



Australian Capital Territory

Evidence (Miscellaneous Provisions) Act 1991

A1991-34

Republication No 17

Effective: 9 September 2008 – 26 October 2008

Republication date: 9 September 2008

Last amendment made by A2008-44
(republication for amendments by A2008-20)

Not all amendments are in force: see last endnote

Authorised by the ACT Parliamentary Counsel

About this republication

The republished law

This is a republication of the *Evidence (Miscellaneous Provisions) Act 1991* (including any amendment made under the *Legislation Act 2001*, part 11.3 (Editorial changes)) as in force on 9 September 2008. It also includes any amendment, repeal or expiry affecting the republished law to 9 September 2008.

The legislation history and amendment history of the republished law are set out in endnotes 3 and 4.

Kinds of republications

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- authorised republications to which the *Legislation Act 2001* applies
- unauthorised republications.

The status of this republication appears on the bottom of each page.

Editorial changes

The *Legislation Act 2001*, part 11.3 authorises the Parliamentary Counsel to make editorial amendments and other changes of a formal nature when preparing a law for republication. Editorial changes do not change the effect of the law, but have effect as if they had been made by an Act commencing on the republication date (see *Legislation Act 2001*, s 115 and s 117). The changes are made if the Parliamentary Counsel considers they are desirable to bring the law into line, or more closely into line, with current legislative drafting practice.

This republication includes amendments made under part 11.3 (see endnote 1).

Uncommenced provisions and amendments

If a provision of the republished law has not commenced or is affected by an uncommenced amendment, the symbol **U** appears immediately before the provision heading. The text of the uncommenced provision or amendment appears only in the last endnote.

Modifications

If a provision of the republished law is affected by a current modification, the symbol **M** appears immediately before the provision heading. The text of the modifying provision appears in the endnotes. For the legal status of modifications, see *Legislation Act 2001*, section 95.

Penalties

The value of a penalty unit for an offence against this republished law at the republication date is—

- (a) if the person charged is an individual—\$100; or
- (b) if the person charged is a corporation—\$500.



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R17
09/09/08

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Australian Capital Territory

Evidence (Miscellaneous Provisions) Act 1991

An Act about evidence

Part 1 Preliminary

1 Name of Act

This Act is the *Evidence (Miscellaneous Provisions) Act 1991*.

2 Dictionary

The dictionary at the end of this Act is part of this Act.

Note 1 The dictionary at the end of this Act defines certain terms used in this Act, and includes references (*signpost definitions*) to other terms defined elsewhere in this Act.

For example, the signpost definition '*participating State*, for part 3 (Use of audiovisual links and audio links)—see section 16.' means that the term 'participating State' is defined in section 16 for part 3.

Note 2 A definition in the dictionary (including a signpost definition) applies to the entire Act unless the definition, or another provision of the Act, provides otherwise or the contrary intention otherwise appears (see Legislation Act, s 155 and s 156 (1)).

3 Notes

A note included in this Act is explanatory and is not part of this Act.

Note See the Legislation Act, s 127 (1), (4) and (5) for the legal status of notes.

4 Offences against Act—application of Criminal Code etc

Other legislation applies in relation to offences against this Act.

Note 1 Criminal Code

The Criminal Code, ch 2 applies to all offences against this Act (see Code, pt 2.1).

The chapter sets out the general principles of criminal responsibility (including burdens of proof and general defences), and defines terms used for offences to which the Code applies (eg *conduct*, *intention*, *recklessness* and *strict liability*).

Note 2 Penalty units

The Legislation Act, s 133 deals with the meaning of offence penalties that are expressed in penalty units.

Part 2 Evidence of children

5 Definitions—pt 2

In this part:

court means—

- (a) the Supreme Court; or
- (b) the Magistrates Court; or
- (c) the Coroner's Court.

Magistrates Court includes the Childrens Court.

prescribed witness means a child.

proceeding means a proceeding in relation to which this part applies.

6 Sworn or unsworn evidence

For this part, it is immaterial whether evidence is to be, or is being, given on oath or otherwise.

U 7 Application—pt 2

This part applies in relation to—

- (a) a proceeding in the Supreme Court—
 - (i) for a trial on indictment in relation to the alleged commission of an offence against a law in force in the ACT; or
 - (ii) for the passing of sentence in relation to the commission of an offence against a law in force in the ACT; or

- (iii) by way of an appeal from a conviction, order, sentence or other decision of the Magistrates Court in a proceeding in relation to which this part applies; or
- (b) a proceeding in the Magistrates Court on an information in relation to the alleged commission, or commission, of an offence against a law in force in the ACT; or
- (c) a proceeding under the *Domestic Violence and Protection Orders Act 2001*; or
- (d) a proceeding under the *Children and Young People Act 1999*, part 7.3 (Care and protection orders and emergency action); or
- (e) a proceeding under the *Victims of Crime (Financial Assistance) Act 1983*; or
- (f) a proceeding by way of an inquest or inquiry in the Coroner's Court.

8 Location of prescribed witness giving evidence

- (1) If—
 - (a) a prescribed witness is to give evidence in a proceeding; and
 - (b) the courtroom and a place other than the courtroom are equipped with, and linked by, an audiovisual link that can allow—
 - (i) people in the courtroom to see and hear the people at the other place; and
 - (ii) people at the other place to hear, or to see and hear, people in the courtroom;

the evidence of the witness must be given from the other place using the audiovisual link unless the court otherwise orders.

- (2) A court must not make an order under subsection (1) unless satisfied that—

- (a) the prescribed witness prefers to give evidence in the courtroom; or
 - (b) the proceeding will be unreasonably delayed if an order is not made; or
 - (c) there is a substantial risk of the court being unable to ensure that the proceeding is conducted fairly if an order is not made.
- (3) Despite subsection (1), the evidence of a child who is an accused person in a proceeding is not to be given in the way described in that subsection.
- (4) While a prescribed witness is at a place other than a courtroom for the purpose of giving evidence in accordance with subsection (1), that place is taken for all purposes to be part of the courtroom.

9 Consequential orders

- (1) If a prescribed witness is to give evidence from a place other than a courtroom in accordance with section 8 (1) (Location of prescribed witness giving evidence), the court may make the orders it considers appropriate in relation to the giving of evidence by the witness.
- (2) An order under subsection (1) may specify—
- (a) the people who may be present at the other place with the prescribed witness; and
 - (b) the people in the courtroom who are to be able to be heard, or to be seen and heard, by the witness and by the people with the witness; and
 - (c) the people in the courtroom who are not to be able to be heard, or to be seen and heard, by the witness and by the people with the witness; and
 - (d) the people in the courtroom who are to be able to see and hear the witness and the people with the witness; and

- (e) the stages in the proceeding during which a specified part of the order is to have effect; and
 - (f) the method of operation of the audiovisual link.
- (3) If a prescribed witness is to give evidence from a place other than a courtroom in accordance with section 8 (1) (Location of prescribed witness giving evidence), the court may make the order it considers appropriate if satisfied that it is desirable to do so—
- (a) to ensure that the proceeding is conducted fairly; or
 - (b) to allow the witness to identify a person or thing; or
 - (c) to allow the witness to take part in a view or to watch a demonstration or an experiment; or
 - (d) to allow part of the proceeding to be heard elsewhere than in the courtroom.
- (4) Notwithstanding any other territory law, the court may direct that a person be excluded from the other place while the prescribed witness is giving evidence.
- (5) Nothing in subsection (2), (3) or (4) limits the power of the court to make an order under subsection (1).

10 Jury warning about adverse inference

If, in a proceeding mentioned in section 7 (a) (i) (Application—pt 2), a prescribed witness is to give evidence from a place other than the courtroom in accordance with section 8 (1) (Location of prescribed witness giving evidence), the judge must warn the jury to the effect that an inference adverse to the accused should not be drawn from the fact that the witness is giving evidence from the other place.

11 Representation of child

If—

- (a) a child is to give evidence from a place other than a courtroom in accordance with section 8 (1) (Location of prescribed witness giving evidence); and
- (b) the child concerned is not separately represented by another person; and
- (c) it appears to the court that the child should be separately represented by another person;

the court may order that the child be separately represented by another person, and the court may make any other order it considers necessary to secure that separate representation.

12 Court's discretions about orders

- (1) An order under this part may be made on the court's own initiative or on application—
 - (a) by a party to the proceeding; or
 - (b) by or on behalf of a prescribed witness; or
 - (c) by a parent or guardian of the prescribed witness.
- (2) The court may inform itself as it considers appropriate for the purposes of making an order under this part.

13 Amendment or revocation of order

A court may make an order for the amendment or revocation of an order made by the court in the proceeding.

14 Failure to comply with pt 2

- (1) The evidence of a prescribed witness in a proceeding is not inadmissible only because the evidence was not given in accordance with this part.

- (2) The validity of a proceeding is not affected by a failure to comply with this part.

15 Child turning 18 during proceeding

If a person who was a prescribed witness in a proceeding turns 18 years before the proceeding is decided, the person continues to be a prescribed witness for the purpose of the proceeding.

Part 3 Use of audiovisual links and audio links

Division 3.1 Preliminary—pt 3

16 Definitions—pt 3

In this part:

audio link means a system of 2-way communication linking different places so that a person speaking at any of them can be heard at the other places.

participating State means another State where provisions of an Act in terms substantially corresponding to this part are in force.

recognised court means a court or tribunal of a participating State that is authorised by the provision of an Act of the State in terms substantially corresponding to this part to direct that evidence be taken or a submission made by audiovisual link or audio link from the ACT.

State includes Territory.

territory court means—

- (a) a court constituted under a territory law; or
- (b) a royal commission under the *Royal Commissions Act 1991*; or
- (c) a judicial commission under the *Judicial Commissions Act 1994*; or
- (d) a tribunal of the Territory; or
- (e) an arbitrator or umpire conducting a proceeding under the *Commercial Arbitration Act 1986*; or
- (f) the sentence administration board; or

- (g) a presiding officer under the *Corrections Management Act 2006*, chapter 11 (Disciplinary inquiries); or
- (h) a review officer under the *Children and Young People Act 2008*, chapter 9 (Conduct of disciplinary review—general).

tribunal, in relation to a State, means an entity authorised under the law of the State to take evidence on oath.

17 Application—pt 3

This part applies in relation to all proceedings, including—

- (a) proceedings pending at the commencement of this part; and
- (b) proceedings started after the commencement of this part that arise from circumstances, matters or events that arose or happened before that commencement.

18 Operation of other Acts

This part is not intended to exclude or limit the operation of any territory law that makes provision for the taking of evidence or making of a submission outside the ACT for a proceeding in the ACT.

Division 3.2 Use of interstate audiovisual links or audio links in proceedings before territory courts

19 Application—div 3.2

This division applies to any proceeding before a territory court.

20 Territory courts may take evidence and submissions from outside ACT

- (1) A territory court may, on the application of a party to a proceeding before the court or on its own initiative, direct that evidence be

taken or a submission made by audiovisual link or audio link, from a participating State.

- (2) The court may make the direction only if satisfied that—
 - (a) the necessary facilities are available or can reasonably be made available; and
 - (b) the evidence or submission can more conveniently be given or made from the participating State; and
 - (c) the making of the direction is not unfair to a party opposing the making of the direction.
- (3) The court may exercise in the participating State, in relation to taking evidence or receiving a submission by audiovisual link or audio link, any of its powers that the court is permitted, under the law of the participating State, to exercise in the participating State.
- (4) The court may at any time amend or revoke a direction under this division, either on the application of a party to the proceeding or on its own initiative.

21 Legal practitioners entitled to practise

A person who is entitled to practise as a legal practitioner in a participating State is entitled to practise as a legal practitioner—

- (a) in relation to the examination in chief, cross-examination or re-examination of a witness in the participating State whose evidence is being given by audiovisual link or audio link in a proceeding before a territory court; and
- (b) in relation to the making of a submission by audiovisual link or audio link from the participating State in a proceeding before a territory court.

Division 3.3 Use of interstate audiovisual links or audio links in proceedings in participating States

22 Application—div 3.3

This division applies to any proceeding before a recognised court.

23 Recognised courts may take evidence or receive submissions from people in ACT

A recognised court may, for a proceeding before it, take evidence or receive a submission by audiovisual link or audio link from a person in the ACT.

24 Powers of recognised courts

- (1) The recognised court may, for the proceeding, exercise in the ACT, in relation to taking evidence or receiving a submission by audiovisual link or audio link, any of its powers except its powers—
 - (a) to punish for contempt; and
 - (b) to enforce or execute its judgments or process.
- (2) The laws of the participating State (including rules of court) that apply to the proceeding in that State also apply, by operation of this subsection, to the practice and procedure of the recognised court in taking evidence or receiving a submission by audiovisual link or audio link from a person in the ACT.
- (3) For the exercise by the recognised court of its powers, the place in the ACT where evidence is given or a submission is made is taken to be part of the court.

25 Orders made by recognised court

Without limiting section 24, the recognised court may, by order—

- (a) direct that the proceeding, or a part of the proceeding, be conducted in private; or
- (b) require a person to leave a place in the ACT where the giving of evidence or the making of a submission is taking place or is going to take place; or
- (c) prohibit or restrict the publication of evidence given in the proceeding or of the name of a party to, or a witness in, the proceeding.

26 Enforcement of order

- (1) Subject to rules of court, an order under section 25 may be enforced by the Supreme Court as if the order were an order of that court.
- (2) Without limiting subsection (1), a person who contravenes the order—
 - (a) is taken to be in contempt of the Supreme Court; and
 - (b) is punishable accordingly;

unless the person establishes that the contravention should be excused.

27 Privileges, protection and immunity of participants in proceedings in courts of participating States

- (1) A judge or other person presiding at or otherwise taking part in a proceeding before a recognised court has, in relation to evidence being taken or a submission being received by audiovisual link or audio link from a person in the ACT, the same privileges, protection and immunity as a judge of the Supreme Court.
- (2) A person appearing as a legal practitioner in a proceeding before a recognised court has, in relation to evidence being taken or a

submission being received by audiovisual link or audio link from a person in the ACT, the same protection and immunity as a barrister has in appearing for a party in a proceeding before the Supreme Court.

- (3) A person appearing as a witness in a proceeding before a recognised court by audiovisual link or audio link from the ACT has the same protection as a witness in a proceeding before the Supreme Court.

28 Recognised court may administer oath in ACT

- (1) A recognised court may, for the purpose of obtaining in a proceeding, by audiovisual link or audio link, the testimony of a person in the ACT, administer an oath in accordance with the practice and procedure of the recognised court.
- (2) A proceeding in which evidence is given on oath administered under subsection (1) is a legal proceeding for the Criminal Code, chapter 7 (Administration of justice offences).

