

Explanatory Notes

FOR

Amendments to be moved during consideration in detail by the Honourable Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women

Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023

Objectives of the Amendments

The objectives of the amendments to the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (Bill) to be moved during consideration in detail are to:

- amend the definition of consent in section 227A of the Criminal Code (Observations or recordings in breach of privacy) for consistency with other similar sections amended by the Bill;
- respond to concerns raised by the former Legal Affairs and Safety Committee (Committee) about the publication of identifying matter about a deceased complainant who is a First Nations person, by clarifying the relevance of cultural considerations in relation to the making of a complainant privacy order; and
- correct minor technical errors in the Bill.

Achievement of the objectives

Definition of consent

Amendment 1 relates to provisions in the Bill which introduce an affirmative model of consent.

Clause 13 of the Bill replaces section 348 (Meaning of consent) with a new section. Subsection (1) provides that, in Chapter 32, consent means free and voluntary agreement. The Bill also amends the definitions of consent in Chapter 22 offences, where the absence of consent is an element, to ensure consistency with the new definition in section 348.

The absence of consent is an element of the offence in section 227A (Observations or recordings in breach of privacy) of the Criminal Code. The Committee noted that the definition of consent in

this section was not amended alongside similar sections, and suggested that the Government may wish to consider doing so.

For consistency with amendments in the Bill, the Criminal Code is further amended by replacing the definition of consent in section 227A(3) to reflect the new definition of consent in proposed new section 348 of the Criminal Code, meaning ‘free and voluntary agreement by a person with the cognitive capacity to make the agreement’.

Limits on publishing information in relation to sexual offences

Amendments 10 and 11 are to provisions in the Bill which relate to publishing identifying matter in relation to sexual offence complainants.

Clause 69 of the Bill inserts Part 6C, Limits on publishing information in relation to sexual offences, into the *Evidence Act 1977* (Evidence Act). The Bill maintains the existing prohibition on publishing identifying information about a complainant, however, provides that the prohibition does not apply where the complainant is deceased.

The Committee considered these provisions and raised concerns about the publishing of identifying matter about deceased First Nations people, noting that ‘the reproduction of the names and photographs of deceased persons is restricted in some areas of indigenous Australia during periods of mourning’.

New Part 6C, as inserted by the Bill, includes provisions establishing a framework for complainant privacy orders, which allow persons with sufficient interest to apply to the court for a complainant privacy order to prohibit or restrict publication of a complainant’s identifying matter.

The amendments respond to the Committee’s concern by further amending proposed new section 103ZZZG (Court may make complainant privacy order), subsection (2), to provide that the court may have regard to any cultural considerations relevant to the applicant or complainant when deciding whether to make a complainant privacy order.

Technical errors

The amendments will correct minor technical errors in the Bill by:

- amending clause 59 which inserts proposed new section 103ZE (Court to exclude public while complainant gives evidence) of the Evidence Act to address incorrect cross-references (amendments 5 and 6);
- amending Clause 22 to omit amendments to section 552B of the Criminal Code which are no longer required, pursuant to an interaction with amendments to the same section in the Criminal Code (Decriminalising Sex Work) and Other Legislation Amendment Bill 2024 (amendments 2 and 3); and
- amending Clauses 57, 60, 64, 66, 70 and 73 to replace references to new Division 14 in Part 9 of the Evidence Act with ‘Division 14A’, and to renumber new section 160 of the Evidence Act as 160A, pursuant to an interaction with amendments in the Forensic Science Queensland Bill 2023 which also amend Part 9 of the Evidence Act (amendments 4, 7, 8, 9, 12 and 13).

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 Bill has been drafted with regard to the fundamental legislative principles (FLPs) in the *Legislative Standards Act 1992*.

The original Explanatory Notes for the Bill address the consistency with the FLPs of the amendments to the Criminal Code and the Evidence Act (relating to affirmative consent and limits on publishing information in relation to sexual offences).

The proposed amendments do not raise additional FLP considerations.

Consultation

The amendment related to limits on publishing information in relation to sexual offences responds to consultation on the Bill undertaken through the Committee's inquiry process.

Notes on provisions

Amendment 1 inserts Clause 10A into the Bill which amends section 227A (Observations or recordings in breach of privacy) of the Criminal Code to replace the definition of consent with a definition meaning 'free and voluntary agreement by a person with the cognitive capacity to make the agreement'.

Amendment 2 amends Clause 22 (Amendment of s 552B (Charges of indictable offences that must be heard and decided summarily unless defendant elects for jury trial)) as a consequence of amendment 3.

Amendment 3 amends Clause 22 to omit subclauses (2) and (3).

Amendment 4 amends Clause 57 (Insertion of new pt 9, div 14) by renumbering the division to be new Division 14A, and renumbering section 160 (Application of s 21 to proceedings) to be new section 160A.

Amendment 5 amends proposed new section 103ZE(3) of the Evidence Act (Clause 59) by replacing the incorrect reference to subsection (1) with the correct reference to subsection (2).

Amendment 6 amends proposed new section 103ZE(4) of the Evidence Act (Clause 59) by replacing the incorrect reference to subsection (1) with the correct reference to subsection (2).

Amendment 7 amends Clause 60 to replace the reference to division 14 with a reference to division 14A as a consequence of amendment 4.

Amendment 8 amends Clause 64 to replace the reference to division 14 with a reference to division 14A as a consequence of amendment 4.

Amendment 9 amends Clause 66 to replace the reference to division 14 with a reference to division 14A as a consequence of amendment 4.

Amendment 10 amends new section new section 103ZZZG(2) (Clause 69) by inserting a new paragraph to provide that the court may have regard to any cultural considerations relevant to the applicant or complainant when deciding whether to make a complainant privacy order.

Amendment 11 amends new section new section 103ZZZG(2) (Clause 69) to renumber the subsection as a consequence of amendment 10.

Amendment 12 amends Clause 70 to replace the reference to division 14 with a reference to division 14A as a consequence of amendment 4.

Amendment 13 amends Clause 73 to replace the reference to division 14 with a reference to division 14A as a consequence of amendment 4.