

EXPLANATORY STATEMENT

Criminal Code Further Amendment Bill 2019

SERIAL NO. 87

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

GENERAL OUTLINE

The Bill amends the *Criminal Code Act 1983* to fix an unintended procedural difficulty in relation to cases involving offences that were committed before the *Criminal Code Act 1983* commenced on 1 January 1984, as identified in the recent Supreme Court case of *R v Walker* [2019] NTSC 6. The Bill ensures that certain historical offences can be dealt with in the Supreme Court by way of indictment. It further validates past proceedings to which the loophole in *Walker* might otherwise apply.

NOTES ON CLAUSES

Clause 1. Short title

This is a standard clause that provides that the Act may be referred to by the short title: *Criminal Code Further Amendment Act 2019*.

Clause 2. Commencement

This clause provides that the Act commences on the day on which the Administrator assents to the Act.

Clause 3. Act amended

This clause is a standard clause indicating that the provisions in this Part amend the *Criminal Code Act 1983*.

Clause 4. Schedule I, Part XI, Division 14 inserted

This clause inserts a new division into the end of Part XI of the Criminal Code. New Division 14 is titled 'Criminal Code Further Amendment Act 2019'.

In particular, the new division contains new section 461, titled 'Pre-Code offences', to clearly set out the criminal procedures available in relation to offences that were committed prior to 1984.

Subsection (1) provides a simple test to identify whether an historical offence committed before 1984 is to be defined as an 'indictable offence'. If the offence had a penalty of more than six months imprisonment under the law in force at the time it was committed, and was committed before 1984, it is an 'indictable offence'. There is no additional requirement to show the offence could be proceeded with by way of indictment at the time it was committed. It is intended that this definition affects offences that were committed at any time prior to 1984, including prior to the commencement of the *Northern Territory (Self-Government) Act 1978* (Cth).

Subsections (2)-(4) clarify that this procedural classification for pre-Code offences is taken to have always been in place, including for past proceedings, and proceedings that have already commenced at the time section 461 commences. This ensures there is no doubt as to the validity of past proceedings, or any steps in past proceedings for pre-Code offences, where pre-Code offences were treated as indictable offences by Territory courts.

Clause 5. Repeal of Act

This clause is a standard clause that ensures that this Bill will not remain on the statute book once it has complete its work of amending other legislation.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with the Thirteenth Assembly Sessional Orders (part 12.3) as adopted on 24 August 2017.

Criminal Code Further Amendment Bill 2019

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

OVERVIEW OF THE BILL

The Bill amends the *Criminal Code Act 1983* to fix an unintended procedural difficulty that has been identified in relation to cases involving offences that were committed before the *Criminal Code Act 1983* commenced on 1 January 1984, as identified in the recent Supreme Court case of *R v Walker*. The Bill ensures that certain historical offences can be dealt with in the Supreme Court by way of indictment.

The Bill also applies retrospectively to ensure the Supreme Court had lawful jurisdiction to deal with matters that would otherwise be arbitrarily excluded by the unexpected operation of procedures designed to extend the Supreme Court's jurisdiction to deal with summary offences.

HUMAN RIGHTS IMPLICATIONS

This Bill engages the following rights and prohibition referred to in the International Covenant on Civil and Political Rights (ICCPR).

Right to be presumed innocent until proven guilty by law – Article 14 ICCPR

Article 14(2) of the ICCPR provides that 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

The Bill operates retrospectively to validate pleas and hearings where there may be some doubt as to the Supreme Court's jurisdiction. If the Supreme Court did not have jurisdiction at the time the matter proceeded, such persons were not technically proven guilty *according to law*. The Bill will provide certainty that such matters proceeded according to law. The Legislative Assembly is lawfully empowered to create retrospective laws, and the Bill is important to clarify the application of the law. The Bill creates a law of general application that ensures that the Supreme Court has legal authority to perform the functions it was intended to perform, and believed to have been able to perform through the relevant period. As such, the Bill does not limit the presumption of innocence, but ensures that the fair and appropriate processes under which persons are proven guilty of relevant offences in the Territory are lawful. This preserves the rule of law, and ensures that persons who committed offences before 1984 are not arbitrarily excluded from the operation of laws that applied to their conduct at that time.

The Bill therefore engages the presumption of innocence as defined by Article 14(2), but operates to preserve the rule of law rather than limit the presumption of innocence.

The prohibition on retrospective criminal laws – Article 15 ICCPR

Article 15(1) of the ICCPR provides that '[N]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby'.

This Bill does not create an offence for acts done before its proposed commencement or make a person liable for an offence for which they were not liable at the time. Nor does this Bill increase the maximum or mandatory punishment available for persons who have already been convicted of a criminal offence.

To a limited extent, this Bill does potentially engage with the prohibition on retrospective criminal laws on the basis that it arguably changes the criminal law procedure that applies to criminal conduct which is alleged to have occurred before the Bill commences.

It is generally accepted that retrospective changes to trial practice or rules of evidence would not normally infringe the prohibition, in particular when any retrospective changes to procedures do not form part of the penalty or punishment of an offence.

It is possible that changes to criminal procedure may infringe the prohibition if the changes affect the basic elements of a fair trial. This Bill will not affect the right of the accused to be heard, to respond to any allegations made against them and the requirement that the court be unbiased, independent and impartial. The minimum guarantees in criminal proceedings, as contained in article 14(3), (5), (6) and (7) of the ICCPR, are not affected by this Bill.

CONCLUSION

This Bill is compatible with human rights as it does not raise any human rights issues.