

Serial 102
Evidence and Other Legislation Amendment Bill 2019
Ms Fyles

A Bill for an Act to amend the *Bail Act 1982, Domestic and Family Violence Act 2007, Evidence Act 1939, Police Administration Act 1978, Sentencing Act 1995* and *Sexual Offences (Evidence and Procedure Act) 1983*

NORTHERN TERRITORY OF AUSTRALIA

EVIDENCE AND OTHER LEGISLATION AMENDMENT ACT 2019

Act No. [] of 2019

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NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2019

An Act to amend the *Bail Act 1982*, *Domestic and Family Violence Act 2007*, *Evidence Act 1939*, *Police Administration Act 1978*, *Sentencing Act 1995* and *Sexual Offences (Evidence and Procedure Act) 1983*

[Assented to [] 2019]
[Introduced [] 2019]

The Legislative Assembly of the Northern Territory enacts as follows:

Part 1 Preliminary matters

1 Short title

This Act may be cited as the *Evidence and Other Legislation Amendment Act 2019*.

2 Commencement

This Act commences on the day fixed by the Administrator by *Gazette* notice.

Part 2 Amendment of Bail Act 1982

3 Act amended

This Part amends the *Bail Act 1982*.

4 Section 33 amended (Review)

Section 33(4), at the end

insert

Note for subsection (4)

Section 49E(8) of the Evidence Act 1939 provides that a requirement that a person be before a court is taken to be satisfied if the person is before the court by way of a communication link in accordance with Part 5, Division 2 of that Act.

Part 3 Amendment of Domestic and Family Violence Act 2007**5 Act amended**

This Part amends the *Domestic and Family Violence Act 2007*.

6 Section 4 amended (Definitions)

Section 4

insert

audiovisual link, for Chapter 4, Part 4.1, see section 104.

complainant, for Chapter 4, Part 4.1, Division 4A, see section 21G of the *Evidence Act 1939*.

domestic violence offence, for Chapter 4, Part 4.1, Division 4A, see section 21G of the *Evidence Act 1939*.

recorded statement, for Chapter 4, Part 4.1, see section 104.

vulnerable witness, for Chapter 4, Part 4.1, see section 104.

7 Section 104 amended (Definitions)

(1) Section 104

omit

Division:

insert

Part:

- (2) Section 104, definition **recorded statement**
omit, insert
recorded statement:
- (a) for Division 3, see section 21AA of the *Evidence Act 1939*;
and
- (b) for Division 4A, see section 21G of the *Evidence Act 1939*.
- (3) Section 104, definition **vulnerable witness**, paragraph (b)
omit
section 21A(1)
insert
section 21AB

8 Section 106 amended (When Court to be closed)

Section 106(1)(b) and (3)

omit

evidence.

insert

evidence, including in cross-examination.

9 Section 109 amended (No cross-examination of child)

- (1) Section 109, before "A"

insert

(1)

- (2) Section 109, at the end

insert

- (2) The prohibition against cross-examination of a child in subsection (1) applies whether or not a defendant is represented by a legal practitioner.

10 Chapter 4, Part 4.1, Division 4A inserted

After section 113

insert

Division 4A Recorded statements**113A Definitions**

In this Division:

complainant, see section 21G of the *Evidence Act 1939*.

domestic violence offence, see section 21G of the *Evidence Act 1939*.

recorded statement, see section 21G of the *Evidence Act 1939*.

113B Application of Division

This Division applies if:

- (a) a recorded statement is made in relation to an alleged domestic violence offence; and
- (b) the protected person in relation to an application for a domestic violence order is the complainant from whom the recorded statement was taken; and
- (c) the defendant against whom a domestic violence order is sought is the person against whom the domestic violence offence is alleged.

113C Use of recorded statement

Part 3A of the *Evidence Act 1939* applies in proceedings to which this Part applies as if a reference in that Part:

- (a) to a domestic violence offence proceeding were a reference to a proceeding for a domestic violence order; and
- (b) to a hearing of a charge, or a trial in respect of a domestic violence offence were a reference to proceedings for a domestic violence order; and
- (c) to the prosecution were a reference to the applicant.

