

2024

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2024

EXPLANATORY STATEMENT

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The Bill is **not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

This explanatory statement relates to Private Members amendments to the *Evidence (Miscellaneous Provisions) Act 1991*. It has been prepared to assist the reader of the Bill. This explanatory statement does not form part of the Bill and has not been endorsed by the Assembly. The statement is to be read in conjunction with the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

OVERVIEW OF THE AMENDMENTS

Purpose

The purpose of this Bill is to amend the *Evidence (Miscellaneous Provisions) Act 1991* to ensure that victims of sexual offences in the workplace can have their identity protected in proceedings. The relevant proceedings will include for those offences committed against sections 31, 32 and 33 of the *Work Health and Safety Act 2011* (WHS Act), and disputes of liability for an infringement notice issued under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011* for an offence against section 38 (1) of the WHS Act.

Background

The WHS Act is the governing piece of legislation to protect workers and other people from harm to their health, safety and welfare in the workplace. In order to achieve this object, regard must be given to the principle that workers and other persons should be given the highest order of protection from risk and hazards which arise in their workplace.

When a worker is harmed at work, WorkSafe ACT (also referred to as 'the regulator') will investigate the system in place to identify and eliminate risks in the workplace. Where it is determined there is an absence of a safe system of work, the regulator may recommend the business be prosecuted for failure to meet its duty of care obligations under the Act. If a matter progresses to court, there are no systems currently in place to protect the identity of injured workers. This can represent a barrier to people reporting incidents which occur in the workplace. Ultimately, this results in WorkSafe not being able to meet community expectations of the regulator being able to hold businesses to account.

In June 2023, amendments to the WHS were made to include sexual offences as a notifiable incident under section 35 of the Act. This followed the passage of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022 (Cth)* in the Federal Parliament in December 2022. This legislation created a positive duty on persons conducting a business or undertaking (PCBU) to prevent, as far as practicable, all forms of sexual harassment and sex-based discrimination in the workplace.

WorkSafe ACT has recently found an impediment to reporting of such incidents. After receiving a complaint of a sexual offence incident in the workplace, WorkSafe must advise the complainant that their identity will be disclosed if they progress to prosecution. Several complainants have asked WorkSafe not to progress with prosecution due to the risk of their identity being disclosed. The inability to protect the identity of a complainant and subsequent lack of prosecution of incidents which involve suspected or alleged sexual assault, or other matters of a sexually offensive, intimidating or humiliating nature results in more unsafe workplaces and those workplaces not being held to account.

CONSULTATION ON THE PROPOSED APPROACH

The list of stakeholders consulted on the proposed approach are detailed below:

- WorkSafe ACT
- Community and Public Sector Union

CONSISTENCY WITH HUMAN RIGHTS

During the development of these amendments, due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004 (ACT) (HRA)*.

An assessment of these amendments against section 28 of the HRA is provided below. Section 28 provides that human rights are subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Rights engaged

These amendments engage with the following sections of the HRA:

- Section 8 – Recognition and equality before the law (promoted)
- Section 11 – Protection of the family and children (promoted)
- Section 12 – Privacy and reputation (promoted)
- Section 27B – Right to work and other work-related rights (promoted)

Rights promoted

Recognition and equality before the law

Section 8 of the HRA provides everyone the right to recognition and equality before the law. This includes the right to enjoy their human rights without distinction or discrimination of any kind, and that everyone has the right to equal and effective protection against discrimination on any ground.

This right is promoted for complainants of sexual offences in the workplace through these amendments.

By providing a prohibition on the publication of a complainant's identity for proceedings of sexual offences against the WHS Act and for WHS infringement notices under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011*, this right is extended to provide similar protection to other offences in section 41 of the EMPA.

Additionally, these amendments will also ensure the positive duty to prevent sex-based discrimination established in the Commonwealth Respect at Work Act is also reflected in Territory law. This expanded definition of complainant will include any person against whom a sexual assault or an act of a sexually offensive, intimidating, or humiliating nature is alleged, suspected, or found to have occurred.

Protection of the family and children

Section 11 of the HRA provide everyone has the right to protection of the family and children. This includes the protection of a family against discrimination of any kind.

