

EXPLANATORY MEMORANDUM

CRIMINAL LAW AMENDMENT (UNCERTAIN DATES) BILL 2019 (WA)

Overview of the Bill

The Criminal Law Amendment (Uncertain Dates) Bill 2019 will amend *The Criminal Code (WA)* [the Code] and the *Children's Court of Western Australia Act 1988 (WA)* [the Children's Court Act]. The purpose of the Bill is to facilitate prosecution, in particular in respect of sexual offences committed against children, where there are uncertainties as to the date of an offence, the age of the victim, or the age of the offender.

To overcome the bulk of these uncertainties, Part 2 of the Bill introduces new Chapter IIB into the Code. This is to provide that a person may be charged and convicted (and sentenced) in respect of the relevant offence with the lesser maximum statutory penalty 'regardless' of when in the relevant period the offence occurred (sections 10L and 10M) or 'regardless' of the age of the victim at the time of the offence (section 10N).

The new provisions will relieve the prosecution from having to resolve the uncertain circumstances in order to secure a conviction. In this way the uncertain circumstance is not a barrier to conviction where the offence is otherwise proved to have been committed.

Part 3 of the Bill introduces new provisions into the Children's Court Act to provide the Children's Court with jurisdiction to hear and determine charges where it is uncertain whether the accused was a child at the time of an offence. These circumstances may arise where there is uncertainty as to the date of the offence (and the accused turned 18 years of age during the relevant period) or where there is no formal registration of an accused's date of birth.

Proposed sections 19(2AA) and 19(2AB) will together provide for the Children's Court to have and retain jurisdiction, if the charge alleges that the accused may have been a child at the time of the commission of the offence. Read together these provisions will avoid prosecutions being discontinued, where during the trial evidence suggests that the accused was, or may have been, an adult at the time of the offence.

Consequential amendments will be made to the *Evidence Act 1906 (WA)* and the *Magistrates Court Act 2004 (WA)* to provide for alignment with the expanded definition of *child* pursuant to Part 3 of the Bill.

Part 1: Preliminary

Clause 1 – Short Title

Clause 1 provides that the Bill, once enacted, will be known as the *Criminal Law Amendment (Uncertain Dates) Act 2019*.

Clause 2 – Commencement

Clause 2 provides for the commencement of the Act.

Part 1 comes into operation on the day the Act receives Royal Assent. The rest of the Act will come into operation on the day after Royal Assent.

Part 2: *The Criminal Code* amended

Clause 3 – Act amended

This Part amends *The Criminal Code*.

Clause 4 – Part I Chapter IIB inserted

Clause 4 inserts new 'Chapter IIB – Charges where date of offence, or age of victim, is uncertain' into *The Criminal Code*.

Proposed Chapter IIB contains the following new provisions:

- 10J. Application of Chapter
- 10K. Terms used
- 10L. Charge of indictable offence committed in a period when written law amended
- 10M. Charge of sexual offence committed in a period when victim has birthday
- 10N. Charge of sexual offence when victim's age uncertain.

Proposed sections 10L, 10M and 10N are not mutually exclusive and may operate together depending on the particular circumstances of a matter.

10J. Application of Chapter

Proposed section 10J provides that Chapter IIB applies in relation to acts or omissions that are alleged to have occurred before, on or after section 4 of the Act comes into operation.

The application of Chapter IIB does not result in any retrospective offences.

10K. Terms used

Proposed section 10K provides the following terms.

The term '**amended**' includes enacted, repealed and replaced. This term is used in proposed section 10L.

The term '**sexual offence**' is used in regard to proposed sections 10M and 10N and means –

- (a) an offence of a sexual nature under Chapter XXII, XXV, XXX, XXXI, XXXIA or XXXII as in force at any time; or

- (b) an offence of attempting, inciting or conspiring to commit an offence referred to in paragraph (a); or
- (c) an offence of becoming an accessory after the fact to an offence referred to in paragraph (a).

Paragraph (a) of the term 'sexual offence' includes reference to current and deleted Chapters of the Code under which offences 'of a sexual nature' are or were contained, and includes the phrase 'as in force at any time'. Read together paragraph (a) includes an offence of a sexual nature in force at any time under any of the listed current or previous Chapters of the Code.

The phrase 'of a sexual nature' is not defined and is to be interpreted in accordance with its ordinary meaning.

10L. Charge of indictable offence committed in period when written law amended

Proposed section 10L provides for the treatment of charges where the date of the commission of an indictable offence is uncertain, and the written law making the act or omission an indictable offence was amended in the relevant period the alleged offence occurred.

Proposed subsection 10L(1) sets out the circumstances under which section 10L has application. All of the following circumstances must exist:

- (a) the alleged act or omission occurred in a period (the **relevant period**) during which the written law making the act or omission an indictable offence (the **relevant law**) was amended;
- (b) it is uncertain when in the relevant period the alleged act or omission occurred;
- (c) the alleged act or omission, if proved, constituted —
 - (i) an indictable offence before the relevant law was amended; and
 - (ii) a separate and different indictable offence after the relevant law was amended.

These circumstances will need to be established in order for an accused person to be charged and convicted under subsections 10L(2) or 10L(3).

Proposed subsection 10L(2) provides for the event that the indictable offences referred to in subsection (1)(c) have the 'same' maximum statutory penalty. In this situation, the prosecution may charge the accused person with either of the offences regardless of when in the relevant period the alleged offence occurred (i.e. whether under the old or new offence provision).

Proposed subsection 10L(3) provides that if the indictable offences referred to in subsection (1)(c) have 'different' maximum statutory penalties, the accused person may be charged with the offence that has the lesser maximum statutory penalty.

