

Serial 240
Evidence Reform (Children and Sexual Offences) Bill 2004
Dr Toyne

**A BILL
for
AN ACT**

to reform Territory law in relation to the evidence of children in matters of
sexual offences, and for related purposes



NORTHERN TERRITORY OF AUSTRALIA
EVIDENCE REFORM (CHILDREN AND SEXUAL OFFENCES) ACT 2004

No. of 2004

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NORTHERN TERRITORY OF AUSTRALIA

No. of 2004

AN ACT

to reform Territory law in relation to the evidence of children in matters of sexual offences, and for related purposes

[Assented to 2004]
[Second reading 2004]

The Legislative Assembly of the Northern Territory enacts as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Evidence Reform (Children and Sexual Offences) Act 2004*.

2. Commencement

This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*.

PART 2 – AMENDMENTS OF EVIDENCE ACT

3. Principal Act

The *Evidence Act* is in this Part referred to as the Principal Act.

4. Repeal and substitution of section 16

Section 16 of the Principal Act is repealed and the following substituted:

"16. Disallowance of question

"(1) The Court may disallow any question that the Court considers to be misleading, confusing, annoying, harassing, intimidating, offensive, repetitive or phrased in inappropriate language.

"(2) In determining whether to disallow a question, the Court must have regard to –

- (a) any relevant condition, attribute or characteristic of the witness, including –
 - (i) the age, maturity and cultural background of the witness; and
 - (ii) any mental, intellectual or physical characteristic of the witness; and
- (b) if the witness is a child – the principles set out in section 21D."

5. Evidence of vulnerable witnesses

Section 21A of the Principal Act is amended –

(a) by inserting before the definition of "vulnerable witness" in subsection (1) the following:

" 'child' means a person who is under 18 years of age;"

(b) by omitting from paragraph (a) of the definition of "vulnerable witness" in subsection (1) "under 16 years of age" and substituting "a child";

(c) by inserting after subsection (1) the following:

"(1A) If a vulnerable witness is to give evidence in a proceeding in relation to a sexual offence, the Court must be closed while the vulnerable witness gives his or her evidence (including evidence given under cross-examination) and a person must not remain in or enter a room or place in which the Court is being held, or remain within the hearing of the Court, without its permission.";

(d) by omitting from subsection (2) "subsection (2A)," and substituting "subsection (2A) and section 21B, in a matter where subsection (1A) does not apply"; and

(e) by omitting from subsection (5) "under 16 years of age" and substituting "a child".

6. Repeal and substitution of section 21B

Section 21B of the Principal Act is repealed and the following substituted:

"21B. Pre-recorded evidence of certain vulnerable witnesses

"(1) This section relates to the following offences:

- (a) a sexual offence;
- (b) an offence against section 177, 181, 184, 186, 186B, 186C, 188 or 193 of the Criminal Code.

"(2) In a proceeding in relation to an offence, at the election of the prosecution –

- (a) the examination-in-chief of a child or a person who suffers from an intellectual disability may be pre-recorded and given by video-tape or other audio-visual means; or
- (b) the whole of the evidence of a child or a person who suffers from an intellectual disability (including cross-examination and re-examination) may be given by video-tape or other audio-visual means.

"(3) If pre-recorded evidence is given under subsection (1)(a) –

- (a) the witness must be available for cross-examination if required (except for a child witness in a preliminary investigation under Part V, Division 1 of the *Justices Act*);
- (b) the Court may rule as inadmissible the whole or any part of the evidence given in the same manner as if the evidence was given orally; and
- (c) the Court may make any other orders as it thinks fit to facilitate the giving of the evidence, including directions for the possession, playing, erasing or editing of the recorded evidence.

"(4) If evidence is given by video-tape or other means under subsection (1)(b) –

- (a) the whole of the evidence must be given and recorded at a special hearing of the Court;
- (b) the defendant must be present at the special hearing but not in the same room as the witness;

- (c) the Court may rule as inadmissible the whole or any part of the evidence given in the same manner as if the evidence was given orally; and
- (d) the Court may make any other orders as it thinks fit to facilitate the giving of the evidence, including directions for the procedure of recording and the possession, playing, erasing or editing of the recorded evidence.

"(5) Evidence given in accordance with this section is of the same effect as evidence given orally."

7. New section 21D

The Principal Act is amended by inserting after section 21C in Part IIA the following:

"21D. Principles in relation to child witnesses

"(1) It is the intention of the Legislative Assembly that, as children tend to be vulnerable in dealings with persons in authority (including courts and lawyers), child witnesses be given the benefit of special measures.

"(2) If a witness is a child, the Court must have regard to the following principles:

- (a) the Court must take measures to limit, to the greatest extent practicable, the distress or trauma suffered (or likely to be suffered) by the child when giving evidence;
- (b) the child must be treated with dignity, respect and compassion;
- (c) the child must not be intimidated when giving evidence;
- (d) proceedings in which a child is a witness should be resolved as quickly as possible."

8. New section 26E

The Principal Act is amended by inserting after section 26D the following:

"26E. Exception to rule against hearsay evidence

"(1) In a proceeding in relation to a sexual offence, as an exception to the rule against hearsay evidence, the Court may admit evidence of a child's statement to another person as evidence of the facts in issue if the Court considers the evidence is of sufficient probative value as to justify its admission.

"(2) In a preliminary examination under Part V, Division 1 of the *Justices Act*, the child whose evidence is admitted under subsection (1) cannot be cross-examined in relation to the statement.

"(3) An accused person cannot be convicted solely on the basis of hearsay evidence admitted under subsection (1)."

PART 3 – AMENDMENTS OF *JUSTICES ACT*

9. Principal Act

The *Justices Act* is in this Part referred to as the Principal Act.

