 29), right to a fair hearing (section 31) and rights in criminal proceedings (section 32).

The amendments to address technical issues do not engage or limit any human rights.

Amendment of the Criminal Code: Persons taken to have a child under their care, supervision, or authority

New section 210A(3) of the Criminal Code provides a list of persons taken to have a child under their care, supervision, or authority for the purpose of the new criminal offences at sections 210A (Sexual acts with a child aged 16 or 17 under one's care, supervision or authority) and section 229B(1A) (Repeated sexual conduct with a child) of the Criminal Code. The adults captured in the list are prohibited from relying on a 'similar-age' defence that is otherwise provided in the offence provisions.

The amendments provide a definition of 'health practitioner' for subsection (e) and narrow the scope of subsection (g) to a person associated with a residential care service that provides accommodation where the child resides.

By providing clarity and certainty about who is included in the list of persons taken to have a child under their care, supervision, or authority, the amendments promote the right to liberty and security of person (section 29).

Amendment of Evidence Act 1977 (Evidence Act): Tendency evidence and coincidence evidence

Amendment 7 of the ACiDs replaces and reframes the tendency and coincidence framework to achieve greater consistency with Uniform Evidence Law (UEL) jurisdictions, including New South Wales. This includes re-ordering existing sections of the Bill and as such, the previous Statement of Compatibility tabled with the Bill largely applies. Specific provisions that have been added to the framework to ensure greater consistency with UEL jurisdictions are outlined further below.

Amendments to limit and clarify the application of the new framework

New section 129AA of the Evidence Act excludes the application of the new framework in relation to the following:

- 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.

These amendments do not materially affect the intended operation of the new framework. As such, the previous Statement of Compatibility tabled with the Bill applies.

Amendment to exclude the common law rules restricting admissibility of propensity or similar fact evidence

New section 129AA(3) of the Evidence Act provides that, to avoid doubt, any principle or rule of the common law that prevents or restricts the admissibility of evidence about propensity or similar fact is not relevant when applying new Part 7A to tendency evidence or coincidence evidence about a defendant. The ACiD does not reflect a change in the policy associated with the framework or its intended operation, and therefore the previous Statement of Compatibility tabled with the Bill applies.

Amendment to provisions concerning the possibility that evidence is the result of collusion, suggestion, concoction or contamination

New section 129AA(4) provides how a court must consider any suggestion that tendency evidence or coincidence evidence is the result of collusion, suggestion, concoction or contamination. The amendment is progressed to replicate the drafting of the provision in section 94(5) of the *Evidence Act 1995* (NSW). The ACiD does not reflect a change in the policy associated with the framework or its intended operation, and therefore the previous Statement of Compatibility tabled with the Bill applies.

Amendment to provide clarity in cases where evidence is admissible for a non-tendency or non-coincidence purpose

New section 129AC provides evidence that is not admissible under new Part 7A to prove a particular matter (for tendency evidence and coincidence evidence) must not be used to prove that matter, even if it is relevant for another purpose. This ACiD will assist in ensuring that courts and juries only use permissible reasoning in relation to evidence about a person's prior conduct. This ACiD therefore promotes the right to a fair hearing and rights in criminal proceedings.

Amendments to the definitions of 'child' and 'relevant child sexual offence'

The ACiDs establish new definitions for the terms 'relevant child sexual offence' and 'child' in new section 129AE (Admissibility of tendency evidence in proceedings involving certain child sexual offences).

This amendment will have the effect of achieving consistency between the two definitions and limiting the rebuttable presumption provided in new section 129AE. The rebuttable presumption will only operate in criminal proceedings where the complainant 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. On introduction, this rebuttable presumption had a broader application to proceedings where the child was under 18; and where the tendency evidence related to a sexual interest in a child under 16, or aged 16 or 17 who is under the care, supervision or authority of the defendant.

By limiting the operation of this rebuttable presumption, the ACiD promotes a defendant's right to a fair trial. This is because the amendment reduces the cases in which a defendant would bear the burden of displacing that presumption in their trial.

Amendments to the notice requirements associated with the admission of tendency evidence or coincidence evidence

The ACiDs remove a requirement that notice of an intention to adduce tendency evidence or coincidence evidence under Part 7A of the Evidence Act be given five weeks before the date fixed for the start of the trial of the proceeding. Instead, new sections 129AD(1)(a) and 129AF(1)(a) provide that a party must give reasonable notice in writing. New section 129AG provides that a notice given under section 129AD or 129AF must be given in accordance with any requirement prescribed by regulation. New section 129AH provides that the court may dispense with the notice requirements on application of a party to the proceeding or on its own initiative, if the court considers it appropriate to do so. A direction to dispense with the notice requirements may be subject to any conditions the court thinks fit and given at or before the hearing in which the evidence is to be adduced.

These amendments may engage rights in criminal proceedings, in particular the right for a person charged with a criminal offence to have adequate time and facilities to prepare their defence (section 32(b) HR Act). This right may be engaged as the amendments remove the strict five-week notice requirement, replacing it with a flexible notice requirement to be prescribed by regulation. The amendments also permit a court to dispense with notice requirements on its own initiative. This amendment may promote the right of a person charged with a criminal offence to have adequate time and facilities to prepare their defence by allowing the court to take a more flexible approach when required, for example, in complex trials.

As notice is still required to be given, unless specifically dispensed with by the court, I do not consider this right to be limited. The amendment will promote rights in criminal proceedings, in particular, the right to be tried without unreasonable delay (section 32(c)), by allowing notice periods to be altered by the court, depending on the particular circumstances of the case.

Amendments to the application of the tendency rule – evidence about character of an accused person

New section 129AJ provides that the tendency rule does not apply to evidence adduced by a defendant to prove that the defendant is, generally or in a particular respect, a person of good character; or evidence to refute that kind of evidence. This amendment reflects the common law position that defendants should not be bound by strict conditions for the admission of this type of evidence.

New section 129AJ also provides that the tendency rule does not apply to evidence of the defendant's character, adduced by another defendant, where that evidence is expert opinion evidence. Further, it does not apply to evidence that is admitted to prove that the opinion evidence should not be accepted. This amendment preserves the common law position with respect to these areas.¹

This ACiD will assist in ensuring that defendants are not bound by the same conditions for the admission of tendency evidence in their own defence. This ACiD therefore promotes the right to a fair hearing and rights in criminal proceedings.

¹ See for example *Lowery v the Queen* [1973] 3 All ER 662.

Conclusion

In my opinion, the ACiDs to the Bill are compatible with human rights under the HR Act because they do not limit human rights.

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Attorney-General and Minister for Justice
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