11 Section 114 replaced

Section 114

repeal, insert

114 Leave required for unrepresented defendant to cross-examine certain witnesses

- (1) This section applies if, in an examination of witnesses or a trial, a defendant is not represented by a legal practitioner and the defendant wishes to cross-examine:
 - (a) a vulnerable witness; or
 - (b) any other witness who is in a domestic relationship with the defendant.
- (2) The defendant is not entitled to cross-examine the witness directly unless the court grants leave.
- (3) The court cannot grant leave under subsection (2) if the witness is a child or has a cognitive impairment or an intellectual disability.
- (4) The court must not grant leave under subsection (2) unless satisfied that the witness's ability to testify under cross-examination will not be adversely affected if the defendant conducts the cross-examination.
- (5) In considering whether the witness's ability to testify will be adversely affected, the court must have regard to any trauma or distress that could be caused if the defendant conducts the cross-examination.
- (6) In considering whether to grant leave under subsection (2), the court must not require the witness to give evidence about the matters mentioned in subsections (4) and (5).

114A Leave not given to directly cross-examine witness

- (1) This section applies if the court does not grant leave under section 114(2).
- (2) The court must, as soon as practicable, explain to the defendant:
 - (a) the prohibition against directly cross-examining the witness and the effect of the prohibition; and

- (b) that if the defendant does not cross-examine the witness, the defendant will not be permitted to adduce evidence in relation to a fact in issue in order to contradict the evidence of the witness; and
 - (c) that the defendant can arrange for a legal practitioner to cross-examine the witness on the defendant's behalf; and
 - (d) that the defendant must notify the court of the name of the arranged legal practitioner by a date specified by the court; and
 - (e) that if the defendant does not wish to make such an arrangement, or if the defendant fails to notify the court of the name of a legal practitioner by the date specified:
 - (i) the court will decide whether it is necessary in the interests of justice to appoint a legal practitioner to cross-examine the witness for the defendant; and
 - (ii) if the court decides that it is necessary – the court may appoint a legal practitioner to cross-examine the witness for the defendant, or make any other order the court considers necessary.
- (3) If the defendant does not wish to make such an arrangement, or if the defendant fails to notify the court of the name of a legal practitioner by the date specified:
- (a) the court must decide whether it is necessary in the interests of justice to appoint a legal practitioner to cross-examine the witness for the defendant; and
 - (b) if the court decides that it is necessary – the court may appoint a legal practitioner (the **appointed person**) to cross-examine the witness for the defendant, or make any other order the court considers necessary.
- (4) If the defendant wishes to cross-examine a witness mentioned in section 114(1), the defendant must put any question to the appointed person and the appointed person must put the question to the witness, unless the appointed person considers the question to be improper.

Notes for subsection (4)

- 1 *The appointed person need not use the exact same words as the defendant when putting a question.*
- 2 *The court can also rule that a question is improper and need not be answered – see section 41(2) of the Evidence (National Uniform Legislation) Act 2011.*

3 See section 41(3) of the Evidence (National Uniform Legislation) Act 2011 for the meaning of "improper question".

- (5) If the defendant does not give any instructions to an appointed person, the appointed person must act in the best interests of the defendant.
- (6) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith as an appointed person for this section.

114B Warning

If a defendant cross-examines a witness through an appointed person, the court must issue a warning to the jury (if any) to the effect that:

- (a) the procedure is a routine practice of the court; and
- (b) no adverse inference is to be drawn against the defendant as a result of the use of the arrangement; and
- (c) the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.

12 Section 115 amended (Procedural directions)

Section 115(1)

omit

The

insert

Subject to sections 114A and 114B, the

13 Chapter 7, Part 7.5 inserted

After section 141

insert

Part 7.5 Transitional matters for Evidence and Other Legislation Amendment Act 2019

142 Proceeding already commenced

- (1) This section applies in relation to a proceeding mentioned in Part 4.1 of this Act that started before the commencement.

(2) The provisions of this Act, as in force immediately before the commencement, continue to apply to the proceeding.

