

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

Statement of Compatibility

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

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, Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women, make this statement of compatibility with respect to the amendments to be moved during consideration in detail (ACiDs) of the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 (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 amendments

The objectives of the ACiDs 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.

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.

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

Amendments 2 to 9 and 12 to 13 correct minor technical errors.

Human Rights Issues

Human rights relevant to the amendments

In my opinion, the human rights relevant to the ACiDs are the right to privacy and reputation (section 25 of the HR Act), cultural rights – generally (section 27 of the HR Act) and cultural rights – Aboriginal peoples and Torres Strait Islander people (section 28 of the HR Act).

The amendments to correct technical errors do not engage or limit any human rights.

Definition of consent

The amendment to the definition of consent in section 227A of the Criminal Code will promote the right to privacy and reputation (section 25 of the HR Act). Section 227A provides offences where a person observes or visually records another person or another person's genital or anal region, in circumstances where a reasonable adult would expect to be afforded privacy. An element of the offences is an absence of consent. Clearly defining consent as an agreement, consistent with an affirmative model of consent, will send a strong message regarding what consent requires, reflecting modern community standards and better protecting the privacy of individuals.

Limits on publishing information in relation to sexual offences

The amendment to proposed new section 103ZZZG(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 promotes cultural rights – generally, and cultural rights – Aboriginal and Torres Strait Islander peoples (sections 27 and 28 of the HR Act).

The Statement of Compatibility for the Bill identified that the amendments in Clause 69 (Limits on publishing information in relation to sexual offences) engaged and limited the following rights in the HR Act: freedom of expression (section 21); right to a fair trial (section 31); and rights in criminal proceedings (section 32).

The amendment to new section 103ZZZG(2) of the Evidence Act will clarify rather than materially affect the intended operation of the proposed provisions and as such, the previous assessment of compatibility with human rights applies.

Conclusion

In my opinion, the ACiDs for the Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Bill 2023 are compatible with human rights because they do not limit human rights.

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Minister for Health, Mental Health and Ambulance Services
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