Note That chapter includes offences (eg perjury, falsifying evidence, failing to attend and refusing to be sworn) applying in relation to tribunal proceedings.

29 Assistance to recognised court

An officer of a territory court may, at the request of a recognised court—

- (a) attend at the place in the ACT where evidence is to be or is being taken, or a submission is to be or is being made, in the proceeding; and
- (b) take the action that the recognised court directs to facilitate the proceeding; and
- (c) assist with the administering by the recognised court of an oath.

Division 3.4 Use of audiovisual links or audio links between territory courts and places in ACT

31 Application—div 3.4

This division applies to any proceeding before a territory court other than the Supreme Court or Magistrates Court.

32 Use of link in proceedings

- (1) Subject to any Act or rules of court, a territory court may, on the application of a party to a proceeding before it or on its own initiative, direct that a person, whether or not a party to the proceeding, appear before, or give evidence or make a submission to, the court by audiovisual link or audio link from a place in the ACT that is outside the courtroom or other place where the court is sitting.
- (2) The court may make the direction only if satisfied that—
 - (a) the necessary facilities are available or can reasonably be made available; and
 - (b) the evidence or submission can more conveniently be given or made from the place that is outside the courtroom or other place where the court is sitting; and
 - (c) the making of the direction is not unfair to any party opposing the making of the direction.
- (3) The court may at any time amend or revoke a direction made under this division, either on the application of a party to the proceeding or its own initiative.

Division 3.5 Protection of certain communications and documents in criminal proceedings

33 Application—div 3.5

This division applies to a communication made, and a document transmitted, by audiovisual link or audio link between an accused person and his or her legal representative during the course of a proceeding in relation to which, or to a part of which, an audiovisual or audio link has been used under this part or a provision of another territory law.

34 Protection of confidentiality

Without limiting any other protection that applies to it, a communication or document to which this division applies is as confidential and inadmissible in any proceeding as it would be if it had been made or produced while the accused person and his or her legal representative were in each other's presence.

35 Application of Listening Devices Act

The *Listening Devices Act 1992* applies to a communication or document to which this division applies as if—

- (a) for a communication—the communication were a private conversation within the meaning of that Act to which the parties were the accused person and his or her legal representative; and
- (b) for a document—
 - (i) any data, text or visual images in the transmitted document were words spoken to or by a person in a private conversation within the meaning of that Act to

which the parties were the accused person and his or her legal representative; and

- (ii) a reference in that Act to the use of a listening device to overhear, record, monitor or listen to a private conversation included a reference to reading the document.

Division 3.6 Costs and expenses

36 Power to order payment of costs

A territory court that directs evidence to be taken, or a submission to be made, by audiovisual link or audio link under section 20 (Territory courts may take evidence and submissions from outside ACT) or section 32 (Use of link in proceedings) may make the orders it considers just for the payment of the costs and expenses incurred in relation to taking the evidence or making the submission, including any amounts prescribed by regulation.

Part 4 Evidence in criminal proceedings

Division 4.1 Preliminary—pt 4

U 37 Meaning of *sexual offence* in pt 4

In this part:

sexual offence means an offence against the *Crimes Act 1900*, part 3 (Sexual offences).

Note A reference to an offence against a territory law includes a reference to a related ancillary offence, eg attempt (see Legislation Act, s 189).

U Division 4.2 Sexual offence proceedings—general

U 38 Meaning of *complainant* and *sexual offence proceeding* for div 4.2

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.
- (2) For this division, a *sexual offence proceeding* is—
 - (a) a proceeding for a sexual offence; or
 - (b) a proceeding in relation to bail for a person charged with a sexual offence, whether or not the person is also charged with any other offence; or

- (c) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (d) an appeal or other review (whether by prerogative order or otherwise) arising out of a proceeding mentioned in paragraphs (a) to (c); or
 - (e) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c).
- (3) For subsection (2) (a), a *proceeding for a sexual offence* includes—
- (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and
 - (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (4) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

U 38A **Meaning of *violent offence proceeding*—div 4.2**

U 38B **Meaning of *relevant person*—div 4.2**

U 38C **Accused may be screened from witness in court**

U 38D **Cross-examination of complainant or prosecution witness by self-represented accused person—procedure**

U 38E **Witness may have support person in court**

U 39 **Evidence given in closed court**

- (1) This section applies if the complainant gives evidence in a sexual offence proceeding.

- (2) The court may order that the court be closed to the public while all or part of the complainant's evidence (including evidence given under cross-examination) is given.
- (3) However, an order under this section does not stop a person nominated by the complainant from being in court when the evidence is given.

U 40 Prohibition of publication of complainant's identity

- (1) A person commits an offence if the person publishes, in relation to a sexual offence proceeding—
 - (a) the complainant's name; or
 - (b) protected identity information about the complainant; or
 - (c) a reference or allusion that discloses the complainant's identity; or
 - (d) a reference or allusion from which the complainant's identity might reasonably be inferred.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (2) It is a defence to a prosecution for an offence against this section if the person establishes that the complainant consented to the publication before the publication happened.
- (3) An offence against this section is a strict liability offence.
- (4) In this section:

protected identity information means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person.

U Division 4.2A **Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence**

U Division 4.2B **Sexual offence proceedings—giving evidence at pre-trial hearing**

U Division 4.3 **Sexual offence proceedings—giving evidence from places other than courtrooms**

U 41 **Meaning of *complainant* and *sexual offence proceeding* for div 4.3**

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.
- (2) For this division, a *sexual offence proceeding* is—
 - (a) a proceeding for a sexual offence; or
 - (b) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (c) a proceeding under the *Domestic Violence and Protection Orders Act 2001* in relation to a sexual offence; or
 - (d) a proceeding under the *Victims of Crime (Financial Assistance) Act 1983* in relation to a sexual offence; or
 - (e) a proceeding by way of an inquest or inquiry in the Coroner's Court in relation to a sexual offence; or

- (f) an appeal arising out of a proceeding mentioned in paragraphs (a) to (e).
- (3) For subsection (2) (a), a *proceeding for a sexual offence* includes—
 - (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and
 - (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (4) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

U 41A **Meaning of violent offence proceeding—div 4.3**

U 42 **When does div 4.3 apply?**

This division applies if the complainant is to give evidence in a sexual offence proceeding in a court, whether or not the evidence is to be given on oath or otherwise.

U 43 **Complainant giving evidence from place other than courtroom**

- (1) If the courtroom where the sexual offence proceeding is heard and another place are linked by an audiovisual link, the complainant's evidence must be given by audiovisual link from the other place unless the court orders otherwise.
- (2) The court may make an order under subsection (1) only if satisfied that—
 - (a) the complainant prefers to give evidence in the courtroom; or
 - (b) if the order is not made—
 - (i) the sexual offence proceeding may be unreasonably delayed; or

- (ii) there is a substantial risk that the court will not be able to ensure that the sexual offence proceeding is conducted fairly.
- (3) While the complainant is at the other place for the purpose of giving evidence, the place is taken for all purposes to be part of the courtroom.

U 44 **Consequential orders under div 4.3**

- (1) This section applies if the complainant is to give evidence from a place (the *other place*) other than the courtroom where the sexual offence proceeding is heard.
- (2) The court may make any order it considers appropriate—
 - (a) to ensure that the sexual offence proceeding is conducted fairly; or
 - (b) to allow the complainant to identify a person or thing; or
 - (c) to allow the complainant to take part in a view or to watch a demonstration or experiment; or
 - (d) to allow part of the sexual offence proceeding to be heard somewhere other than in the courtroom.
- (3) The court may make any other order it considers appropriate, including, for example, an order specifying—
 - (a) who may be with the complainant at the other place; or
 - (b) who must not be with the complainant at the other place; or
 - (c) who, in the courtroom, is to be able, or must not be able, to be heard, or seen and heard, by the complainant and people in the other place with the complainant; or
 - (d) who, in the courtroom, is to be able to see and hear the complainant and anyone else in the other place with the complainant; or

(e) how the audiovisual link is to operate.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (4) The court may order that a person be excluded from the other place while the complainant is giving evidence.
- (5) The court may direct that an order under this section apply only to a particular part of the sexual offence proceeding.

U 45 Making of orders under div 4.3

- (1) The court may make an order under this division in a sexual offence proceeding on its own initiative or on the application of a party to the proceeding or the complainant.
- (2) For the purpose of making an order under this division, the court is not bound by the rules of evidence and may inform itself as it considers appropriate.

U 46 Jury to be warned about adverse inferences

If the complainant gives evidence from a place other than the courtroom where the sexual offence proceeding is being heard and the proceeding is before a jury, the judge must warn the jury to the effect that the jury should not draw any inference adverse to an accused person in the proceeding from the fact the evidence is given from a place other than the courtroom.

U 47 Failure to comply with div 4.3

- (1) If the complainant's evidence is not given in accordance with this division, the evidence is not inadmissible for that reason only.
- (2) Failure to comply with this division in relation to a sexual offence proceeding does not affect the validity of the proceeding.

Division 4.4 Evidence of complainant's sexual reputation and activities

48 Meaning of *complainant* and *sexual offence proceeding* for div 4.4

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.
- (2) For this division, a *sexual offence proceeding* is—
 - (a) a proceeding for a sexual offence; or
 - (b) a proceeding in relation to bail for a person charged with a sexual offence, whether or not the person is also charged with any other offence; or
 - (c) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (d) an appeal arising out of a proceeding mentioned in paragraphs (a) to (c).
- (3) For subsection (2) (a), a *proceeding for a sexual offence* includes—
 - (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and
 - (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (4) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

49 When does div 4.4 apply?

This division applies to evidence in a sexual offence proceeding.

50 Immunity of sexual reputation

Evidence of the complainant's sexual reputation is not admissible.

51 General immunity of evidence of complainant's sexual activities

- (1) Evidence of the sexual activities of the complainant is not admissible in a sexual offence proceeding without leave of the court dealing with the proceeding.
- (2) Subsection (1) does not apply to evidence of the specific sexual activities of the complainant with an accused person in the sexual offence proceeding.

52 Application for leave under s 51

Application for leave under section 51 (General immunity of evidence of complainant's sexual activities) in a sexual offence proceeding must be made—

- (a) in writing; and
- (b) if the proceeding is before a jury—in the absence of the jury; and
- (c) in the absence of the complainant, if an accused person in the proceeding requests.

53 Decision to give leave under s 51

- (1) The court must not give leave under section 51 (General immunity of evidence of complainant's sexual activities) unless satisfied that the evidence—
 - (a) has substantial relevance to the facts in issue; or

- (b) is a proper matter for cross-examination about credit.
- (2) Evidence (*sexual activity evidence*) that relates to, or tends to establish, the fact that the complainant was accustomed to engage in sexual activities is not to be regarded as having a substantial relevance to the facts in issue because of any inference it may raise about general disposition.
- (3) Sexual activity evidence is not to be regarded as being a proper matter for cross-examination about credit unless the evidence, if accepted, would be likely to substantially impair confidence in the reliability of the complainant's evidence.
- (4) If the court gives leave under section 51, it must give written reasons for its decision.
- (5) In this section:

proper matter for cross-examination about credit—evidence is a *proper matter for cross-examination about credit* if the credibility rule under the *Evidence Act 1995* (Cwlth), section 102 does not apply to the evidence because of that Act, section 103 (Exception: cross-examination as to credibility).

Division 4.5 Protection of counselling communications

54 Definitions—div 4.5

In this division:

counselling means counselling, therapy or treatment for an emotional or psychological condition, whether or not the counselling, therapy or treatment is provided for remuneration.

counsellor means a person who—

- (a) has undertaken training or study, or has experience, relevant to the process of counselling people who have suffered harm; or

(b) is supervised by someone to whom paragraph (a) applies.

criminal proceeding means—

- (a) a proceeding for any offence; or
- (b) a sentencing proceeding for a person convicted of any offence; or
- (c) an appeal or other review (whether by prerogative order or otherwise) arising out of a proceeding mentioned in paragraph (a) or (b); or
- (d) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c);

but does not include a preliminary criminal proceeding.

document recording a protected confidence includes—

- (a) a copy, reproduction, republication, duplicate or summary of, or extract from, a document recording a protected confidence; and
- (b) the part of a document recording a protected confidence; and
- (c) the part of a document containing a report, observation, opinion, advice, recommendation or anything else in relation to a protected confidence that is—
 - (i) made or given by the person who made the protected confidence; or
 - (ii) made or given by a third party mentioned in section 55 (4) in whose presence the protected confidence is made; and
- (d) a copy, reproduction, republication, duplicate or summary of, or extract from, the part of a document mentioned in paragraph (b) or (c).

harm includes—

- (a) actual physical harm; and

- (b) stress or shock; and
- (c) prejudice to privacy; and
- (d) emotional or psychological harm, including, for example, shame, humiliation and fear; and
- (e) damage to reputation; and
- (f) financial loss.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

preliminary criminal proceeding means—

- (a) a committal proceeding for any offence; or
- (b) a proceeding in relation to bail for a person charged with any offence; or
- (c) an appeal or other review (whether by prerogative order or otherwise) arising out of a proceeding mentioned in paragraph (a) or (b); or
- (d) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c).

protected confidence—see section 55.

protected confidence evidence means—

- (a) oral or written evidence that would disclose a protected confidence; or
- (b) a document recording a protected confidence; or
- (c) oral or written evidence that would disclose the contents of a document recording a protected confidence.

55 **Meaning of *protected confidence* for div 4.5**

- (1) For this division, a *protected confidence* is a counselling communication made by, to or about a person against whom a sexual offence was, or is alleged to have been, committed (the *counselled person*).
- (2) A counselling communication is a protected confidence even if—
 - (a) it is made before the happening, or alleged happening, of the acts constituting the sexual offence; or
 - (b) it is not made in relation to—
 - (i) the sexual offence or any sexual offence; or
 - (ii) a condition arising from the sexual offence or any sexual offence.
- (3) For this section, a *counselling communication* is a communication made in circumstances that give rise to a reasonable expectation of confidentiality or a duty of confidentiality—
 - (a) by the counselled person to a counsellor for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
 - (b) to or about the counselled person by the counsellor for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
 - (c) by the counselled person to a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or

- (d) to the counselled person by a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
 - (e) about the counselled person by a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor to—
 - (i) the counselled person; or
 - (ii) the counsellor; or
 - (iii) another third party to whom subsection (4) applies; or
 - (f) about the counselled person by a counsellor to someone else who has also been a counsellor for the counselled person; or
 - (g) about the counselled person to a counsellor by someone else who has also been a counsellor for the counselled person.
- (4) For this section, in deciding whether a communication was made in circumstances that gave rise to a reasonable expectation of confidentiality, it does not matter that the communication was made in the presence of a third party, if the third party was present to assist or encourage communication between the counselled person and counsellor or otherwise assist the counselling process.