(3) In this section:

commencement means the commencement of section 5 of the *Evidence and Other Legislation Amendment Act 2019*.

Part 4 Amendment of Evidence Act 1939

14 Act amended

This Part amends the *Evidence Act 1939*.

15 Section 4 amended (Definitions)

(1) Section 4, definition **audiovisual link**

omit

, for Part 5, see section 49

insert

means a facility (including closed-circuit television) that enables audio and visual communication between persons at different places

(2) Section 4, definitions **audiovisual record**, **authorised person**, **child**, **examination**, **recorded statement** paragraph (a), **serious violence offence** and **special sitting**

omit

section 21A(1)

insert

section 21AA

(3) Section 4, definition **vulnerable witness**

omit

section 21A(1)

insert

section 21AB

16 Sections 21AA and 21AB inserted

Before section 21A, in Part 3

insert

21AA Definitions

In this Part:

audiovisual record includes a recorded statement.

authorised person means any of the following:

- (a) a police officer with the rank of constable or above;
- (b) a member of the Australian Federal Police who is appointed as a special constable under the *Police Administration Act 1978*;
- (c) a member of a police force of a State or another Territory who is appointed as a special constable under the *Police Administration Act 1978*;
- (d) a person who is an authorised officer under section 304(1)(a) of the *Care and Protection of Children Act 2007*;
- (e) a member of a police force of a State or another Territory with the rank of constable or above;
- (f) a person prescribed by regulation.

child means a person who is under 18 years of age.

examination of a witness includes cross-examination and re-examination.

recorded statement means an interview, recorded on video-tape or by other audiovisual means, in which an authorised person elicits from a vulnerable witness statements of fact which, if true, would be of relevance to a proceeding.

serious violence offence means an offence against any of the following provisions of the Criminal Code that is punishable by imprisonment for 5 or more years:

- (a) Part V, Division 2;
- (b) Part VI, Divisions 3 to 6A;
- (c) section 211 or 212;

- (d) another provision prescribed by regulation.

special sitting, of a court, means a sitting of the court held for the purpose of conducting an examination, or part of an examination, of a vulnerable witness in proceedings for a sexual offence or serious violence offence.

vulnerable witness, see section 21AB.

21AB Meaning of vulnerable witness

A **vulnerable witness** means a witness in proceedings:

- (a) who is a child; or
- (b) who has a cognitive impairment or an intellectual disability; or
- (c) who is the alleged victim of a sexual offence to which the proceedings relate; or
- (d) who is a complainant in a domestic violence offence proceeding; or
- (e) whom a court considers to be vulnerable.

17 Section 21A amended (Evidence of vulnerable witnesses)

- (1) Section 21A(1), (1A) and (2)

omit, insert

- (1) In considering whether a witness is a vulnerable witness, the court may have regard to the following matters:
 - (a) any relevant condition or characteristic of the witness, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality;
 - (b) any mental or physical disability to which the witness is, or appears to be, subject;
 - (c) any relationship between the witness and the defendant to the proceedings;
 - (d) any other matter the court considers relevant.
- (2) Subject to section 21B, a vulnerable witness is to give evidence at a place outside the courtroom using an audiovisual link, unless:
 - (a) an audiovisual link is not available; or

- (b) the witness chooses to give evidence in the courtroom.
 - (2AB) Subject to subsection (2) and section 21B, if a vulnerable witness is giving evidence in the courtroom, a screen, partition or one-way glass must be placed so that the witness's view of the defendant is obscured but not the view of the witness by the judge or the jury.
 - (2AC) A witness is entitled to dispense with the use of the screen, partition or one-way glass mentioned in subsection (2AB).
 - (2AD) In addition to the arrangements mentioned in subsections (2) to (2AC), a vulnerable witness is also entitled to the following:
 - (a) for the purpose of providing the vulnerable witness with emotional support – be accompanied by:
 - (i) a relative; or
 - (ii) a friend; or
 - (iii) any other person requested by the vulnerable witness and whom the court considers is in the circumstances appropriate to accompany the vulnerable witness;
 - (b) that the court be closed while evidence is being given by the vulnerable witness in the proceeding (including evidence given under cross-examination) and that no persons 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.
- (2) Section 21A(2A) and (2B)
omit
subsection (2)
insert
subsection (2AB) or (2AD)
- (3) Section 21A(3)
omit
subsection (2)(a) or (b)
insert
subsection (2) or (2AB)