10. Definitions

Section 100A of the Principal Act is amended –

- (a) by omitting "In" and substituting "(1) In"; and
- (b) by inserting at the end the following:

"(2) For sections 105AA, 105A and 105B –

'recorded statement' means a statement recorded on audio-tape, video-tape or by other audio-visual means;

'sexual offence' has the same meaning as in the *Sexual Offences (Evidence and Procedure) Act*."

11. New section 105AA

The Principal Act is amended by inserting after section 105 the following:

"105AA. Evidence of child witness in sexual offence matter

"(1) If a person is charged with an indictable offence that is a sexual offence, the evidence of a child under the age of 18 years in relation to the matter at a preliminary examination must be given by written or recorded statement.

"(2) A child who gives evidence by written or recorded statement need not attend the preliminary examination and cannot be cross-examined in relation to his or her evidence."

12. Procedure when prosecutor proposes to tender written or recorded statements to Court

Section 105A of the Principal Act is amended by inserting in subsections (1)(b) and (2)(b) "or recorded statements" after "written statements".

13. Written and recorded statements may be admitted in evidence

Section 105B of the Principal Act is amended –

- (a) by inserting in subsection (1) "or recorded statement" after "written statement";
- (b) by inserting after subsection (2) the following:

"(2A) A recorded statement cannot be admitted as evidence unless it has been made as a statutory declaration under the *Oaths Act* and it complies with the requirements of that Act.";

- (c) by omitting from subsection (3) "Where a person has made a written statement" and substituting "Subject to subsection (11), where a person has made a written statement or recorded statement";
- (d) by omitting from subsection (6) "Notwithstanding" and substituting "Subject to subsection (11), despite";
- (e) by inserting in subsection (6) "or recorded statement" after "written statement";
- (f) by omitting from subsection (7) "Where" and substituting "Subject to subsection (11), where";
- (g) by inserting in subsections (7) and (8) "or recorded statement" after "written statement";
- (h) by inserting after "the statement" (last reference) in subsection (8) "(or, if the statement was recorded, on a transcript of the statement)";
- (i) by omitting from subsection (9) "Where" and substituting "Subject to subsection (11), if";
- (j) by inserting in subsections (9) and (10) "or recorded statement" after "written statement"; and
- (k) by inserting after subsection (10) the following:

"(11) Subsections (3), (6), (7) and (9) do not apply if the statement was made by a child in a sexual offence matter.".

PART 4 – AMENDMENTS OF *OATHS ACT*

14. New section 23CA

The *Oaths Act* is amended by inserting after section 23C the following:

"23CA. Recorded statutory declaration

"(1) A person may make a statutory declaration by audio tape, video-tape or other audio-visual recording means.

"(2) A recorded declaration must include a statement by the person making the declaration that it is true in every particular and that the person is aware that making a false declaration is an offence.

"(3) A recorded declaration must be witnessed by a person who has attained the age of 18 years.

"(4) A person who witnesses a recorded declaration –

(a) if an audio-visual recording – must appear on the recording at the conclusion of the declaration and state –

(i) that he or she witnessed the recording of the declaration in full or the making of the statement under subsection (2) (as the case may be); and

(ii) his or her name and contact address or telephone number; or

(b) if an audio recording – must state on the recording at the conclusion of the declaration –

(i) that he or she witnessed the recording of the declaration in full or the making of the statement under subsection (2) (as the case may be); and

(ii) his or her name and contact address or telephone number.

"(5) A person who tampers with a recorded declaration, or edits the recording in a manner that gives a false or misleading impression, is guilty of an offence.

Penalty: 20 penalty units or imprisonment for 12 months."

PART 5 – AMENDMENTS OF SEXUAL OFFENCES (EVIDENCE AND PROCEDURE) ACT

15. Principal Act

The *Sexual Offences (Evidence and Procedure) Act* is in this Part referred to as the Principal Act.

16. Definitions

Section 3 of the Principal Act is amended by omitting the definition of "sexual offence" and substituting the following:

" 'sexual offence' means –

- (a) an offence against section 127, 128, 130, 131, 131A, 132, 134, 192, 192B or 201 of the Criminal Code;
- (b) an offence against section 188(1) of the Criminal Code committed in the circumstances referred to in subsection (2)(k) of that section;
- (c) an offence against Part VI, Division 6A of the Criminal Code; or
- (d) an offence committed against section 60 to 69 (inclusive), 70(2), 71, 72 or 74 of the *Criminal Law Consolidation Act*."

17. New section 3A

The Principal Act is amended by inserting after section 3 the following:

"3A. Time limit on prosecutions

"(1) If a person is to be tried summarily for a sexual offence, the trial must be commenced within 3 months of the matter being first mentioned in court.

"(2) If a person is charged with an indictable offence that is a sexual offence, a preliminary investigation under Part V, Division 1 of the *Justices Act* must be commenced within 3 months of the matter being first mentioned in court.

"(3) If a person is to be tried on indictment for a sexual offence, the trial must be commenced within 3 months of the person being committed for trial.

— (4) The court in which the person is to be tried, or which is to conduct a preliminary examination (as the case may be) may, if it thinks fit, at any time and despite that the period fixed by subsection (1), (2) or (3) (as the case may be) has expired, grant an extension, not exceeding 3 months, of the period.

— (5) More than one extension may be granted under subsection (4)."

PART 6 – TRANSITIONAL

18. Amendment of Evidence Act

Section 26E of the *Evidence Act* as amended by this Act applies in relation to a statement –

Evidence Reform (Children and Sexual Offences) Act 2004

- (a) whether the statement was made; and
- (b) whether proceedings in the matter had begun,
before or after the commencement of this Act.

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