Text of Second Reading Speech:

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Madam Speaker, I move that the bill be now read a second time.

This bill makes amendments to the procedural provisions in the *Criminal Code* relating to joinder and severance of charges on an indictment.

Where an accused is charged on an indictment with multiple accounts of sexual offences involving multiple complainants, there are two possibilities in relation to the trial: (a) there will be separate trials in respect to each or some of the complainants; or (b) the charges relating to all complainants will be heard together in the same trial.

This bill introduces a presumption that trials for sexual offences, where the accused is charged with multiple sexual offences, will proceed together, even where the offences are alleged to have been committed against different persons.

Section 309 of the *Criminal Code* permits the joining of more than one charge on an indictment against an accused, if those charges are founded on the same facts or are, or form part of, a series of offences of the same or a similar character.

Under Section 341 of the *Criminal Code*, an accused can apply for the charges to be severed and tried separately where the accused maybe prejudiced or embarrassed in their defence because they are charged with more than one offence on the same indictment, or for any other reason it is desirable for the charges to be tried separately.

Cases such as *De Jesus v R (1996) 61 ALR*, decided that the general rule in sexual offence cases is that where evidence of one complainant in relation to one count on an indictment is not cross-admissible, that is, it cannot be used as evidence to prove another charge on the indictment, the charges should be severed and separate trials ordered unless there are good reasons not to do so.

This might arise in a case, for example, where two young girls who are friends are alleged to have been victims of a sexual assault by the same man in similar circumstances.

Cross-admissibility of evidence in multiple sexual assault cases is determined by reference to the rules relating to tendency and coincidence evidence in sections 97, 98 and 101 of the *Evidence (National Uniform Legislation) Act* and similar acts in jurisdictions that have adopted the *Uniform Evidence Act.*

These rules determine whenever evidence relating to an offence against one complainant can be used in respect of an offence against another complainant because the evidence shows a tendency of the accused to commit that type of offence, or because two or more events are similar, such as there would be no other innocent explanation for them other than the accused was guilty of the offences.

In a case involving a number of charges and more than one complainant, an accused might argue that separate trials should be ordered to prevent an injustice to the defendant because a jury might decide a case on the basis of a prejudiced view of the accused and, so, give rise to an unfair trial. There is a possibility of this where a jury hears evidence of an accused's alleged sexual offending on more than one occasion. The trial judge may decide to disallow the evidence because, while it was probative, the prejudicial effect of the evidence outweighs its probative value. The result at common law would be separate trials

for each of the counts of a sexual offence.

This bill reverses the common law presumption and, instead, introduces the presumption for joint trials, which is not to be rebutted only because the evidence of the complainants is not cross-admissible, nor because there is a possibility that the evidence is the result of a collusion between the complainants.

The bill arises out of a number of law reform reports. The Tasmanian Law Reform Institute 2012 Report entitled *Evidence Act 2001 Sections 97, 98 and 101 and Hoch's Case: Admissibility of 'Tendency' and 'Coincidence' Evidence in Sexual Assault Cases with Multiple Complainants* and the Australian Law Reform Commission 2010 Report entitled *Family Violence—A National Legal Response* both recommended that criminal statutes should be amended to:

(a) establish a presumption that when two or more charges for sexual offences are joined in the same indictment those charges are to be tried together; and
(b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible in relation to another charge.

The reasons for having a presumption for joint trials are:

• a reduction in trauma to complainants (particularly children) in sexual assault cases because they will be required to give evidence and be cross-examined on fewer occasions if the charges are joined

• there may be a reduction in costs, a saving of time and a conservation of legal and judicial resources because there would be fewer trials

• in joint trials, juries will be provided with the full picture of circumstances and facts surrounding the allegations, rather than an artificial and individualised context to the alleged offending if the charges are tried separately

• convictions for sexual offences are relatively difficult to obtain, and this is said to reflect the fact that sexual assaults are usually committed in private without corroborating evidence. The Australian Law Reform Commission in its report noted that while there is a risk that juries will consider past criminal behaviour is an indication of present guilt, and it may lead to bias, this needs to be weighed against the many jury-eligible citizens believing myths and holding prejudiced views about women and children who report sexual assaults.

Of particular concern to this government is the easing of the burden on victims of sexual assault, particularly in the family violence context.

While there are provisions in the *Sexual Offences (Evidence and Procedure) Act* which are designed to make the giving of evidence for vulnerable witnesses easier, the need to testify on multiple occasions does not serve the interests of complainants and can only serve to repeatedly traumatise them. This bill is intended to reduce the burden where possible.

A number of jurisdictions have already reversed the effect of the cases that require evidence of multiple complainants in sexual assault cases to be cross-admissible in order to join them in the same trial, including South Australia, Western Australia, and Queensland. This bill is modelled on section 194 of the Victorian *Criminal Procedure Act 2009* which provides that if two or more charges for sexual offences are joined in the same indictment, it is presumed they will be tried together. Section 194 also provides the presumption is not

rebutted merely because the evidence is not cross-admissible.

Turning to specific provisions of the bill, clause 6 introduces the new presumption in a new section 341A of the *Criminal Code* which is modelled on section 194 of the Victorian act. Like the Victorian act, new section 341A(2) states that the presumption of joint trials is not rebutted merely because evidence on one charge is not admissible on another charge. In addition, proposed new section 341A(2) provides that the presumption of joint trials is also not rebutted merely because there is a possibility that the evidence may be the result of collusion of suggestion.

The effect of proposed new section 341A is that even if evidence in relation to once charge cannot be used in respect of another charge to show a tendency, the court can still keep the charges together in a joint trail because unfair prejudice to the defendant can be overcome by directions to the jury not to use the evidence in relation to one charge to decide whether the defendant is guilty of another charge.

Section 194 of the *Victorian Criminal Procedure Act 2009* reflects the former section 372 (3AA) of the now repealed Victorian *Crimes Act*. It has been in force in Victoria since 1997 and there is, therefore, a significant body of case law to assist in its interpretation and application in the Northern Territory. The presumption does not indicate that all sexual offences charged on the same indictment should be heard together. The judge retains the discretion to decide whether the charges should be severed or whether adequate directions about the use of evidence for particular purposes can be given.

The Victorian cases, such as the Queen v Papamitrou (2004) 7 VR 375, have interpreted their section 194 to mean that judges must carefully consider whether severing the charges and ordering separate trials is necessary, even where a judge concluded that the evidence of two complainants is not cross-admissible and whether adequate directions to the jury can be given. However, the cases also say that the judge should first determine whether the evidence is cross-admissible because that determination will still be a powerful influence in the exercise of the discretion to sever the charges and that the capacity to ensure a fair trial for the accused must always be the dominant consideration.

Clause 4 of the bill also amends section 309 to make it clear that in the case of any doubt about the ability to join multi-complainant sex offence charges on indictment under section 309, that section does allow the joinder of multiple charges against an accused even if they were committed against different persons.

Finally, it should also be noted that the issue of a presumption of joint trials and tendency and coincidence evidence is currently being considered by the National Uniform Evidence Working Group under the auspices of the now former Standing Council on Law and Justice. These issues arose out of a Tasmanian Law Reform Institute report which made a number of recommendations in relation to the law of tendency and coincidence, including that there should be a presumption along the lines of the Victorian presumption in section 194 of the *Criminal Procedure Act 2009*.

The Department of Attorney-General and Justice will continue to participate in that working group, and the government will consider the outcomes of any report when it is finalised. For now, this government is moving on the presumption of joint trials as a measure to support victims of sexual crimes.

I commend the bill to honourable members, and also table a copy of the explanatory statement.

Debate adjourned