10M. Charge of sexual offence committed in period when victim has birthday

Proposed section 10M provides for the treatment of charges where the date of the commission of a sexual offence is uncertain, and the **victim** had a birthday in the relevant period the alleged act or omission occurred.

This is to provide a remedy where the circumstances under proposed subsection 10M(1) result in uncertainty as to which category of age-dependent sexual offences would apply in respect of child sexual abuse or whether the victim was an adult or child at the time of the offence.

Proposed subsection 10M(1) sets out the circumstances under which section 10M has application. All of the following circumstances must exist:

- (a) the alleged act or omission occurred in a period (the **relevant period**) during which the victim had a birthday (the **relevant birthday**);
- (b) it is uncertain when in the relevant period the alleged act or omission occurred;
- (c) the alleged act or omission, if proved, constituted —
 - (i) a sexual offence in respect of the victim before the relevant birthday; and
 - (ii) a separate and different sexual offence in respect of the victim on or after the relevant birthday.

These circumstances will need to be established in order for an accused person to be charged and convicted under subsection 10M(2) or 10M(3).

Proposed subsection 10M(2) provides for the event that the sexual offences referred to in subsection (1)(c) have the 'same' maximum statutory penalty. In this situation, the prosecution may charge the accused person with either of the offences regardless of when in the relevant period the alleged offence occurred (i.e. whether before or after the victim's birthday).

Proposed subsection 10M(3) provides that if the sexual offences referred to in subsection (1)(c) have 'different' maximum statutory penalties, the accused person may be charged with the offence that has the lesser maximum statutory penalty.

10N. Charge of sexual offence when victim's age uncertain

Proposed section 10N provides for the treatment of charges where, at the time of the commission of a sexual offence, the age of the **victim** is uncertain.

This is intended to apply in situations where the victim's birthdate is uncertain and results in uncertainty as to which category of age-dependent sexual offences would apply or whether the victim was an adult or child at the time of the offence.

Proposed section 10N(1) sets out the circumstances under which section 10N has application. All of the following circumstances must exist:

- (a) the age of the victim at the time of the alleged act or omission is uncertain;

(b) the alleged act or omission, if proved, constituted —

- (i) a sexual offence if the victim was of a particular age; and
- (ii) a separate and different sexual offence if the victim was of a different age to that referred to in subparagraph (i).

These circumstances will need to be established in order for an accused person to be charged and convicted under subsection 10N(2) or 10N(3).

Proposed subsection 10N(2) provides for the event that the sexual offences referred to in subsection (1)(c) have the ‘same’ maximum statutory penalty. In this situation, the prosecution may charge the accused person with either of the offences regardless of the age of the victim at the time of the alleged offence.

Proposed subsection 10N(3) provides that if the sexual offences referred to in subsection (1)(c) have ‘different’ maximum statutory penalties, the accused person may be charged with the offence that has the lesser maximum statutory penalty.

Part 3: *Children’s Court of Western Australia Act 1988* amended

Clause 5 – Act amended

This Part amends the *Children’s Court of Western Australia Act 1988* [the Children’s Court Act].

Clause 6 – Section 3 amended

Clause 6 amends the definition of **child** at section 3(1) of the Children’s Court Act at paragraph (c) to include a person dealt with under section 19(2) and new sections 19(2AA) and 19(2AB).

Clause 7 – Section 19 amended

Clause 7(1) provides for new sections 19(2AA) and 19(2AB) to be inserted into the Children’s Court Act.

New section 19(2AA) of the Children’s Court Act is proposed to establish jurisdiction where there is uncertainty as to whether an accused person was a child at the time of an alleged offence. This section provides that the Children’s Court will have jurisdiction for the purposes of subsection (1) of the Act, if the charge alleges that the offence was committed by a person who might have been a child (at the time of the commission of the offence).

Proposed new section 19(2AB) confirms that the Children’s Court will retain jurisdiction referred to in 19(2AA), despite any evidence produced in proceedings that the person had reached 18 years of age at the time of the commission of the offence.

Clause 7(2) amends section 19(2a) of the Children’s Court Act to include reference to new section 19(2AB). This confirms that reference to

'proceedings' under 19(2AB) extends to proceedings relating to an order that the Court makes when finding the offender guilty of the offence.

Part 4: *Evidence Act 1906* amended

Clause 8 – Act amended

This Part amends the *Evidence Act 1906* [the Evidence Act].

Clause 9 – Section 106A amended

Clause 9 amends the definition of **child** in section 106A of the Evidence Act at paragraph (c). This is to provide for alignment with the expanded definition of *child* in section 3(1) of the Children's Court Act which will include new sections 19(2AA) and 19(2AB).

Paragraph (c) of section 106A will be deleted and replaced to mean — in any proceedings in the Children's Court, a person dealt with under the Children's Court Act section 19(2), 19(2AA) or 19(2AB).

Part 5: *Magistrates Court Act 2004* amended

Clause 10 – Act amended

This Part amends the *Magistrates Court Act 2004* [the Magistrates Court Act].

Clause 11 – Section 11 amended

Clause 11 amends paragraph (c) at section 11(3) of the Magistrates Court Act.

Current section 11(3) paragraph (c) provides for the Magistrates Court to exercise jurisdiction subject to the Children's Court Act Part 3 where the accused, at the time of the alleged offence, was under 18 years of age.

New paragraph (c) will provide for the Magistrates Court to exercise jurisdiction subject to the Children's Court Act Part 3 without reference to 'where the accused, at the time of the alleged offence, was under 18 years of age'.

In this way, the Magistrates Court will exercise jurisdiction subject to Part 3 of the Children's Court Act including circumstances under new sections 19(2AA) and 19(2AB), where a prosecutorial charge provides that the accused might have been under 18 years of age at the time of the alleged offence.