- (4) Section 21A(4)
omit
subsection (2)(c)
insert
subsection (2AD)(a)
- (5) Section 21A(5)
omit (all references)
subsection (2)(d)
insert
subsection (2AD)(b)

18 Sections 21QA to 21QC inserted

After section 21Q

insert

21QA Leave required for unrepresented defendant to cross-examine certain vulnerable witnesses

- (1) This section applies if, in an examination of witnesses or a trial, a defendant is not represented by a legal practitioner and the defendant wishes to cross-examine a vulnerable witness.
- (2) The defendant is not entitled to cross-examine the witness directly unless the court grants leave.
- (3) The court cannot grant leave under subsection (2) if the witness is a child, or has a cognitive impairment or an intellectual disability.
- (4) The court must not grant leave under subsection (2) unless satisfied that the witness's ability to testify under cross-examination will not be adversely affected if the defendant conducts the cross-examination.
- (5) In considering whether the witness's ability to testify will be adversely affected, the court must have regard to any trauma or distress that could be caused if the defendant conducts the cross-examination.

- (6) In considering whether to grant leave under subsection (2), the court must not require the witness to give evidence about the matters mentioned in subsections (4) and (5).

21QB Leave not given to directly cross-examine witness

- (1) This section applies if the court does not grant leave under section 21QA(2).
- (2) The court must, as soon as practicable, explain to the defendant:
- (a) the prohibition against directly cross-examining the witness and the effect of the prohibition; and
 - (b) that if the defendant does not cross-examine the witness, the defendant will not be permitted to adduce evidence in relation to a fact in issue in order to contradict the evidence of the witness; and
 - (c) that the defendant can arrange for a legal practitioner to cross-examine the witness on the defendant's behalf; and
 - (d) that the defendant must notify the court of the name of the arranged legal practitioner by a date specified by the court; and
 - (e) that if the defendant does not wish to make such an arrangement, or if the defendant fails to notify the court of the name of a legal practitioner by the date specified:
 - (i) the court will decide whether it is necessary in the interests of justice to appoint a legal practitioner to cross-examine the witness for the defendant; and
 - (ii) if the court decides that it is necessary – the court may appoint a legal practitioner to cross-examine the witness for the defendant, or make any other order the court considers necessary.
- (3) If the defendant does not wish to make such an arrangement, or if the defendant fails to notify the court of the name of a legal practitioner by the date specified:
- (a) the court must decide whether it is necessary in the interests of justice to appoint a legal practitioner to cross-examine the witness for the defendant; and

- (b) if the court decides that it is necessary – the court may appoint a legal practitioner (the **appointed person**) to cross-examine the witness for the defendant, or make any other order the court considers necessary.
- (4) If the defendant wishes to cross-examine a vulnerable witness, the defendant must put any question to the appointed person and the appointed person must put the question to the witness, unless the appointed person considers the question to be improper.

Notes for subsection (4)

- 1 *The appointed person need not use the exact same words as the defendant when putting a question.*
 - 2 *The court can also rule that a question is improper and need not be answered – see section 41(2) of the Evidence (National Uniform Legislation) Act 2011.*
 - 3 *See section 41(3) of the Evidence (National Uniform Legislation) Act 2011 for the meaning of "improper question".*
- (5) If the defendant does not give any instructions to an appointed person, the appointed person must act in the best interests of the defendant.
- (6) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith as an appointed person for this section.

21QC Warning

If a defendant cross-examines a witness through an appointed person, the court must issue a warning to the jury (if any) to the effect that:

- (a) the procedure is a routine practice of the court; and
- (b) no adverse inference is to be drawn against the defendant as a result of the use of the arrangement; and
- (c) the evidence of the witness is not to be given any greater or lesser weight because of the use of the arrangement.