Examples of third parties

- 1 a parent, partner, carer, spiritual adviser or other supportive person
- 2 a person present at the request of the counsellor to take notes of the counselling session

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (5) In this section:
sexual offence includes alleged sexual offence.

56 When does div 4.5 apply?

This division applies to a protected confidence made before or after the commencement of this division.

57 Immunity for protected confidences in preliminary criminal proceedings

- (1) A protected confidence must not be disclosed in, or for the purposes of, a preliminary criminal proceeding.
- (2) Without limiting subsection (1)—
 - (a) a person cannot be required (whether by subpoena, application, notice or any other procedure), in or in relation to a preliminary criminal proceeding, to produce a document recording a protected confidence; and
 - (b) protected confidence evidence is not admissible in the preliminary criminal proceeding.

Example for par (a)

A person could not be required to disclose a protected confidence in response to a request for production of documents in a preliminary criminal proceeding.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

58 General immunity for protected confidences

- (1) This section applies in relation to a criminal proceeding.
- (2) A protected confidence must not be disclosed in, or for the purposes of, the criminal proceeding unless the court dealing with the proceeding gives leave for the disclosure.

- (3) Without limiting subsection (2)—
- (a) a person cannot be required (whether by subpoena, application, notice or any other procedure), in or in relation to the criminal proceeding, to produce a document recording a protected confidence, unless the court gives leave; and
 - (b) protected confidence evidence is not admissible in the criminal proceeding, unless the court gives leave.

Example for par (a)

A person could not be required to disclose a protected confidence in response to a request for production of documents in a criminal proceeding unless the court gives leave.

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

59 Application for leave to disclose protected confidence

- (1) An application for leave must—
- (a) be in writing; and
 - (b) set out the leave sought; and
 - (c) set out the applicant's arguments in support of the application (including the matters mentioned in section 60 (2) (Threshold test—legitimate forensic purpose)).
- (2) The application must also—
- (a) set out briefly the nature of the protected confidence evidence (if known); and
 - (b) set out, or be accompanied by a copy of, any relevant documents.

60 Threshold test—legitimate forensic purpose

- (1) The court must refuse the leave sought under section 59 if not satisfied that the applicant has established a legitimate forensic purpose for seeking the leave.
- (2) To establish a legitimate forensic purpose, the applicant must—
 - (a) identify a legitimate forensic purpose for seeking the leave; and
 - (b) satisfy the court that there is an arguable case that the evidence in relation to which the leave is sought would materially assist the applicant in his or her case in the proceeding.
- (3) The court must decide whether or not to refuse the application under this section before it conducts a preliminary examination of the protected confidence evidence under section 61.

61 Preliminary examination of protected confidence evidence

- (1) If the court is satisfied that the applicant has established a legitimate forensic purpose for seeking the leave, the court must then conduct a preliminary examination of the protected confidence evidence to decide whether leave should be given.
- (2) For the preliminary examination, the court may—
 - (a) require anyone who has custody or control of a document recording a protected confidence to produce the document to the court for inspection; or
 - (b) require the counsellor concerned or, if the counsellor provides counselling on behalf of an entity, the principal or another representative of the entity—
 - (i) to give the court written answers to any questions; or
 - (ii) to attend the court for oral examination.

- (3) The court must not order a person to attend for oral examination under subsection (2) (b) (ii) unless the oral examination of the person is necessary for the effective conduct of the preliminary examination.
- (4) Only a person mentioned in subsection (2) may be ordered to answer questions or be examined under this section.
- (5) The preliminary examination must be conducted—
 - (a) in the absence of the public and the jury (if any); and
 - (b) in the absence of the parties to the criminal proceeding and their lawyers, except to the extent otherwise decided by the court.
- (6) Evidence taken at the preliminary examination must not be disclosed to the parties or their lawyers, except to the extent otherwise decided by the court or an appellate court under section 62 (6).
- (7) A record of the preliminary examination must be made, but must not be made available for public access.

62 Giving of leave to disclose protected confidence

- (1) After conducting the preliminary examination of the protected confidence evidence, the court may give leave for the disclosure of the protected confidence only if satisfied that, in the circumstances of the case, the public interest in ensuring an accused person in the criminal proceeding is given a fair trial outweighs the public interest in preserving the confidentiality of the protected confidence.
- (2) To remove any doubt, if the court is satisfied under subsection (1) about part of a document only, it may give leave in relation to that part and refuse leave for the rest of the document.
- (3) In making a decision under subsection (1), the court must have regard to—

- (a) the extent to which disclosure of the protected confidence is necessary for an accused person to make a full defence; and
 - (b) the public interest in ensuring that victims of sexual offences receive effective counselling or other treatment; and
 - (c) the extent to which disclosure of protected confidences may dissuade victims of sexual offences from seeking counselling or other treatment or diminish the value of counselling or other treatment; and
 - (d) whether the evidence will have a substantial probative value to a fact in issue and whether other evidence of similar or greater probative value is available about the matters to which the evidence relates; and
 - (e) the likelihood that disclosure of the protected confidence will affect the outcome of the case; and
 - (f) whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias; and
 - (g) whether the person to or by whom the protected confidence was made objects to the disclosure of the protected confidence; and
 - (h) the nature and extent of the reasonable expectation of confidentiality for the protected confidence and the potential prejudice to the privacy of anyone, including to the extent to which any interest in confidentiality or privacy has been lessened by the passage of time or the happening of any event since the protected confidence was made.
- (4) Subsection (3) does not limit the matters to which the court may have regard.
- (5) Leave under this section may be given subject to restrictions.

- (6) If the court refuses to give leave, and an appeal is made against the refusal, or a ground of an appeal is the refusal, the appellate court may examine the evidence taken at the preliminary examination under section 61 (Preliminary examination of protected confidence evidence), and may make the orders about the disclosure of the evidence it considers appropriate.

63 Ancillary orders for protection of person who made protected confidence

- (1) The court may make the orders it considers appropriate to limit possible harm, or the extent of possible harm, to a person who made a protected confidence by the disclosure of protected confidence evidence.
- (2) Without limiting subsection (1), the court may—
- (a) order that the court be closed to the public while all or part of the protected confidence evidence is presented; or
 - (b) for a document recording a protected confidence—order that a document be edited as directed by the court or that a copy of a document (or part of a document) be disclosed instead of the original; or
 - (c) make orders in relation to the suppression or publication of all or any part of the protected confidence evidence; or
 - (d) for a document recording a protected confidence—make orders about the production or inspection of the document; or
 - (e) make orders in relation to the disclosure of—
 - (i) protected identity information about the person who made the protected confidence; or
 - (ii) information that discloses the identity of the person who made the protected confidence; or

(iii) information from which the identity of the person who made the protected confidence might reasonably be inferred.

(3) This section is in addition to section 40 (Prohibition of publication of complainant's identity).

(4) In this section:

protected identity information means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person.

64 No waiver of protected confidence immunity

This division applies whether or not a person who has made a protected confidence consents or does not object to the disclosure of the protected confidence.

65 No protected confidence immunity for medical information

(1) This division does not apply in relation to—

- (a) information obtained by a doctor because of a physical examination of a person against whom a sexual offence was, or is alleged to have been, committed; or
- (b) any communication made in the course, or because, of such an examination.

66 No protected confidence immunity for communications for criminal investigations and proceedings

This division does not apply to a communication made for the purpose of—

- (a) an investigation by a law enforcement entity into the commission or alleged commission of a sexual offence; or

- (b) a preliminary criminal proceeding or criminal proceeding arising from the commission or alleged commission of a sexual offence.

67 No protected confidence immunity in case of misconduct

- (1) This division does not apply in relation to a communication made, or a document prepared, in the furtherance of the commission of an offence, a fraud or an act that makes a person liable to a civil penalty.
- (2) A court may find that a communication was made, or a document was prepared, in the furtherance of the commission of an offence, a fraud or an act if there are reasonable grounds for finding that—
 - (a) the offence, fraud or act was committed; and
 - (b) the communication was made, or document prepared, in the furtherance of the offence, fraud or act.

**Division 4.6 Sexual offence proceedings—
directions and warnings to juries**

Note The *Supreme Court Act 1933*, s 68C (3) provides that in a criminal proceeding tried by a judge alone, if a territory law would otherwise require a warning to be given to a jury in the proceeding, the judge must take the warning into account in considering his or her verdict.

68 Meaning of *complainant* and *sexual offence proceeding* for div 4.6

- (1) For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged to have been committed.

- (2) For this division, a *sexual offence proceeding* is a proceeding for a sexual offence before a jury, and includes any of the following before a jury:
- (a) a proceeding for a sexual offence and any other offence;
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence;
 - (c) a proceeding for a sexual offence that may result in a finding of guilt for any other offence.

69 Comments on complainants' evidence

If evidence is given by a complainant in a sexual offence proceeding, the judge must not give the jury any warning or suggestion to the effect that the law regards complainants to be an unreliable class of witnesses.

70 Comments on children's evidence

If evidence is given by a child in a sexual offence proceeding, the judge must not give the jury any warning or suggestion to the effect that the law regards children to be an unreliable class of witnesses.

71 Comments about lack of, or delays in making, complaint

- (1) This section applies if, in a sexual offence proceeding, evidence is given, or a question is asked of a witness, that tends to suggest that—
- (a) the complainant made no complaint about the alleged offence;
or
 - (b) there was a delay in making a complaint.
- (2) The judge must—
- (a) give the jury a warning to the effect that the absence of, or the delay in making, the complaint does not necessarily indicate that the allegation that the offence was committed is false; and

- (b) tell the jury that there may be good reasons why a victim of a sexual offence may not make, or may hesitate in making, a complaint about the offence.

Note The *Evidence Act 1971*, s 76C (Evidence of complaint) was repealed by the *Evidence (Miscellaneous Provisions) Amendment Act 2003*. Section 76C abolished the common law rule that complaint evidence in a sexual offence matter was admissible for the purpose of supporting the complainant's credit (by showing the complainant's consistency). The common law is not revived by the repeal of s 76C (see Legislation Act, s 86).

72 Directions about implied consent

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that a person is not to be regarded as having consented to a sexual act just because—

- (a) the person did not say or do anything to indicate that the person did not consent; or
- (b) the person did not protest or physically resist; or
- (c) the person did not sustain a physical injury; or
- (d) on that or an earlier occasion, the person had consented to engage in a sexual act (whether or not of the same kind) with the accused person or someone else.

73 Directions about mistaken belief about consent

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that, in deciding whether the accused person was under a mistaken belief that a person consented to a sexual act, the jury may consider whether the belief was reasonable in the circumstances.

Division 4.7 Family objections

U 74 Application—div 4.7

- (1) This division applies in relation to a criminal proceeding.
- (2) This division does not apply in relation to a proceeding for any of the following offences:
 - (a) an offence against the *Crimes Act 1900*, part 2 (Offences against the person) or part 3 (Sexual offences), if the offence is against a person who is under 16 years old;
 - (b) an offence against any of the following provisions of the *Children and Young People Act 1999*:
 - section 374 (Dangerous employment)
 - section 375 (Regulation of employment of children and young people)
 - section 376 (Duty of employers of children and young people);
 - (c) an offence if the conduct making up the offence is domestic violence under the *Domestic Violence and Protection Orders Act 2001*.

75 Family objections to giving evidence

A person who, when required to give evidence, is the domestic partner, parent or child of a defendant may make an objection (a **family objection**) to being required, as a witness for the prosecution—

- (a) to give evidence; or
- (b) to give evidence of a communication between the person and the defendant.

Note For the meaning of **domestic partner**, see the Legislation Act, s 169.

76 Time to make family objection

A person may only make a family objection before giving evidence or, if the person has started to give evidence, as soon as practicable after becoming aware of the right to object.

77 Person to be made aware of right to make family objection

If it appears to the court that a person may have a right to make a family objection, the court must satisfy itself that the person is aware of the effect of this division as it may apply to the person.

78 Family objections to be heard in absence of jury

If there is a jury, the court must hear and decide a family objection in the absence of the jury.

79 Matters court may consider in deciding family objection

- (1) A court must not require a person who makes a family objection to give the evidence if the court finds that—
 - (a) there is a likelihood that harm would or might be caused (directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence; and
 - (b) the nature and extent of that harm outweighs the desirability of having the evidence given.
- (2) In making a decision under subsection (1), the court must take into account matters including the following:
 - (a) the nature and seriousness of the offence for which the defendant is being prosecuted;
 - (b) the substance and importance of any evidence that the person might give and the weight likely to be attached to it;

- (c) whether any other evidence about the matters to which the evidence of the person would relate is reasonably available to the prosecution;
- (d) the nature of the relationship between the defendant and the person;
- (e) whether, in giving the evidence, the person would have to disclose something that was received by the person in confidence from the defendant.

80 Prosecution not to comment about family objections

If the court has made a decision on a family objection by a person, the prosecution must not comment on any of the following:

- (a) the objection;
- (b) the decision on the objection;
- (c) the failure of the person to give evidence.

81 Comments by judge and parties about failure to give evidence by family members

- (1) This section applies to a proceeding for an indictable offence in which a defendant's family member fails to give evidence.
- (2) The judge or a party (other than the prosecution) may comment on the failure to give evidence.
- (3) However, unless the comment is made by another defendant in the proceeding, the comment must not suggest that the family member failed to give evidence because—
 - (a) the defendant was guilty of the offence; or
 - (b) the family member believed the defendant to be guilty of the offence.

- (4) If 2 or more defendants are being tried together for the offence, and any defendant comments on the failure of any other defendant's family member to give evidence, the judge may do either or both of the following:
- (a) comment on the failure to give evidence;
 - (b) comment on the defendant's comment.

- (5) In this section:

family member, of a defendant, means the defendant's domestic partner, parent or child at the time of the failure to give evidence.

Note For the meaning of *domestic partner*, see the Legislation Act, s 169.