These amendments will promote this right for complainants in sexual offences in the workplace.

Publication and disclosure of a complainants identify can also allow their family members to be identified. This can place the family of complainant at an unnecessary risk of experiencing a range of forms of discrimination.

Privacy and reputation

Section 12 of the HRA provides everyone the right to privacy and reputation. This extends to not having their privacy interfered with unlawfully and arbitrarily. It also provides everyone the right to not have their reputation unlawfully attacked.

These amendments promote both aspects of this right for complainants of sexual offences in the workplace.

By not having their identity disclosed in relevant sexual offence proceedings, the complainant will have their right to privacy maintained by remaining anonymous. An extension of remaining anonymous also means that their reputation can be protected and not arbitrarily or unlawfully interfered with.

Right to work and other work-related rights

Section 27B of the HRA provides everyone the right to work, and other work-related rights. This extends to providing everyone the right to just and favourable working conditions.

For working condition to be just and favourable, workers must have a workplace which has suitable systems in place to minimise and eliminate any risks and hazards to their health and wellbeing. These amendments will promote this right by ensuring workers who experience sexual offences, or any sexually offensive, intimidating, and humiliating conduct feel free to report such incidents.

Under the current settings, this is limited as the regulator must inform the complainant that their identity will be disclosed in court if the complaint proceeds to prosecution. This places a barrier on victims reporting such incidents and limits the effectiveness of work health and safety systems to eliminate such risks. The inability to protect a worker's identity if the offence involves a suspected or alleged sexual assault or any other act of a sexually offensive, intimidating or humiliating nature, could result in an unsafe workplace not being held to account.

Rights limited

No rights are anticipated to be limited through enacting these amendments.

CLAUSE NOTES

Clause 1 – Name of Act

This clause names this Act. It shall be named *Evidence (Miscellaneous Provisions) Amendment Act 2024*.

Clause 2 – Commencement

This clause will have the Act commence on its notification date in line with section 75(1) of the *Legislation Act 2001*.

Clause 3 – Legislation amended

This clause states that this Act will amend the *Evidence (Miscellaneous Provisions) Act 1991*.

Clause 4 – Section 41, new paragraphs (d) and (e)

This clause will insert two new paragraphs (d) and (e) into section 41 around the definition of *sexual offence proceedings*. Updating this definition will mean that victims of sexual offences in the workplace will have their identity protected under section 74 of the *Evidence (Miscellaneous Provisions) Act 1991*.

Section 41 of the *Evidence (Miscellaneous Provisions) Act 1991* deals with the meaning of a sexual offence proceeding. The two new subsections will expand the definition to include offences against the *Work Health and Safety Act 2011* and the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011*.

Subsection (d) updates the definition to include offences against sections 31, 32 and 33 of the *Work Health and Safety Act 2011*. Section 31 of the *Work Health and Safety Act 2011* covers negligence and reckless conduct which is a category 1 offence. Sections 32 and 33 both cover failure to comply with health and safety duty. These are category 2 and 4 offences respectively.

Subsection (e) also expanded the definition to include proceedings in relation to a dispute around liability for an infringement notice under the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2022* for an offence against section 38(1) of the *Work Health and Safety Act 2011* if the incident involves a sexual assault incident.

Clause 5 – New section 41 (2)

This clause inserts a new section 41 (2) to include a definition of *sexual assault incident* in the Act. The definition will be aligned to that of section 37A in the *Work Health and Safety Act 2011*. Section 37A provides the following definition: ‘sexual assault incident means an incident (including a suspected incident) in relation to a workplace that exposes a worker or any other person at the workplace to sexual assault’.

Clause 6 – Section 42

This clause will substitute a new definition of *complainant* into section 42/ In relation to a proceeding for an offence, a complainant is a person against whom the offence is alleged or has been found to be committed. For a family violence proceeding, a complaint is also a family member for the accused person.

For a sexual offence proceeding, a complainant includes a person against whom a sexual assault or an act of sexually offensive, intimidating, or humiliating nature is suspected, or alleged, or has been found to be committed.