19 Section 49 amended (Interpretation)

Section 49, definition **audiovisual link**

omit

20 Section 49E replaced

Section 49E

repeal, insert

49E Use of communication link by Territory entity

- (1) A Territory entity may direct that a person (whether or not a party to the proceeding) appear before, or give evidence or make a submission to, the entity by a communication link from any place within or outside the Territory (including outside Australia) that is outside the place where the entity is sitting.
- (2) The entity may give a direction under subsection (1) on its own initiative or on application by a party to the proceeding, and the direction may be subject to any conditions the entity considers appropriate.
- (3) A direction under subsection (1) may be given at any stage of a proceeding.

Example for subsection (3)

A court may direct that an offender appear before the court by communication link for sentencing.

- (4) However, the entity must not give a direction under subsection (1) unless it is satisfied that the necessary facilities are available or can reasonably be made available.
- (5) Without limiting the matters to which the entity may have regard for giving a direction under subsection (1), the entity must have regard to the following matters, as appropriate:
 - (a) the risk of endangering the personal security of a person, including any safety and welfare considerations involved in transporting a person;
 - (b) the risk of an accused person escaping, or attempting to escape, from custody;
 - (c) past behaviour of a person while appearing before an entity or while in custody;
 - (d) the efficient use of available judicial and administrative resources;

(e) any other matters that the entity considers appropriate.

Examples for subsection (5)(e)

- 1 *The ability of the defendant to comprehend the proceedings or access legal advice or representation or the assistance of an interpreter.*
- 2 *Any special needs of the defendant, including the impact of any intellectual or physical disability, mental illness or the need for a support person.*

(6) If the person who is to appear before the entity is an expert witness or a police officer giving corroborative evidence, the person is to appear by communication link unless:

- (a) the necessary facilities are not available and cannot reasonably be made available; or
- (b) the entity is of the view that it is in the interests of justice that the witness should appear before the entity in person.

(7) The entity may at any time vary or revoke an order made under this Division, either on its own initiative or on application of a party to the proceeding.

(8) A requirement by or under an Act that a person is to be present, or is to attend or be brought before a Territory entity is to be taken to be satisfied if the person is present, attends or is brought before the entity by way of a communication link in accordance with this Division.

21 Part 10, Division 4 inserted

After section 71

insert

Division 4 Evidence and Other Legislation Amendment Act 2019

72 Proceeding already commenced

(1) If a proceeding commenced before the commencement, this Act as amended by the amending Act applies to that part of the proceeding that takes place on or after the commencement.

(2) However, subsection (1) does not apply in relation to a trial or hearing, including a preliminary examination under Part V of the *Local Court (Criminal Procedure) Act 1928*, in the proceeding that commenced before the commencement and:

- (a) continued on or after the commencement; or

- (b) was adjourned until the commencement or after the commencement.
- (3) The provisions of this Act, as in force immediately before the commencement, apply to a trial or hearing mentioned in subsection (2).
- (4) In this section:

amending Act means the *Evidence and Other Legislation Amendment Act 2019*.

commencement means the commencement of Part 4 of the amending Act.

Part 5 Amendment of Police Administration Act 1978

22 Act amended

This Part amends the *Police Administration Act 1978*.

23 Section 133 amended (Application to member for release)

Section 133(2), at the end

insert

Note for subsection (2)

Section 49E(8) of the Evidence Act 1939 provides that a requirement that a person be before a court is taken to be satisfied if the person is before the court by way of a communication link in accordance with Part 5, Division 2 of that Act.

24 Section 137 amended (Time for bringing person before court generally)

Section 137(1), at the end

insert

Note for subsection (1)

Section 49E(8) of the Evidence Act 1939 provides that a requirement that a person be before a court is taken to be satisfied if the person is before the court by way of a communication link in accordance with Part 5, Division 2 of that Act.

Part 6 Amendment of Sentencing Act 1995

25 Act amended

This Part amends the *Sentencing Act 1995*.