U **Division 4.8** **Proceedings against young people**

U **Part 4A** **Evidence in any proceedings**

Part 5

Certain evidence under court rules not admissible

82 Evidence not admissible in court—neutral evaluation

- (1) This section applies if, under rules under the *Court Procedures Act 2004* (the *rules*), the Supreme Court or Magistrates Court has referred a civil proceeding, or part of a civil proceeding, for neutral evaluation.
- (2) Evidence of anything said, or of any admission made, in a neutral evaluation session under the rules is not admissible in any proceeding before a court or tribunal.
- (3) A document prepared for, in the course of, or because of, a neutral evaluation session under the rules is not admissible in any proceeding before a court or tribunal.
- (4) Subsections (1) and (2) do not apply to any evidence or document—
 - (a) for evidence—if the people attending, or identified during, the neutral evaluation session consent to the admission of the evidence; or
 - (b) for a document—if the people attending, or identified during, the neutral evaluation session and all the people identified in the document, consent to the admission of the document; or
 - (c) in a proceeding (including a criminal proceeding) brought in relation to an act or omission in relation to which a disclosure has been made under the rules because an evaluator has reasonable grounds to believe the disclosure is necessary or desirable to prevent or reduce the danger of death or injury to anyone or damage to any property.

- (5) In this section:

neutral evaluation session includes any steps taken in the course of making arrangements for the session or in the course of the follow-up of the session.

83 Evidence not admissible in court—expert report

- (1) This section applies if—
- (a) a party to a civil proceeding in the Supreme Court or Magistrates Court (the *court*) engages an expert witness; and
 - (b) the expert witness prepares a report (an *expert report*); and
 - (c) the expert report does not contain an acknowledgment by the expert witness who prepared the report that the expert witness has read the code of conduct for expert witnesses prescribed by the rules under the *Court Procedures Act 2004* applying to the expert witness and agrees to be bound by it.
- (2) The expert report is not admissible in evidence in the proceeding, unless the court otherwise orders.

84 Evidence not admissible in court—meeting of experts

- (1) This section applies if, in a civil proceeding in the Supreme Court or Magistrates Court (the *court*), the court directs the expert witnesses in the proceeding to meet—
- (a) to identify the matters on which they agree; and
 - (b) to identify the matters on which they disagree and the reasons why; and
 - (c) to try to resolve any disagreement.

- (2) Unless the court otherwise orders, evidence of anything done or said, or an admission made, at the meeting is admissible at a trial of the proceeding only if all the parties to the proceeding that are active parties under the rules under the *Court Procedures Act 2004* applying to the proceeding (the *rules*) agree.
- (3) However, subsection (2) does not apply to a document produced in accordance with a direction made by the court under the rules that the expert witnesses produce a document for the court's use, identifying—
 - (a) the matters on which they agree; and
 - (b) the matters on which they disagree; and
 - (c) the reasons for any failure to reach agreement on any matter.

85 Evidence not admissible in court—evidence taken in examination

- (1) This section applies if—
 - (a) in a civil or criminal proceeding, the Supreme Court or the Magistrates Court (the *court*) makes an order under the rules under the *Court Procedures Act 2004*—
 - (i) for the examination of a person on oath at a place in or outside the ACT (including outside Australia) before a person appointed by the court; or
 - (ii) for the issue of a commission for the examination of a person on oath at a place in or outside the ACT (including outside Australia); or
 - (iii) for the issue of a letter of request to a judicial authority of a place outside the ACT (including outside Australia) to take the evidence of a person (or cause it to be taken); and
 - (b) the person's evidence is taken in an examination held in accordance with the order; and

- (c) a party to the proceeding tenders the person's evidence as evidence in the proceeding.
- (2) Unless the court otherwise orders, the person's evidence is not admissible if, at the hearing of the proceeding, the court is satisfied that the person is in the ACT and is able to attend the hearing.

Part 6 Publication of evidence

90 Application—pt 6

This part applies to a proceeding in the Supreme Court or the Magistrates Court, or to an inquest or inquiry under the *Coroners Act 1997*.

91 Prohibition of publication of evidence etc

- (1) If it appears to a court that—
 - (a) the publication of evidence, given or intended to be given, in a proceeding before the court, is likely to prejudice the administration of justice; or
 - (b) in the interests of the administration of justice, it is desirable that the name of a party to, or a witness, or intended witness, in a proceeding before the court be not published;
the court may, at any time during or after the hearing of the proceeding, make an order—
 - (c) forbidding the publication of the evidence or a specified part of the evidence, or of a report of the evidence, either absolutely or subject to any conditions that the court specifies or for any period that is specified; or
 - (d) forbidding the publication of the name of the party or witness.
- (2) If a court makes an order under subsection (1), the court may, if it considers appropriate, also direct that people specified by the court, or everyone except people so specified, must remain outside the courtroom for the period that the court specifies.

92 Noncompliance with s 91 order

- (1) A person who contravenes an order or direction under section 91 commits an offence.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (2) For section 91 and this section, the publication of a reference or allusion to a party to, or a witness in, a proceeding is, if the reference or allusion is such as to disclose the identity of the party or witness, taken to be a publication of the name of the party or witness.

Part 7 Miscellaneous

100 Approved forms

- (1) The Minister may, in writing, approve forms for this Act.

Note For other provisions about forms, see the Legislation Act, s 255.

- (2) If the Minister approves a form for a particular purpose, the approved form must be used for that purpose.
- (3) An approved form is a notifiable instrument.

Note A notifiable instrument must be notified under the Legislation Act.

101 Regulation-making power

- (1) The Executive may make regulations for this Act.

Note A regulation must be notified, and presented to the Legislative Assembly, under the Legislation Act.

- (2) A regulation may prescribe the amounts, or the way of calculating amounts, payable to a territory court in relation to the cost of, or incidental to, the provision of an audiovisual link or audio link and ancillary equipment for part 3 (Use of audiovisual links and audio links).
- (3) In this section:

audio link—see section 16 (Definitions for pt 3).

territory court—see section 16 (Definitions for pt 3).

U Part 10

Transitional—Sexual and Violent Offences Legislation Amendment Act 2008

U Dictionary

(see s 2)

Note 1 The Legislation Act contains definitions and other provisions relevant to this Act.

Note 2 For example, the Legislation Act, dict, pt 1, defines the following terms:

- child
- Childrens Court
- Coroner’s Court
- doctor
- document
- entity
- Executive
- lawyer
- may (see s 146)
- Minister (see s 162)
- must (see s 146)
- oath
- proceeding (for this Act, pt 3)
- sentence administration board
- take (an oath).

audio link, for part 3 (Use of audiovisual links and audio links)—see section 16.

audiovisual link means a system of 2-way communication linking different places so that a person at any of them can be seen and heard at the other places.

complainant—

- (a) for division 4.2 (Sexual offence proceedings—general)—see section 38; and
- (b) for division 4.3 (Sexual offence proceedings—giving evidence from places other than courtrooms)—see section 41; and

- (c) for division 4.4 (Evidence of complainant's sexual reputation and activities)—see section 48; and
- (d) for division 4.6 (Sexual offence proceedings—directions and warnings to juries)—see section 68.

counsellor, for division 4.5 (Protection of counselling communications)—see section 54.

court, for part 2 (Evidence of children)—see section 5.

criminal proceeding, for division 4.5 (Protection of counselling communications)—see section 54.

document recording a protected confidence, for division 4.5 (Protection of counselling communications)—see section 54.

family objection, for division 4.7 (Family objections)—see section 75.

harm, for division 4.5 (Protection of counselling communications)—see section 54.

Magistrates Court, for part 2 (Evidence of children)—see section 5.

participating State, for part 3 (Use of audiovisual links and audio links)—see section 16.

preliminary criminal proceeding, for division 4.5 (Protection of counselling communications)—see section 54.

prescribed witness, for part 2 (Evidence of children)—see section 5.

proceeding, for part 2 (Evidence of children)—see section 5.

protected confidence, for division 4.5 (Protection of counselling communications)—see section 55.

protected confidence evidence, for division 4.5 (Protection of counselling communications)—see section 54.

recognised court, for part 3 (Use of audiovisual links and audio links)—see section 16.

sexual offence, for part 4 (Evidence in criminal proceedings)—see section 37.

sexual offence proceeding—

- (a) for division 4.2 (Sexual offence proceedings—general)—see section 38; and
- (b) for division 4.3 (Sexual offence proceedings—giving evidence from places other than courtrooms)—see section 41; and
- (c) for division 4.4 (Evidence of complainant’s sexual reputation and activities)—see section 48; and
- (d) for division 4.6 (Sexual offence proceedings—directions and warnings to juries)—see section 68.

State, for part 3 (Use of audiovisual links and audio links)—see section 16.

territory court, for part 3 (Use of audiovisual links and audio links)—see section 16.

tribunal, in relation to a State, for part 3 (Use of audiovisual links and audio links)—see section 16.

Endnotes

1 About the endnotes

Amending and modifying laws are annotated in the legislation history and the amendment history. Current modifications are not included in the republished law but are set out in the endnotes.

Not all editorial amendments made under the *Legislation Act 2001*, part 11.3 are annotated in the amendment history. Full details of any amendments can be obtained from the Parliamentary Counsel's Office.

Uncommenced amending laws and expiries are listed in the legislation history and the amendment history. These details are underlined. Uncommenced provisions and amendments are not included in the republished law but are set out in the last endnote.

If all the provisions of the law have been renumbered, a table of renumbered provisions gives details of previous and current numbering.

The endnotes also include a table of earlier republications.

2 Abbreviation key

am = amended	ord = ordinance
amdt = amendment	orig = original
ch = chapter	par = paragraph/subparagraph
def = definition	pres = present
dict = dictionary	prev = previous
disallowed = disallowed by the Legislative Assembly	(prev...) = previously
div = division	pt = part
exp = expires/expired	r = rule/subrule
Gaz = gazette	renum = renumbered
hdg = heading	reloc = relocated
IA = Interpretation Act 1967	R[X] = Republication No
ins = inserted/added	RI = reissue
LA = Legislation Act 2001	s = section/subsection
LR = legislation register	sch = schedule
LRA = Legislation (Republication) Act 1996	sdiv = subdivision
mod = modified/modification	sub = substituted
o = order	SL = Subordinate Law
om = omitted/repealed	<u>underlining</u> = whole or part not commenced or to be expired

Endnotes

3 Legislation history

3 Legislation history

The *Evidence (Miscellaneous Provisions) Act 1991* was formerly the *Evidence (Closed-Circuit Television) Act 1991*. It was renamed by the *Justice and Community Safety Legislation Amendment Act 2000 (No 3)* No 17 (see sch 1).

After 11 May 1989 and before 10 November 1999, Acts commenced on notification day unless otherwise stated (see *Australian Capital Territory (Self-Government) Act 1988* (Cwlth), s 25).

Evidence (Miscellaneous Provisions) Act 1991 No 34

notified 21 August 1991 (Gaz 1991 No S84)

commenced 21 August 1991

as amended by

Evidence (Closed-Circuit Television) (Amendment) Act 1992 No 80

notified 24 December 1992 (Gaz 1992 No S236)

commenced 24 December 1992 (s 2)

Evidence (Closed-Circuit Television) (Amendment) Act 1994 No 24

notified 31 May 1994 (Gaz 1994 No S93)

commenced 31 May 1994 (s 2)

Evidence (Closed-Circuit Television) (Amendment) Act (No 2) 1994 No 96

notified 15 December 1994 (Gaz 1994 No S280)

commenced 15 December 1994 (s 2)

Evidence (Closed-Circuit Television) (Amendment) Act 1996 No 25

notified 21 June 1996 (Gaz 1996 No S124)

commenced 21 June 1996 (s 2)

Evidence (Closed-Circuit Television) (Amendment) Act 1998 No 45

notified 30 October 1998 (Gaz 1998 No S204)

commenced 30 October 1998 (s 2)

Children and Young People (Consequential Amendments) Act 1999 No 64 sch 2

notified 10 November 1999 (Gaz 1999 No 45)

s 1, s 2 commenced 10 November 1999 (IA s 10B)

sch 2 commenced 10 May 2000 (s 2 (2))

Victims of Crime (Financial Assistance) (Amendment) Act 1999 No 91 sch 2

notified 23 December 1999 (Gaz 1999 No S65)
s 1, s 2 commenced 23 December 1999 (IA s 10B)
sch 2 commenced 24 December 1999 (s 2 (2) and Gaz 1999 No S69)

Justice and Community Safety Legislation Amendment Act 2000 (No 3) No 17 sch 1

notified 1 June 2000 (Gaz 2000 No 22)
sch 1 commenced 1 June 2000 (s 2)

Legislation (Consequential Amendments) Act 2001 No 44 pt 136

notified 26 July 2001 (Gaz 2001 No 30)
s 1, s 2 commenced 26 July 2001 (IA s 10B)
pt 136 commenced 12 September 2001 (s 2 and see Gaz 2001 No S65)

Rehabilitation of Offenders (Interim) Act 2001 No 82 sch 1 pt 1.3

notified 10 September 2001 (Gaz 2001 No S66)
s 1, s 2 commenced 10 September 2001 (IA s 10B)
sch 1 pt 1.3 commenced 24 September 2001 (s 2 and CN 2001 No 4)

Protection Orders (Consequential Amendments) Act 2001 No 90 pt 6

notified LR 27 September 2001
s 1, s 2 commenced 27 September 2001 (LA s 75)
pt 6 commenced 27 March 2002 (LA s 79)

Statute Law Amendment Act 2002 No 30 pt 1.1

notified LR 16 September 2002
s 1, s 2 taken to have commenced 19 May 1997 (LA s 75 (2))
pt 1.1 commenced 17 September 2002 (s 2 (1))

Statute Law Amendment Act 2002 (No 2) No 49 pt 3.7

notified LR 20 December 2002
s 1, s 2 taken to have commenced 7 October 1994 (LA s 75 (2))
pt 3.7 commenced 17 January 2003 (s 2 (1))

Endnotes

3 Legislation history

Evidence (Miscellaneous Provisions) Amendment Act 2003 A2003-48 s 4, sch 1 (as am A2004-18 pt 7)

notified LR 31 October 2003

s 1, s 2 commenced 31 October 2003 (LA s 75 (1))

s 4, sch 1 commenced 30 April 2004 (s 2 and LA s 79)

Sexuality Discrimination Legislation Amendment Act 2004 A2004-2 sch 2 pt 2.5

notified LR 18 February 2004

s 1, s 2 commenced 18 February 2004 (LA s 75 (1))

amdt 2.11 commenced 22 March 2004 (s 2 and CN2004-4)

remainder sch 2 pt 2.5 commenced 30 April 2004 (s 2 and LA s 79A)

Justice and Community Safety Legislation Amendment Act 2004 A2004-18 pt 7

notified LR 6 April 2004

s 1, s 2 commenced 6 April 2004 (LA s 75 (1))

pt 7 commenced 30 April 2004 (s 2 and LA s 79A)

Note This Act only amends the Evidence (Miscellaneous Provisions) Act 2003 A2003-48).

