

## CLAUSE NOTES

### *Sentencing Amendment (Sexual Offences) Bill 2016*

**Clause 1: Short title**

Clause 1 cites the Bill as the *Sentencing Amendment (Sexual Offences) Act 2016*.

**Clause 2: Commencement**

Clause 2 provides for the Act to commence on the day on which it receives Royal Assent.

**Clause 3: Principal Act**

Clause 3 provides that the Principal Act to which the amendments apply is the *Sentencing Act 1997*.

**Clause 4: Section 11A inserted**

Clause 4 inserts new section 11A in the *Sentencing Act 1997*.

The major objectives of new section 11A are to:

- define aggravating circumstances that a court is to take into account when determining an appropriate sentence for certain sexual offences; and
- provide that a court is not to take into account an offender's good character or lack of previous convictions where those matters were of assistance to the offender in the commission of certain sexual offences.

New section 11A will apply where adult offenders are convicted of sexual offences, but will not apply to youths sentenced under the *Youth Justice Act 1997*.

Courts take into account all of the circumstances of a case before sentencing an offender. They consider aggravating and mitigating circumstances before deciding on an appropriate sentence.

Aggravating circumstances are circumstances that are taken into account by a court that result in a more severe penalty than would otherwise have been the case. For example, the particular vulnerability of a victim of a crime may be an aggravating circumstance.

Mitigating circumstances are circumstances that are taken into account by a court that result in a more lenient penalty than would otherwise have been the case. For example, an offender's plea of guilty may be a mitigating circumstance.

Clause 4 inserts new subsection 11A(1) which defines aggravating circumstances in relation to a sexual offence to include:

- The victim being under the care, supervision or authority of the offender; or
- The victim being a person with a disability; or
- The victim being under the age of 13 years; or

- The offender committing the offence in whole or in part in the presence of another person or persons, other than the victim; or
- The offender subjecting the victim to violence or the threat of violence; or
- The offender supplying the victim with alcohol or drugs with the intention of facilitating the commission of the offence; or
- The offender making forced or uninvited entry into the victim's home or other premises; or
- The offender doing, in the course of committing the sexual offence, an act likely to seriously and substantially degrade or humiliate the victim; or
- The offender causing other any other person or persons to carry out an act referred to in the previous 4 dot points.

The definition of aggravating circumstance in new section 11A was finalised after considering existing laws in Australia and internationally and following extensive consultation with legal stakeholders.

Clause 4 inserts new paragraph 11A(1)(a). This new paragraph makes it an aggravating circumstance if the victim of a sexual offence is under the care, supervision or authority of the offender. The objective of this new paragraph is to encompass the sexual offending of people who, because of relationships, employment, voluntary status, or other circumstances have gained access to a victim. This aggravating circumstance may apply where a teacher commits a sexual offence against his or her student, or where a parent commits a sexual offence against his or her child.

Clause 4 inserts new paragraph 11A(1)(b). This new paragraph makes it an aggravating circumstance if a sexual offence is committed against a victim with a disability.

Disability means any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological or anatomical structure or function) of ability to perform an activity in a normal manner.

Clause 4 inserts new paragraph 11A(1)(c). This new paragraph makes it an aggravating circumstance if the victim of a sexual offence is under 13 years of age.

Clause 4 inserts new paragraph 11A(1)(d). This new paragraph makes it an aggravating circumstance if an offender commits a sexual offence wholly or partly in the presence of another person.

Clause 4 inserts new paragraph 11A(1)(e). This new paragraph makes it an aggravating circumstance if an offender commits a sexual offence and subjects the victim to violence or the threat of violence.

Clause 4 inserts new paragraph 11A(1)(f). This new paragraph makes it an aggravating circumstance if an offender supplies a victim with drugs or alcohol with the intention of facilitating the commission of the sexual offence.

Clause 4 inserts new paragraph 11A(1)(g). This new paragraph will make forced or uninvited entry into the victim's home or other premises by the offender an aggravating circumstance. The objective of new paragraph 11A(1)(g) is that forced or uninvited

entry into a victim's home, or other place where the victim is staying, regardless of the length of the victim's stay, will be an aggravating circumstance.

Clause 4 inserts new paragraph 11A(1)(h). This new paragraph will make it an aggravating circumstance if an offender does something in the course of the sexual offence that is likely to seriously and substantially degrade or humiliate the victim. New paragraph 11A(1)(h) sets an objective test and courts will need to determine whether any particular act was likely to seriously and substantially degrade or humiliate the victim in the circumstances of each case.

Clause 4 inserts new paragraph 11A(1)(i). This new paragraph makes it an aggravating circumstance for an offender to cause another person to carry out certain acts that are an aggravating circumstance. The objective of new paragraph 11A(1)(i) is to ensure that an offender does not escape liability for an aggravated circumstance only because the offender did not personally commit the act.

New subsection 11A(1) inserts a definition of sexual offence. Sexual offence means any of the following crimes, or an attempt to commit any of the following crimes:

- sexual intercourse with a young person; or
- permitting unlawful sexual intercourse with a young person on premises; or
- maintaining a sexual relationship with a young person
- indecent act with a young person; or
- procuring unlawful sexual intercourse with a young person; or
- procuring indecent act by, or with, a young person; or
- sexual intercourse with a person with a mental impairment; or
- indecent assault; or
- aggravated sexual assault; or
- procuring by threats, fraud, or drugs; or
- involving a person under the age of 18 years in the production of child exploitation material; or
- producing child exploitation material; or
- incest; or
- rape.

Clause 4 inserts new subsection 11A(2). New subsection 11A(2) directs matters that a court is and is not to take into account in determining an appropriate sentence where an offender is convicted of a sexual offence.

Clause 4 inserts new paragraph 11A(2)(a). This new paragraph requires a court to take into account any aggravating circumstance.

Clause 4 inserts new paragraph 11A(2)(b). This new paragraph says that a court is not to take into account an offender's good character or lack of previous convictions where those factors assisted the offender in committing the sexual offence. This new paragraph is based on a similar provision in South Australian legislation. New paragraph 11A(2)(b) modifies the existing law as good character and lack of previous convictions are generally treated as mitigating circumstances in court.

#### **Clause 5                      Repeal of Act**

Clause 5 inserts a standard repeal provision to remove the empty shell of the Bill after all its provisions have been transferred and have come into effect in the Principal Act.