26 Section 117 amended (Offender to be present when sentence imposed)

- (1) Section 117, heading

omit

present

insert

before court

- (2) Section 117(1), at the end

insert

Note for subsection (1)

Section 49E(8) of the Evidence Act 1939 provides that a requirement that a person be before a court is taken to be satisfied if the person is before the court by way of a communication link in accordance with Part 5, Division 2 of that Act.

Part 7 Amendment of Sexual Offences (Evidence and Procedure) Act 1983**27 Act amended**

This Part amends the *Sexual Offences (Evidence and Procedure) Act 1983*.

28 Section 5 replaced

Section 5

repeal, insert

5 Leave required for unrepresented defendant to cross-examine complainant

- (1) In an examination of witnesses or a trial, a defendant who is not represented by a legal practitioner is not entitled to cross-examine the complainant directly.
- (2) The court must, as soon as practicable, explain to the defendant:
- (a) the prohibition against directly cross-examining the complainant and the effect of the prohibition; and

- (b) that if the defendant does not cross-examine the complainant, the defendant will not be permitted to adduce evidence in relation to a fact in issue in order to contradict the evidence of the complainant; and
 - (c) that the defendant can arrange for a legal practitioner to cross-examine the complainant on the defendant's behalf; and
 - (d) that the defendant must notify the court of the name of the arranged legal practitioner by a date specified by the court; and
 - (e) that if the defendant does not wish to make such an arrangement, or if the defendant fails to notify the court of the name of a legal practitioner by the date specified:
 - (i) the court will decide whether it is necessary in the interests of justice to appoint a legal practitioner to cross-examine the complainant for the defendant; and
 - (ii) if the court decides that it is necessary – the court may appoint a legal practitioner to cross-examine the complainant for the defendant, or make any other order the court considers necessary.
- (3) If the defendant does not wish to make such an arrangement, or if the defendant fails to notify the court of the name of a legal practitioner by the date specified:
- (a) the court must decide whether it is necessary in the interests of justice to appoint a legal practitioner to cross-examine the complainant for the defendant; and
 - (b) if the court decides that it is necessary – the court may appoint a legal practitioner (the **appointed person**) to cross-examine the complainant for the defendant, or make any other order the court considers necessary.
- (4) If the defendant wishes to cross-examine the complainant, the defendant must put any question to the appointed person and the appointed person must put the question to the complainant, unless the appointed person considers the question to be improper.

Notes for subsection (4)

- 1 *The appointed person need not use the exact same words as the defendant when putting a question.*
- 2 *The court can also rule that a question is improper and need not be answered – see section 41(2) of the Evidence (National Uniform Legislation) Act 2011.*

3 See section 41(3) of the *Evidence (National Uniform Legislation) Act 2011* for the meaning of "improper question".

- (5) If the defendant does not give any instructions to an appointed person, the appointed person must act in the best interests of the defendant.
- (6) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith as an appointed person for this section.

5A Warning

If a defendant cross-examines a complainant through an appointed person, the court must issue a warning to the jury (if any) to the effect that:

- (a) the procedure is a routine practice of the court; and
- (b) no adverse inference is to be drawn against the defendant as a result of the use of the arrangement; and
- (c) the evidence of the complainant is not to be given any greater or lesser weight because of the use of the arrangement.

29 Part 3, Division 3 inserted

After section 18

insert

Division 3 Evidence and Other Legislation Amendment Act 2019

19 Proceeding already commenced

- (1) If a proceeding commenced before the commencement, this Act as amended by the amending Act applies to that part of the proceeding that takes place on or after the commencement.
- (2) However, subsection (1) does not apply in relation to a trial or hearing, including a preliminary examination under Part V of the *Local Court (Criminal Procedure) Act 1928*, in the proceeding that commenced before the commencement and:
 - (a) continued on or after the commencement; or
 - (b) was adjourned until the commencement or after the commencement.

(3) The provisions of this Act, as in force immediately before the commencement, apply to a trial or hearing mentioned in subsection (2).

(4) In this section:

amending Act means the *Evidence and Other Legislation Amendment Act 2019*.

commencement means the commencement of Part 7 of the amending Act.

Part 8 Repeal of Act

30 Repeal of Act

This Act is repealed on the day after it commences.