Domestic Violence and Protection Orders Amendment Act 2005 A2005-13 sch 1 pt 1.8

notified LR 24 March 2005

s 1, s 2 commenced 24 March 2005 (LA s 75 (1))

sch 1 pt 1.8 commenced 25 March 2005 (s 2)

Criminal Code (Administration of Justice Offences) Amendment Act 2005 A2005-53 sch 1 pt 1.10

notified LR 26 October 2005

s 1, s 2 commenced 26 October 2005 (LA s 75 (1))

sch 1 pt 1.10 commenced 23 November 2005 (s 2)

Sentencing Legislation Amendment Act 2006 A2006-23 sch 1 pt 1.17

notified LR 18 May 2006

s 1, s 2 commenced 18 May 2006 (LA s 75 (1))

sch 1 pt 1.17 commenced 2 June 2006 (s 2 (1) and see Crimes (Sentence Administration) Act 2005 A2005-59 s 2, Crimes (Sentencing) Act 2005 A2005-58, s 2 and LA s 79)

**Justice and Community Safety Legislation Amendment Act 2006
A2006-40 sch 2 pt 2.16, amdt 2.90**

notified LR 28 September 2006
s 1, s 2 commenced 28 September 2006 (LA s 75 (1))
sch 2 pt 2.16, amdt 2.90 commenced 29 September 2006 (s 2 (1))

Corrections Management Act 2007 A2007-15 sch 1 pt 1.4

notified LR 18 June 2007
s 1, s 2 commenced 18 June 2007 (LA s 75 (1))
sch 1 pt 1.4 commenced 18 December 2007 (s 2 and LA s 79)

Children and Young People Act 2008 A2008-19 sch 1 pt 1.7

notified LR 17 July 2008
s 1, s 2 commenced 17 July 2008 (LA s 75 (1))
sch 1 pt 1.7 commences 27 February 2009 (s 2 and CN2008-13)

**Children and Young People (Consequential Amendments) Act 2008
A2008-20 sch 2 pt 2.7, sch 3 pt 3.13, sch 4 pt 4.15**

notified LR 17 July 2008
s 1, s 2 commenced 17 July 2008 (LA s 75 (1))
s 3 commenced 18 July 2008 (s 2 (1))
sch 2 pt 2.7 commenced 9 September 2008 (s 2 (3) and see Children and Young People Act 2008 A2008-19, s 2 and CN2008-13)
sch 3 pt 3.13 commences 27 October 2008 (s 2 (4) and see Children and Young People Act 2008 A2008-19, s 2 and CN2008-13)
sch 4 pt 4.15 commences 27 February 2009 (s 2 (5) and see Children and Young People Act 2008 A2008-19, s 2 and CN2008-13)

**Sexual and Violent Offences Legislation Amendment Act 2008
A2008-41 pt 2**

notified LR 8 September 2008
s 1, s 2 commenced 8 September (LA s 75 (1))
pt 2 awaiting commencement (s 2)

Note default commencement under s 2 (2): 8 June 2009 (default commencement under LA s 79 does not apply to this Act)

Crimes Legislation Amendment Act 2008 A2008-44 sch 1 pt 1.9

notified LR 9 September 2008
s 1, s 2 commenced 9 September 2008
sch 1 pt 1.9 awaiting commencement (s 2)

Note default commencement under s 2 (2): 9 June 2009 (default commencement under LA s 79 does not apply to this Act)

Endnotes

4 Amendment history

4 Amendment history

Title

title sub 2000 No 17 sch 1

Preliminary

pt 1 ins 2000 No 17 sch 1

Name of Act

s 1 sub 2000 No 17 sch 1

Dictionary

s 2 hdg sub 2000 No 17 sch 1
s 2 am 1994 Nos 24 and 96; 2000 No 17 sch 1
om A2003-48 amdt 1.3
ins A2003-48 amdt 1.1

Notes

s 3 orig s 3 renum as s 6
ins A2003-48 amdt 1.1

Prescribed witnesses

s 3A renum as s 4

Offences against Act—application of Criminal Code etc

s 4 (prev s 3A) ins 1994 No 96
am 1996 No 25; 1998 No 45; 2000 No 17 sch 1
renum 2000 No 17 sch 1
am 2002 No 30 amdt 1.1
om A2004-48 amdt 1.5
ins A2003-48 amdt 1.1
am A2005-53 amdt 1.49

Location of child giving evidence

s 4A renum as s 6

Evidence of children

pt 2 hdg ins 2000 No 17 sch 1
sub 2002 No 49 amdt 3.54; A2003-48 amdt 1.2

Definitions—pt 2

s 5 (prev s 4) am 1994 No 24; 1999 No 64 s 4 sch 2; 1999 No 91
s 13 sch 2; 2000 No 17 sch 1; 2001 No 90 amdts 1.60-1.62;
pars renum R6 LA (see 2001 No 90 amdt 1.63)
renum as s 5 2000 No 17 sch 1
renum as s 7 A2003-48 amdt 1.6
ins A2003-48 amdt 1.3
def **court** ins A2003-48 amdt 1.3
def **Magistrates court** ins A2003-48 amdt 1.3
def **prescribed witness** ins A2003-48 amdt 1.3
def **proceeding** ins A2003-48 amdt 1.3

Sworn or unsworn evidence

s 6 (prev s 4A) ins 1994 No 24
am 1994 No 96
renum as s 6 2000 No 17 sch 1
renum as s 8 A2003-48 amdt 1.9
(prev s 3) am 2000 No 17 sch 1
renum as s 6 A2003-48 amdt 1.4

Application—pt 2

s 7 orig s 7 om 1994 No 24
(prev s 5) am 1994 No 24; 1994 No 96
renum as s 7 2000 No 17 sch 1
renum as s 9 A2003-48 amdt 1.13
(prev s 5) renum as s 7 A2003-48 amdt 1.6
am A2005-13 amdt 1.33; A2008-20 amdt 3.27

Location of prescribed witness giving evidence

s 8 (prev s 6) sub 1994 No 24
am 1994 No 96
renum as s 8 2000 No 17 sch 1
renum as s 10 A2003-48 amdt 1.16
(prev s 6) am A2003-48 amdt 1.7, amdt 1.8
renum as s 8 A2003-48 amdt 1.9

Court's discretions reorders

s 8A renum as s 10

Consequential orders

s 9 (prev s 8) am 1994 No 24
renum as s 9 2000 No 17 sch 1
renum as s 11 A2003-48 amdt 1.18
(prev s 7) am A2003-48 amdts 1.10-1.12
renum as s 9 A2003-48 amdt 1.13

Jury warning about adverse inference

s 10 (prev s 8A) ins 1994 No 24
am 1994 No 96; 2000 No 17 sch 1
renum as s 10 2000 No 17 sch 1
renum as s 12 A2003-48 amdt 1.20
(prev s 8) am A2003-48 amdt 1.14, amdt 1.15
renum as s 10 A2003-48 amdt 1.16

Representation of child

s 11 (prev s 9) am 1994 No 24
renum as s 11 2000 No 17 sch 1
renum as s 13 A2003-48 amdt 1.20
(prev s 9) am A2003-48 amdt 1.17
renum as s 11 A2003-48 amdt 1.18

Endnotes

4 Amendment history

Court's discretions about orders

s 12 hdg (prev s 10 hdg) am 2000 No 17 sch 1
s 12 (prev s 10) sub 1994 No 24
am 1994 No 96; 2000 No 17 sch 1
renum as s 12 2000 No 17 sch 1
renum as s 14 A2003-48 amdt 1.20
(prev s 10) am A2003-48 amdt 1.19
renum as s 12 A2003-48 amdt 1.20

Amendment or revocation of order

s 13 (prev s 11) om 1992 No 80
ins 1994 No 24
sub 1994 No 96
renum as s 13 2000 No 17 sch 1
renum as s 15 A2003-48 amdt 1.21
(prev s 11) renum as s 13 A2003-48 amdt 1.20

Failure to comply with pt 2

s 14 renum as s 16 A2003-48 amdt 1.23
(prev s 12) renum as s 14 A2003-48 amdt 1.20

Child turning 18 during proceeding

s 15 hdg (prev s 13 hdg) sub A2003-48 amdt 1.21
s 15 orig s 15 renum as s 17 A2003-48 amdt 1.23
(prev s 13) am A2003-48 amdt 1.21
renum as s 15 A2003-48 amdt 1.21

Use of audiovisual links and audio links

pt 3 hdg ins 2000 No 17 sch 1

Preliminary—pt 3

div 3.1 hdg ins 2000 No 17 sch 1

Definitions—pt 3

s 16 orig s 16 renum as s 18 A2003-48 amdt 1.23
(prev s 14) ins 2000 No 17 sch 1
am 2001 No 82 amdt 1.5
renum as s 16 A2003-48 amdt 1.23
def **audiovisual link** om A2003-48 amdt 1.22
def **territory court** am A2006-23 amdt 1.196; A2007-15
amdt 1.25; A2008-20 amdt 2.18
def **tribunal** am A2005-53 amdt 1.50

Application—pt 3

s 17 orig s 17 renum as s 19 A2003-48 amdt 1.23
(prev s 15) ins 2000 No 17 sch 1
renum as s 17 A2003-48 amdt 1.23

Operation of other Acts

s 18 orig s 18 renum as s 20 A2003-48 amdt 1.23
(prev s 16) ins 2000 No 17 sch 1
renum as s 18 A2003-48 amdt 1.23

Use of interstate audiovisual links or audio links in proceedings before territory courts

div 3.2 hdg ins 2000 No 17 sch 1

Application—div 3.2

s 19 orig s 19 renum as s 21 A2003-48 amdt 1.23
(prev s 17) ins 2000 No 17 sch 1
renum as s 19 A2003-48 amdt 1.23

Territory courts may take evidence and submissions from outside ACT

s 20 orig s 20 renum as s 22 A2003-48 amdt 1.23
(prev s 18) ins 2000 No 17 sch 1
renum as s 20 A2003-48 amdt 1.23

Legal practitioners entitled to practice

s 21 orig s 21 renum as s 23 A2003-48 amdt 1.23
(prev s 19) ins 2000 No 17 sch 1
renum as s 21 A2003-48 amdt 1.23

Use of interstate audiovisual links or audio links in proceedings in participating States

div 3.3 hdg ins 2000 No 17 sch 1

Application—div 3.3

s 22 orig s 22 renum as s 24 A2003-48 amdt 1.23
(prev s 20) ins 2000 No 17 sch 1
renum as s 22 A2003-48 amdt 1.23

Recognised courts may take evidence or receive submissions from people in ACT

s 23 orig s 23 renum as s 25 A2003-48 amdt 1.25
(prev s 21) ins 2000 No 17 sch 1
renum as s 23 A2003-48 amdt 1.23

Powers of recognised courts

s 24 orig s 24 renum as s 26 A2003-48 amdt 1.27
(prev s 22) ins 2000 No 17 sch 1
renum as s 24 A2003-48 amdt 1.23

Orders made by recognised court

s 25 orig s 25 renum as s 27 A2003-48 amdt 1.27
(prev s 23) ins 2000 No 17 sch 1
am A2003-48 amdt 1.24
renum as s 25 A2003-48 amdt 1.25

Endnotes

4 Amendment history

Enforcement of order

s 26 orig s 26 renum as s 28 A2003-48 amdt 1.27
(prev s 24) ins 2000 No 17 sch 1
am A2003-48 amdt 1.26
renum as s 26 A2003-48 amdt 1.27

Privileges, protection and immunity of participants in proceedings in courts of participating States

s 27 orig s 27 renum as s 29 A2003-48 amdt 1.27
(prev s 25) ins 2000 No 17 sch 1
renum as s 27 A2003-48 amdt 1.27

Recognised court may administer oath in ACT

s 28 orig s 28 renum as s 30 A2003-48 amdt 1.29
(prev s 26) ins 2000 No 17 sch 1
renum as s 28 A2003-48 amdt 1.27
am A2005-53 amdt 1.51, amdt 1.52

Assistance to recognised court

s 29 orig s 29 renum as s 31 A2003-48 amdt 1.29
(prev s 27) ins 2000 No 17 sch 1
renum as s 29 A2003-48 amdt 1.27
am A2005-53 amdt 1.53

Contempt of recognised courts

s 30 orig s 30 renum as s 32 A2003-48 amdt 1.29
(prev s 28) ins 2000 No 17 sch 1
am A2003-48 amdt 1.28
renum as s 30 A2003-48 amdt 1.29
om A2005-53 amdt 1.54

Use of interstate audiovisual links or audio links between territory courts and places in ACT

div 3.4 hdg ins 2000 No 17 sch 1

Application—div 3.4

s 31 orig s 31 renum as s 33 A2003-48 amdt 1.29
(prev s 29) ins 2000 No 17 sch 1
renum as s 31 A2003-48 amdt 1.29
sub A2006-40 amdt 2.106

Use of link in proceedings

s 32 orig s 32 renum as s 34 A2003-48 amdt 1.29
(prev s 30) ins 2000 No 17 sch 1
renum as s 32 A2003-48 amdt 1.29

Protection of certain communications and documents in criminal proceedings

div 3.5 hdg ins 2000 No 17 sch 1

Application—div 3.5

s 33 orig s 33 renum as s 35 A2003-48 amdt 1.29
(prev s 31) ins 2000 No 17 sch 1
renum as s 33 A2003-48 amdt 1.29

Protection of confidentiality

s 34 orig s 34 renum as s 36 A2003-48 amdt 1.31
(prev s 32) ins 2000 No 17 sch 1
renum as s 34 A2003-48 amdt 1.29

Application of Listening Devices Act

s 35 orig s 35 ins 2000 No 17 sch 1
am 2001 No 44 amdt 1.1581
om A2003-48 s 5 (as am A2004-18 s 21)
(prev s 33) ins 2000 No 17 sch 1
renum as s 35 A2003-48 amdt 1.29

Costs and expenses

div 3.6 hdg ins 2000 No 17 sch 1

Power to order payment of costs

s 36 (prev s 34) ins 2000 No 17 sch 1
am A2003-48 amdt 1.30
renum as s 36 A2003-48 amdt 1.31

Evidence in criminal proceedings

pt 4 hdg ins 2000 No 17 sch 1
sub A2003-48 s 4 (as am A2004-18 s 20)

Preliminary—pt 4

div 4.1 hdg ins A2003-48 s 6 (as am A2004-18 s 21)

Definitions—pt 4

s 37 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2005-53 amdt 1.55
sub A2008-41 s 4
def **less serious violent offence** ins A2008-41 s 4
def **serious violent offence** ins A2008-41 s 4
def **sexual offence** ins A2008-41 s 4
def **similar act witness** ins A2008-41 s 4
def **violent offence** ins A2008-41 s 4
def **witness with a disability** ins A2008-41 s 4

Sexual and violent offence proceedings—general

div 4.2 hdg ins A2003-48 s 6 (as am A2004-18 s 21)
sub A2008-41 s 5

Meaning of complainant and sexual offence proceeding for div 4.2

s 38 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2006-40 amdt 2.107; A2008-41 s 6, s 7; A2008-44
amdt 1.56, amdt 1.57

Endnotes

4 Amendment history

Meaning of *violent offence proceeding*—div 4.2

s 38A ins A2008-41 s 8
am A2008-44 amdt 1.58

Meaning of *relevant person*—div 4.2

s 38B ins A2008-41 s 8

Accused may be screened from witness in court

s 38C ins A2008-41 s 8

Cross-examination of complainant or prosecution witness by self-represented accused person—procedure

s 38D ins A2008-41 s 8

Witness may have support person in court

s 38E ins A2008-41 s 8

Sexual and violent offence proceeding—evidence to be given in closed court

s 39 ins A2003-48 s 6 (as am A2004-18 s 21)
sub A2008-41 s 9

Sexual offence proceeding—prohibition of publication of complainant's identity

s 40 hdg sub A2008-41 s 10
s 40 ins A2003-48 s 6 (as am A2004-18 s 21)

Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence

div 4.2A ins A2008-41 s 11

Meaning of *complainant*—div 4.2A

s 40A ins A2008-41 s 11

Meaning of *sexual offence proceeding*—div 4.2A

s 40B ins A2008-41 s 11

Meaning of *violent offence proceeding*—div 4.2A

s 40C ins A2008-41 s 11

Meaning of *witness*—div 4.2A

s 40D ins A2008-41 s 11

Meaning of *audiovisual recording*—div 4.2A

s 40E ins A2008-41 s 11

Audiovisual recording may be admitted as evidence

s 40F ins A2008-41 s 11

Audiovisual recording—notice

s 40G ins A2008-41 s 11

Audiovisual recording—notice for access

s 40H ins A2008-41 s 11

Audiovisual recording—access to accused person

s 40I ins A2008-41 s 11

Audiovisual recording—admissibility

s 40J ins A2008-41 s 11

Audiovisual recording—jury trial

s 40K ins A2008-41 s 11

Transcript of audiovisual recording—access to court

s 40L ins A2008-41 s 11

Audiovisual recording—offences

s 40M ins A2008-41 s 11

Sexual offence proceedings—giving evidence at pre-trial hearing

div 4.2B ins A2008-41 s 11

Meaning of complainant—div 4.2B

s 40N ins A2008-41 s 11

Meaning of sexual offence proceeding—div 4.2B

s 40O ins A2008-41 s 11

Meaning of witness—div 4.2B

s 40P ins A2008-41 s 11

Witness to give evidence at pre-trial hearing

s 40Q ins A2008-41 s 11

Who may be present at pre-trial hearing

s 40R ins A2008-41 s 11

Evidence of witness at pre-trial hearing to be evidence at hearing

s 40S ins A2008-41 s 11

Witness may be required to attend hearing

s 40T ins A2008-41 s 11

Evidence of witness at pre-trial hearing—jury trial

s 40U ins A2008-41 s 11

Recording of witness's evidence at pre-trial hearing admissible in related hearing

s 40V ins A2008-41 s 11

Audiovisual recording of child's evidence—admissibility

s 40W ins A2008-41 s 11

Sexual and violent offence proceedings—giving evidence from places other than courtrooms

div 4.3 hdg ins A2003-48 s 6 (as am A2004-18 s 21)
sub A2008-41 s 12

Endnotes

4 Amendment history

Meaning of *complainant* and *sexual offence proceeding* for div 4.3

s 41 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2005-13 amdt 1.34; A2008-41 s 13, s 14; A2008-44
amdt 1.59, amdt 1.60

Meaning of *violent offence proceeding*—div 4.3

s 41A ins A2008-41 s 15
am A2008-44 amdt 1.61

When does div 4.3 apply?

s 42 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2005-53 amdt 1.56
sub A2008-41 s 16

Giving evidence from place other than courtroom

s 43 ins A2003-48 s 6 (as am A2004-18 s 21)
sub A2008-41 s 17

Consequential orders under div 4.3

s 44 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2008-41 s 18, s 19

Making of orders under div 4.3

s 45 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2008-41 s 20, s 21

Jury to be warned about adverse inferences

s 46 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2008-41 s 22

Failure to comply with div 4.3

s 47 ins A2003-48 s 6 (as am A2004-18 s 21)
am A2008-41 s 23, s 24

Evidence of complainant's sexual reputation and activities

div 4.4 hdg ins A2003-48 s 6 (as am A2004-18 s 21)

Meaning of *complainant* and *sexual offence proceeding* for div 4.4

s 48 ins A2003-48 s 6 (as am A2004-18 s 21)

When does div 4.4 apply?

s 49 ins A2003-48 s 6 (as am A2004-18 s 21)

Immunity of sexual reputation

s 50 ins A2003-48 s 6 (as am A2004-18 s 21)

General immunity of evidence of complainant's sexual activities

s 51 ins A2003-48 s 6 (as am A2004-18 s 21)

Application for leave under s 51

s 52 ins A2003-48 s 6 (as am A2004-18 s 21)

Decision to give leave under s 51

s 53 ins A2003-48 s 6 (as am A2004-18 s 21)

Protection of counselling communications

div 4.5 hdg ins A2003-48 s 6 (as am A2004-18 s 21)

Definitions—div 4.5

s 54 ins A2003-48 s 6 (as am A2004-18 s 21)
def **counselling** ins A2003-48 s 6 (as am A2004-18 s 21)
def **counsellor** ins A2003-48 s 6 (as am A2004-18 s 21)
def **criminal proceeding** ins A2003-48 s 6 (as am A2004-18 s 21)
am A2006-40 amdt 2.108
def **document recording a protected confidence** ins A2003-48 s 6 (as am A2004-18 s 21)
def **harm** ins A2003-48 s 6 (as am A2004-18 s 21)
def **preliminary criminal proceeding** ins A2003-48 s 6 (as am A2004-18 s 21)
am A2006-40 amdt 2.108
def **protected confidence** ins A2003-48 s 6 (as am A2004-18 s 21)
def **protected confidence evidence** ins A2003-48 s 6 (as am A2004-18 s 21)

Meaning of protected confidence for div 4.5

s 55 ins A2003-48 s 6 (as am A2004-18 s 21)

When does div 4.5 apply?

s 56 ins A2003-48 s 6 (as am A2004-18 s 21)
(2), (3) exp 1 January 2005 (s 56 (3))

Immunity for protected confidences in preliminary criminal proceedings

s 57 ins A2003-48 s 6 (as am A2004-18 s 21)

General immunity for protected confidences

s 58 ins A2003-48 s 6 (as am A2004-18 s 21)

Application for leave to disclose protected confidence

s 59 ins A2003-48 s 6 (as am A2004-18 s 21)

Threshold test—legitimate forensic purpose

s 60 ins A2003-48 s 6 (as am A2004-18 s 21)

Preliminary examination of protected confidence evidence

s 61 ins A2003-48 s 6 (as am A2004-18 s 21)

Giving of leave to disclose protected confidence

s 62 ins A2003-48 s 6 (as am A2004-18 s 21)

Ancillary orders for protection of person who made protected confidence

s 63 ins A2003-48 s 6 (as am A2004-18 s 21)

Endnotes

4 Amendment history

No waiver of protected confidence immunity

s 64 ins A2003-48 s 6 (as am A2004-18 s 21)

No protected confidence immunity for medical information

s 65 ins A2003-48 s 6 (as am A2004-18 s 21)

No protected confidence immunity for communications for criminal investigations and proceedings

s 66 ins A2003-48 s 6 (as am A2004-18 s 21)

No protected confidence immunity in case of misconduct

s 67 ins A2003-48 s 6 (as am A2004-18 s 21)

Sexual offence proceedings—directions and warnings to juries

div 4.6 hdg ins A2003-48 s 6 (as am A2004-18 s 21)

Meaning of *complainant* and *sexual offence proceeding* for div 4.6

s 68 ins A2003-48 s 6 (as am A2004-18 s 21)

Comments on complainants' evidence

s 69 ins A2003-48 s 6 (as am A2004-18 s 21)

Comments on children's evidence

s 70 ins A2003-48 s 6 (as am A2004-18 s 21)

Comments about lack of, or delays in making, complaint

s 71 ins A2003-48 s 6 (as am A2004-18 s 21)

Directions about implied consent

s 72 ins A2003-48 s 6 (as am A2004-18 s 21)

Directions about mistaken belief about consent

s 73 ins A2003-48 s 6 (as am A2004-18 s 21)

Family objections

div 4.7 hdg ins A2004-2 amdt 2.11

Application—div 4.7

s 74 ins A2004-2 amdt 2.11
am A2005-13 amdt 1.35; [A2008-20 amdt 4.39](#)

Note for s 74 s 74 also ins A2003-48 s 7 (as am A2004-18 s 22) and
renum as s 82 and then s 100

Family objections to giving evidence

s 75 ins A2004-2 amdt 2.11

Note for s 75 s 75 also ins A2003-48 s 7 (as am A2004-18 s 22) and
renum as s 83 and then s 101

Time to make family objection

s 76 ins A2004-2 amdt 2.11

Person to be made aware of right to make family objection

s 77 ins A2004-2 amdt 2.11

Family objections to be heard in absence of jury

s 78 ins A2004-2 amdt 2.11

Matters court may consider in deciding family objection

s 79 ins A2004-2 amdt 2.11

Prosecution not to comment about family objections

s 80 ins A2004-2 amdt 2.11

Comments by judge and parties about failure to give evidence by family members

s 81 ins A2004-2 amdt 2.11

Proceedings against young peoplediv 4.8 hdg ins A2008-19 amdt 1.85**Exclusion of evidence unlawfully obtained**

s 81A ins A2008-19 amdt 1.85

Evidence in any proceedingspt 4A hdg ins A2008-41 s 25**Meaning of witness with a disability—pt 4A**

s 81B ins A2008-41 s 25

Witness may have support person in court

s 81C ins A2008-41 s 25

Evidence given in closed court

s 81D ins A2008-41 s 25

Certain evidence under court rules not admissiblept 5 hdg orig pt 5 hdg renum as pt 7 hdg
ins A2006-40 amdt 2.109**Evidence not admissible in court—neutral evaluation**s 82 **orig s 82**
(prev s 74) renum as s 100
pres s 82
ins A2006-40 amdt 2.109**Evidence not admissible in court—expert report**s 83 **orig s 83**
(prev s 75) renum as s 101
pres s 83
ins A2006-40 amdt 2.109**Evidence not admissible in court—meeting of experts**

s 84 ins A2006-40 amdt 2.109

Endnotes

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Evidence not admissible in court—evidence taken in examination

s 85 ins A2006-40 amdt 2.109

Publication of evidence

pt 6 hdg reloc from Court Procedures Act 2004 pt 6 A2006-40
amdt 2.90

Application—pt 6

s 90 reloc from Court Procedures Act 2004 s 53 A2006-40
amdt 2.90

Prohibition of publication of evidence etc

s 91 reloc from Court Procedures Act 2004 s 54 A2006-40
amdt 2.90

Noncompliance with s 91 order

s 92 reloc from Court Procedures Act 2004 s 55 A2006-40
amdt 2.90

Miscellaneous

pt 7 hdg (prev pt 5 hdg) ins A2003-48 s 7 (as am A2004-18 s 22)
renum as pt 7 hdg A2006-40 amdt 2.110

Approved forms

s 100 (prev s 74) ins A2003-48 s 7 (as am A2004-18 s 22)
renum as s 82 A2004-2 amdt 2.12
renum as s 100 A2006-40 amdt 2.111

Regulation-making power

s 101 (prev s 75) ins A2003-48 s 7 (as am A2004-18 s 22)
renum as s 83 A2004-2 amdt 2.12
renum as s 101 A2006-40 amdt 2.111

Transitional—Sexual and Violent Offences Legislation Amendment Act 2008

pt 10 hdg ins A2008-41 s 26
exp 1 year after the day it commences (s 151)

Application of amendments

s 150 ins A2008-41 s 26
exp 1 year after the day it commences (s 151)

Expiry—pt 10

s 151 ins A2008-41 s 26
exp 1 year after the day it commences (s 151)

Dictionary

dict ins A2003-48 s 7 (as am A2004-18 s 22)
am A2005-53 amdt 1.57; A2006-23 amdt 1.197
def **audio link** ins A2003-48 s 7 (as am A2004-18 s 22)
def **audiovisual link** ins A2003-48 s 7 (as am A2004-18 s 22)
def **audiovisual recording** ins A2008-41 s 27

- def **complainant** ins A2003-48 s 7 (as am A2004-18 s 22)
sub A2008-41 s 28
- def **counsellor** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **court** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **criminal proceeding** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **document recording a protected confidence** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **family objection** ins A2004-2 amdt 2.13
- def **harm** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **less serious violent offence** ins A2008-41 s 29
- def **Magistrates Court** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **participating State** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **preliminary criminal proceeding** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **prescribed witness** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **proceeding** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **protected confidence** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **protected confidence evidence** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **recognised court** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **relevant person** ins A2008-41 s 29
- def **serious violent offence** ins A2008-41 s 29
- def **sexual offence** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **sexual offence proceeding** ins A2003-48 s 7 (as am A2004-18 s 22)
sub A2008-41 s 28
- def **similar act witness** ins A2008-41 s 29
- def **State** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **territory court** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **tribunal** ins A2003-48 s 7 (as am A2004-18 s 22)
- def **violent offence** ins A2008-41 s 29
- def **violent offence proceeding** ins A2008-41 s 29
- def **witness** ins A2008-41 s 29
- def **witness with a disability** ins A2008-41 s 29

Endnotes

5 Earlier republications

5 Earlier republications

Some earlier republications were not numbered. The number in column 1 refers to the publication order.

Since 12 September 2001 every authorised republication has been published in electronic pdf format on the ACT legislation register. A selection of authorised republications have also been published in printed format. These republications are marked with an asterisk (*) in column 1. Electronic and printed versions of an authorised republication are identical.

Republication No and date	Effective	Last amendment made by	Republication for
R1 (RI) 20 Aug 2003	24 Dec 1992– 30 May 1994	A1992-80	amendments by A2002-80 reissue of printed version
R1A 20 Aug 2003	31 May 1994– 14 Dec 1994	A1994-24	amendments by A1994-24
R2 (RI) 30 Aug 2003	15 Dec 1994– 20 June 1996	A1994-96	amendments by A1994-96 reissue of printed version
R3 (RI) 30 Aug 2003	30 Oct 1998– 23 Dec 1999	A1998-45	amendments by A1996-25 and A1998-45
R4 (RI) 30 Aug 2003	1 June 2000– 11 Sept 2001	A2000-17	amendments by A1999-64, A1999-91 and A2000-17 reissue of printed version
R5 13 Dec 2001	12 Sept 2001– 23 Sept 2001	<u>A2001-90</u>	amendments by A2001-44
R6 27 Mar 2002	27 Mar 2002– 16 Sept 2002	A2001-90	amendments by A2001-82 and A2001-90

Republication No and date	Effective	Last amendment made by	Republication for
R7 17 Sept 2002	17 Sept 2002– 16 Jan 2003	A2002-30	amendments by A2002-30
R8 17 Jan 2003	17 Jan 2003– 21 Mar 2004	A2002-49	amendments by A2002-49
R9 22 Mar 2004	22 Mar 2004– 29 Apr 2004	A2004-2	amendments by A2004-2
R10* 30 Apr 2004	30 Apr 2004– 1 Jan 2005	A2004-18	amendments by A2003-48, A2004-2 and A2004-18
R11 7 Jan 2005	2 Jan 2005– 24 Mar 2005	A2004-18	commenced expiry
R12 25 Mar 2005	25 Mar 2005– 22 Nov 2005	A2005-13	amendments by A2005-13
R13 23 Nov 2005	23 Nov 2005– 1 June 2006	A2005-53	amendments by A2005-53
R14 2 June 2006	2 June 2006– 28 Sept 2006	A2006-23	amendments by A2006-23
R15 29 Sept 2006	29 Sept 2006– 17 Dec 2007	A2006-40	amendments by A2006-40
R16 18 Dec 2007	18 Dec 2007– 8 Sept 2008	A2007-15	amendments by A2007-15

6 Renumbered provisions

This Act was renumbered under the *Legislation (Republication) Act 1996* in R4 (see Act 2000 No 17 sch 1). Details of renumbered provisions are shown in endnote 4 (Amendment history). For a table showing the renumbered provisions, see R6.

Endnotes

7 Uncommenced amendments

7 Uncommenced amendments

The following amendments have not been included in this republication because they were uncommenced at the republication date:

Children and Young People Act 2008 A2008-19 sch 1 pt 1.7

Part 1.7 Evidence (Miscellaneous Provisions) Act 1991

[1.85] New division 4.8

insert

Division 4.8 Proceedings against young people

81A Exclusion of evidence unlawfully obtained

- (1) This section applies if, in a proceeding in the Childrens Court against a young person in relation to an offence, the court is satisfied that evidence tendered to the court was obtained in contravention of, or in consequence of a contravention of, the *Crimes Act 1900*, part 10 (Criminal investigation) or the *Crimes Act 1914* (Cwlth).
- (2) The Childrens Court must refuse to admit the evidence in the proceeding unless satisfied that—
 - (a) admission of the evidence is substantially in the public interest in relation to the administration of criminal justice; and
 - (b) the public interest would outweigh any prejudice to the rights of a person, including the young person, that has occurred or is likely to occur as a result of the contravention or the admission of the evidence.

- (3) The matters to which the Childrens Court may have regard in deciding whether it should admit the evidence include—
- (a) the seriousness of the offence to which the evidence relates, the difficulty of detecting the offender, the need to apprehend the offender and the need to preserve evidence of the facts; and
 - (b) the nature and seriousness of the contravention; and
 - (c) the extent to which the evidence might have been lawfully obtained.
- (4) This section is in addition to, and does not limit, any other law or rule under which the Childrens Court may refuse to admit evidence.

**Children and Young People (Consequential Amendments)
Act 2008 A2008-20 sch 3 pt 3.13, sch 4 pt 4.15**

Part 3.13 Evidence (Miscellaneous Provisions) Act 1991

[3.27] Section 7 (d)

substitute

- (d) a proceeding under the care and protection chapters of the *Children and Young People Act 2008*; or

Part 4.15 Evidence (Miscellaneous Provisions) Act 1991

[4.39] Section 74 (2) (b)

substitute

- (b) an offence against any of the following provisions of the *Children and Young People Act 2008*:
- (i) section 789 (Offence—contravene employment prohibition notice);
 - (ii) section 791 (Offence—contravene employment conditions notice);
 - (iii) section 803 (Offence—employment of child or young person under school-leaving age in high risk employment);
 - (iv) section 804 (Offence—contravene condition of permit);

Sexual and Violent Offences Legislation Amendment Act 2008 A2008-41 pt 2

Part 2 Evidence (Miscellaneous Provisions) Act 1991

3 Legislation amended—pt 2

This part amends the *Evidence (Miscellaneous Provisions) Act 1991*.

4 Section 37

substitute

37 Definitions—pt 4

In this part:

less serious violent offence means an offence against any of the following provisions of the *Crimes Act 1900*:

- (a) section 21 (1) (Wounding);
- (b) section 22 (Assault with intent to commit certain indictable offences);
- (c) section 23 (1) (Inflicting actual bodily harm);
- (d) section 24 (1) (Assault occasioning actual bodily harm);
- (e) section 25 (Causing grievous bodily harm);
- (f) section 26 (Common assault);
- (g) section 28 (Acts endangering health etc);
- (h) section 29 (4) and (5) (Culpable driving of motor vehicle);
- (i) section 31 (Threat to inflict grievous bodily harm);
- (j) section 35 (Stalking);
- (k) section 37 (Abduction of young person);
- (l) section 41 (Exposing or abandoning child).

serious violent offence means—

- (a) an offence against any of the following provisions of the *Crimes Act 1900*:
 - (i) section 12 (Murder);
 - (ii) section 15 (Manslaughter);

Endnotes

7 Uncommenced amendments

- (iii) section 19 (Intentionally inflicting grievous bodily harm);
 - (iv) section 20 (Recklessly inflicting grievous bodily harm);
 - (v) section 21 (2) (Wounding);
 - (vi) section 23 (2) (Inflicting actual bodily harm);
 - (vii) section 24 (2) (Assault occasioning actual bodily harm);
 - (viii) section 27 (Acts endangering life etc);
 - (ix) section 29 (2) and (3) (Culpable driving of motor vehicle);
 - (x) section 30 (Threat to kill);
 - (xi) section 32 (Demands accompanied by threats);
 - (xii) section 34 (Forcible confinement);
 - (xiii) section 36 (Torture);
 - (xiv) section 38 (Kidnapping);
 - (xv) section 40 (Unlawfully taking child etc);
 - (xvi) section 42 (Child destruction);
 - (xvii) section 43 (Childbirth—grievous bodily harm); and
- (b) an offence against any of the following provisions of the *Criminal Code 2002*:
- (i) section 309 (Robbery);
 - (ii) section 310 (Aggravated robbery).

sexual offence means an offence against the *Crimes Act 1900*, part 3 (Sexual offences), part 4 (Female genital mutilation) or part 5 (Sexual servitude).

Note A reference to an offence against a territory law includes a reference to a related ancillary offence, eg attempt (see Legislation Act, s 189).

similar act witness means a witness in a sexual or violent offence proceeding who gives, or intends to give, evidence in the proceeding that—

- (a) relates to an act committed on the witness by the accused; and
- (b) is tendency evidence or coincidence evidence under the *Evidence Act 1995* (Cwlth).

violent offence means a serious violent offence or a less serious violent offence.

witness with a disability means a person who gives, or intends to give, evidence in a proceeding and has a mental or physical disability that affects the person's ability to give evidence.

5 Division 4.2 heading

substitute

Division 4.2 Sexual and violent offence proceedings—general

6 Meaning of *complainant* and *sexual offence proceeding* for div 4.2 Section 38 (1)

substitute

- (1) For this division, the *complainant* in relation to a sexual or violent offence proceeding, is the person, or any of the people, against whom a sexual or violent offence the subject of the proceeding is alleged, or has been found, to have been committed.

Endnotes

7 Uncommenced amendments

7 Section 38 (4), new note

insert

Note A complainant is not required to attend and give evidence at a committal proceeding in relation to a sexual offence (see *Magistrates Court Act 1930*, s 90AA (11)).

8 New sections 38A, 38B, 38C, 38D and 38E

insert

38A Meaning of *violent offence proceeding*—div 4.2

- (1) For this division, a *violent offence proceeding* is—
 - (a) a proceeding for a violent offence; or
 - (b) a proceeding in relation to bail for a person charged with a violent offence, whether or not the person is also charged with any other offence; or
 - (c) a sentencing proceeding for a person convicted of a violent offence, whether or not the person is also convicted of any other offence; or
 - (d) an appeal or other review (whether by prerogative order or otherwise) arising out of a proceeding mentioned in paragraphs (a) to (c); or
 - (e) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c).
- (2) For subsection (1) (a), a *proceeding for a violent offence* includes—
 - (a) a proceeding for a violent offence and any other offence; and
 - (b) a proceeding for a violent offence and any other offence as an alternative to the violent offence; and

- (c) a proceeding for a violent offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (3) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

38B Meaning of *relevant person*—div 4.2

- (1) For this division, *relevant person*, in relation to an accused person, means—
 - (a) a domestic partner of the accused person; or
 - Note* A *domestic partner* need not be an adult (see Legislation Act, s 169).
 - (b) a relative of the accused person; or
 - (c) a child of a domestic partner of the accused person; or
 - (d) a parent of a child of the accused person; or
 - (e) someone who is in a domestic relationship with the accused person.
- (2) For this section, a *relative* of an accused person—
 - (a) means the accused person's—
 - (i) father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law or mother-in-law; or
 - (ii) son, daughter, grandson, granddaughter, stepson, stepdaughter, son-in-law or daughter-in-law; or
 - (iii) brother, sister, half-brother, half-sister, stepbrother, stepsister, brother-in-law or sister-in-law; or
 - (iv) uncle, aunt, uncle-in-law or aunt-in-law; or
 - (v) nephew, niece or cousin; and

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- (b) if the accused person has or had a domestic partner (other than a spouse)—includes someone who would have been a relative mentioned in paragraph (a) if the accused person had been legally married to the domestic partner; and

Note **Domestic partner**—see the Legislation Act, s 169.

- (c) includes—

- (i) someone who has been a relative mentioned in paragraph (a) or (b) of the accused person; and
- (ii) anyone else who could reasonably be considered to be a relative of the accused person.

Examples—par (c) (ii)

- 1 if the accused person is an Aboriginal or Torres Strait Islander, the following people:
- (a) a person the accused person has responsibility for, or an interest in, in accordance with the traditions and customs of the accused person's Aboriginal or Torres Strait Islander community;
- (b) a person who has responsibility for, or an interest in, the accused person in accordance with the traditions and customs of the accused person's Aboriginal or Torres Strait Islander community
- 2 a person regarded and treated by the accused person as a relative, for example, as an uncle or aunt

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (3) In this section:

domestic relationship—see the *Domestic Relationships Act 1994*, section 3.

38C Accused may be screened from witness in court

- (1) This section applies to the complainant or a similar act witness (the **witness**) giving evidence in—
- (a) a sexual offence proceeding; or

- (b) a violent offence proceeding in relation to a serious violent offence; or
- (c) a violent offence proceeding in relation to a less serious violent offence if—
 - (i) the witness is a relevant person in relation to the accused person; or
 - (ii) the court considers that the witness has a disability that affects the witness's ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

Examples—par (c) (ii)

- 1 the witness is likely to suffer severe emotional trauma because of the nature of the alleged offence
- 2 the witness is intimidated or distressed because of the witness's relationship to the accused person

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The court may order that the courtroom be arranged in a way that, while the witness is giving evidence, the witness cannot see—
 - (a) the accused person; or
 - (b) anyone else the court considers should be screened from the witness.
- (3) However, the witness must be visible to—
 - (a) the presiding judicial officer; and
 - (b) if the proceeding is a trial by jury—the jury; and
 - (c) the accused person; and
 - (d) the accused person's lawyer; and

- (e) if the court has ordered that someone should be screened from the complainant or similar act witness—the person.

38D Cross-examination of complainant or prosecution witness by self-represented accused person—procedure

- (1) This section applies to the complainant or a similar act witness (the *witness*) giving evidence for the prosecution in—
 - (a) a sexual offence proceeding; or
 - (b) a violent offence proceeding in relation to a serious violent offence; or
 - (c) a violent offence proceeding in relation to a less serious violent offence if—
 - (i) the witness is a relevant person in relation to the accused person; or
 - (ii) the court considers that the witness has a disability that affects the witness’s ability to give evidence because of the circumstances of the proceeding or the witness’s circumstances.

Examples—par (c) (ii)

- 1 the witness is likely to suffer severe emotional trauma because of the nature of the alleged offence
- 2 the witness is intimidated or distressed because of the witness’s relationship to the accused person

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) This section also applies to a child or witness with a disability (the *witness*) giving evidence for the prosecution in a sexual or violent offence proceeding.
- (3) A self-represented accused person must not personally cross-examine a witness.

- (4) If the self-represented accused person intends to cross-examine a witness, the court must—
- (a) tell the person that the person must not cross-examine the witness personally; and
 - (b) if the proceeding is a trial by jury—tell the jury that the person must not cross-examine the witness personally; and
 - (c) ask the person if the person has sought legal representation for the cross-examination of the witness; and
 - (d) if the court is satisfied that the person has not had a reasonable opportunity to obtain legal representation for the cross-examination, and the person applies for an adjournment to obtain the legal representation—adjourn the proceeding; and
 - (e) if the court is satisfied that the person had a reasonable opportunity to obtain legal representation for the cross-examination, and has not obtained legal representation—
 - (i) order that the person obtain legal representation; and
 - (ii) make any other order the court considers necessary to secure legal representation for the person; and
 - (iii) adjourn the proceeding.
- (5) If the court makes an order under subsection (4) (e) (i), the court must tell the self-represented accused person that if the person refuses legal representation, or refuses to cooperate with the person’s legal representative—
- (a) the person may not cross-examine the witness; and
 - (b) the person may not adduce evidence from another witness in relation to a fact in issue to contradict the evidence of the witness in relation to the fact if the fact in the other witness’s evidence intended to contradict the witness’s evidence has not been put to the witness in cross-examination.

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- (6) If the proceeding is a trial by jury, the court must tell the jury that—
- (a) a self-represented accused person obtaining, or being provided with, legal representation to cross-examine the witness is a usual practice; and
 - (b) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the cross-examination is not conducted personally by the self-represented accused person.
- (7) In this section:
- self-represented accused person*, in a sexual or violent offence proceeding, means an accused person who is not represented by a legal practitioner in the proceeding.

38E Witness may have support person in court

- (1) This section applies to the complainant or a similar act witness (the *witness*) giving evidence in—
- (a) a sexual offence proceeding; or
 - (b) a violent offence proceeding in relation to a serious violent offence; or
 - (c) a violent offence proceeding in relation to a less serious violent offence if—
 - (i) the witness is a relevant person in relation to the accused person; or
 - (ii) the court considers that the witness has a disability that affects the witness's ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

Examples—par (c) (ii)

- 1 the witness is likely to suffer severe emotional trauma because of the nature of the alleged offence

2 the witness is intimidated or distressed because of the witness's relationship to the accused person

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The court must, on application by a party who intends to call a witness, order that the witness have a person (a ***support person***) in the court close to, and within the witness's sight, while the witness gives evidence.
- (3) The court may order that a witness have more than 1 support person if it considers it is in the interests of justice.
- (4) The support person must not—
 - (a) speak for the witness during the proceeding; or
 - (b) otherwise interfere in the proceeding.
- (5) Unless the court otherwise orders, the support person must not be, or be likely to be, a witness or party in the proceeding.
- (6) If the proceeding is a trial by jury, the court must tell the jury that—
 - (a) a witness having a support person in the court while giving evidence is a usual practice; and
 - (b) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the support person is present.

9 Section 39

substitute

39 Sexual and violent offence proceeding—evidence to be given in closed court

- (1) This section applies to the complainant or a similar act witness (the *witness*) giving evidence in—
- (a) a sexual offence proceeding; or
 - (b) a violent offence proceeding in relation to a serious violent offence; or
 - (c) a violent offence proceeding in relation to a less serious violent offence if—
 - (i) the witness is a relevant person in relation to the accused person; or
 - (ii) the court considers that the witness has a disability that affects the witness's ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

Examples—par (c) (ii)

- 1 the witness is likely to suffer severe emotional trauma because of the nature of the alleged offence
- 2 the witness is intimidated or distressed because of the witness's relationship to the accused person

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The court may order that the court be closed to the public while all or part of the witness's evidence (including evidence given under cross-examination) is given.

Note The accused is entitled to a fair and public hearing, but the court may exclude the press and public in certain circumstances (see *Human Rights Act 2004*, s 21 (2)).

- (3) In deciding whether to order that the court be closed to the public, the court must consider whether—
- (a) the witness wants to give evidence in open court; and
 - (b) it is in the interests of justice that the witness give evidence in open court.
- (4) However, an order under this section does not stop the following people from being in court when the witness gives evidence:
- (a) a person nominated by the witness;
 - (b) a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer.

Note Publishing certain information in relation to sexual offence proceedings is an offence (see s 40).

- (5) In this section, a reference to a person giving evidence includes the person giving evidence by the playing of an audiovisual recording of the evidence at a hearing under division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence), division 4.2B (Sexual offence proceedings—giving evidence at pre-trial hearing) or by the person giving evidence by audiovisual link under division 4.3 (Sexual and violent offence proceedings—giving evidence from places other than courtrooms).

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10 Section 40 heading

substitute

40 Sexual offence proceeding—prohibition of publication of complainant’s identity

11 New divisions 4.2A and 4.2B

insert

Division 4.2A Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence

40A Meaning of *complainant*—div 4.2A

For this division, the *complainant*, in relation to a sexual or violent offence proceeding, is the person, or any of the people, against whom a sexual or violent offence the subject of the proceeding is alleged, or has been found, to have been committed.

40B Meaning of *sexual offence proceeding*—div 4.2A

- (1) For this division, a *sexual offence proceeding* is—
- (a) a proceeding for a sexual offence; or
 - (b) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (c) a proceeding under the *Domestic Violence and Protection Orders Act 2001* in relation to a sexual offence; or
 - (d) a proceeding under the *Victims of Crime (Financial Assistance) Act 1983* in relation to a sexual offence; or

- (e) a proceeding by way of an inquest or inquiry in the Coroner's Court in relation to a sexual offence; or
 - (f) an appeal arising out of a proceeding mentioned in paragraphs (a) to (e).
- (2) For subsection (1) (a), a *proceeding for a sexual offence* includes—
- (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and
 - (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.

40C Meaning of *violent offence proceeding*—div 4.2A

- (1) For this division, a *violent offence proceeding* is—
- (a) a proceeding for a violent offence; or
 - (b) a sentencing proceeding for a person convicted of a violent offence, whether or not the person is also convicted of any other offence; or
 - (c) a proceeding under the *Domestic Violence and Protection Orders Act 2001* in relation to a violent offence; or
 - (d) a proceeding under the *Victims of Crime (Financial Assistance) Act 1983* in relation to a violent offence; or
 - (e) a proceeding by way of an inquest or inquiry in the Coroner's Court in relation to a violent offence; or
 - (f) an appeal arising out of a proceeding mentioned in paragraphs (a) to (e).
- (2) For subsection (1) (a), a *proceeding for a violent offence* includes—
- (a) a proceeding for a violent offence and any other offence; and

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(b) a proceeding for a violent offence and any other offence as an alternative to the violent offence; and

(c) a proceeding for a violent offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.

40D Meaning of *witness*—div 4.2A

(1) For this division, a *witness* is the complainant in a sexual offence or a violent offence proceeding who—

(a) is a child; or

(b) is intellectually impaired.

(2) In this section:

intellectually impaired—a person is *intellectually impaired* if the person has—

(a) an appreciably below average general intellectual function; or

(b) a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder or a developmental disorder; or

(c) any other intellectual disability.

40E Meaning of *audiovisual recording*—div 4.2A

(1) For this division, an *audiovisual recording* is an audiovisual recording that is of a witness answering questions of a prescribed person in relation to the investigation of a sexual or violent offence.

(2) The audiovisual recording must include the following:

(a) the date when, and the place where, the recording was made;

(b) the times when the recording started and ended;

- (c) the times when any break in questioning started and ended, and the reason for the break;
 - (d) the name of each person present during any part of the recording;
 - (e) for each person present during any part of the recording—the part when the person was present.
- (3) The audiovisual recording must—
- (a) be certified by a prescribed person as an accurate record of the witness answering the questions; and
 - (b) not be edited or changed, unless the court hearing the proceeding in which the recording is tendered otherwise orders.

Example—court ordering change

editing the recording to omit inadmissible material

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

40F Audiovisual recording may be admitted as evidence

- (1) An audiovisual recording may—
- (a) be played at the hearing of a proceeding for the sexual or violent offence to which it relates; and
 - (b) if the recording is played at the hearing—be admitted as the witness’s evidence in chief in the proceeding as if the witness gave the evidence at the hearing in person.
- (2) However, the court may refuse to admit all or any part of the audiovisual recording.
- (3) The witness must not be in the courtroom, or visible to anyone in the courtroom by audiovisual link, when the audiovisual recording is played at the hearing.

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- (4) This section is subject to section 40J.

40G Audiovisual recording—notice

- (1) This section applies if the prosecutor in a sexual or violent offence proceeding intends to tender an audiovisual recording as evidence.
- (2) The prosecutor must give to the accused person—
- (a) written notice that the prosecutor intends to tender the audiovisual recording; and
 - (b) a copy of a transcript of the recording.
- (3) The notice must state the following:
- (a) each audiovisual recording the prosecutor intends to tender;
 - (b) that the accused person and the person's lawyer are entitled to see and listen to each recording at a police station or somewhere else decided by the commissioner of police;
 - (c) the name of the person responsible (the *responsible person*) for arranging access to each recording.

40H Audiovisual recording—notice for access

- (1) The accused person, or the person's lawyer, must give written notice to the responsible person to have access to an audiovisual recording.
- (2) The notice must state the following:
- (a) the name of the accused person, and the person's lawyer;
 - (b) each audiovisual recording for which access is required.

40I Audiovisual recording—access to accused person

- (1) This section applies if an accused person, or the person's lawyer, gives notice under section 40H requesting access to an audiovisual recording.

- (2) The responsible person must give the person who gave notice access to see and listen to the audiovisual recording as soon as practicable after receiving the notice under section 40H.
- (3) The person who gave notice may have access to an audiovisual recording more than once.
- (4) The accused person, and the person's lawyer, must not be given, or take a copy of, an audiovisual recording.

40J Audiovisual recording—admissibility

- (1) An audiovisual recording is admissible in a sexual or violent offence proceeding only if—
 - (a) notice is given under section 40G; and
 - (b) a copy of a transcript of the recording is given to the accused person, or the person's lawyer, a reasonable time before the start of the hearing of the proceeding; and
 - (c) the accused person, and the person's lawyer, are given a reasonable opportunity to see and listen to the recording.
- (2) However, if the prosecutor fails to give notice under section 40G, the audiovisual recording is admissible if—
 - (a) a copy of a transcript of the recording is given to the accused person, or the person's lawyer, a reasonable time before the start of the hearing of the proceeding; and
 - (b) the accused person, and the person's lawyer, are given a reasonable opportunity to see and listen to the recording; and
 - (c) the court considers it is in the interests of justice to admit the recording.
- (3) This section does not prevent the parties consenting to the admission in evidence of an audiovisual recording.

40K Audiovisual recording—jury trial

- (1) This section applies if—
 - (a) a sexual or violent offence proceeding is a trial by jury; and
 - (b) an audiovisual recording is admitted in evidence in the proceeding.
- (2) The court must tell the jury that—
 - (a) admission of the audiovisual recording is a usual practice; and
 - (b) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence is given in that way.
- (3) If the court considers that a transcript of the audiovisual recording would be likely to help the jury’s understanding of the evidence, the court may order that the transcript be made available to the jury.

40L Transcript of audiovisual recording—access to court

If an audiovisual recording is admitted in evidence in a sexual or violent offence proceeding, the court may order that a transcript of the recording be made available to the court.

40M Audiovisual recording—offences

- (1) A person commits an offence if the person, without authority—
 - (a) possesses an audiovisual recording; or
 - (b) supplies, or offers to supply, an audiovisual recording to another person; or

- (c) plays, copies or erases, or allows someone else to play, copy or erase, an audiovisual recording.

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

- (2) For this section, a person has *authority* in relation to an audiovisual recording only if the person does something with the recording in connection with the proceeding for which the recording is prepared, or a re-trial or appeal in relation to the proceeding.

Division 4.2B Sexual offence proceedings—giving evidence at pre-trial hearing

40N Meaning of *complainant*—div 4.2B

For this division, the *complainant*, in relation to a sexual offence proceeding, is the person, or any of the people, against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.

40O Meaning of *sexual offence proceeding*—div 4.2B

- (1) For this division, a *sexual offence proceeding* is—
- (a) a proceeding for a sexual offence; or
 - (b) a sentencing proceeding for a person convicted of a sexual offence, whether or not the person is also convicted of any other offence; or
 - (c) a proceeding under the *Domestic Violence and Protection Orders Act 2001* in relation to a sexual offence; or
 - (d) a proceeding under the *Victims of Crime (Financial Assistance) Act 1983* in relation to a sexual offence; or
 - (e) a proceeding by way of an inquest or inquiry in the Coroner's Court in relation to a sexual offence; or

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- (f) an appeal arising out of a proceeding mentioned in paragraphs (a) to (e).
- (2) For subsection (1) (a), a *proceeding for a sexual offence* includes—
 - (a) a proceeding for a sexual offence and any other offence; and
 - (b) a proceeding for a sexual offence and any other offence as an alternative to the sexual offence; and
 - (c) a proceeding for a sexual offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.

40P Meaning of *witness*—div 4.2B

- (1) For this division, a *witness* is a prosecution witness in a sexual offence proceeding who—
 - (a) is a child; or
 - (b) is intellectually impaired; or
 - (c) is a complainant who the court considers must give evidence as soon as practicable because the complainant is likely to—
 - (i) suffer severe emotional trauma; or
 - (ii) be intimidated or distressed.
- (2) In this section:
intellectually impaired—a person is *intellectually impaired* if the person has—
 - (a) an appreciably below average general intellectual function; or
 - (b) a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder or a developmental disorder; or
 - (c) any other intellectual disability.

40Q Witness to give evidence at pre-trial hearing

- (1) A witness must give the witness's evidence at a pre-trial hearing by audiovisual link from a place that—
 - (a) is not the courtroom in which the pre-trial hearing is held; but
 - (b) is linked to the courtroom by an audiovisual link.
- (2) However, the witness's evidence in chief given at a pre-trial hearing may include an audiovisual recording under division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence).
- (3) If an audiovisual recording under division 4.2A is played at the pre-trial hearing, the witness must not be visible to anyone in the courtroom by audiovisual link when the audiovisual recording is played.
- (4) While the witness is at the place to give evidence, the place is taken for all purposes to be part of the courtroom in which the pre-trial hearing is held.
- (5) While the witness is at the place to give evidence—
 - (a) the accused person must not be at the place; and
 - (b) the witness must not be able to see or hear the accused person; and
 - (c) the accused person must be able to see and hear the witness give evidence; and
 - (d) the accused person must be able to communicate with the person's lawyer.

40R Who may be present at pre-trial hearing

- (1) Only the following people may be present in the courtroom at the pre-trial hearing:
 - (a) the presiding judicial officer;

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- (b) the prosecutor;
 - (c) the accused person;
 - (d) the accused person's lawyer;
 - (e) anyone else the court considers appropriate.
- (2) While the witness is at a place to give evidence, only the following people may be present at the place:
- (a) a support person under section 38E (2) or section 81C;
 - (b) anyone else the court considers appropriate.
- (3) Each person who is present at the place where the witness is to give evidence must be recorded on the audiovisual recording recorded under section 40S.
- (4) The judicial officer who presides at the pre-trial hearing need not be the judicial officer who presides at the trial at which the audiovisual recording of the witness's evidence is tendered.

40S Evidence of witness at pre-trial hearing to be evidence at hearing

- (1) The evidence of a witness (including cross-examination and re-examination) given under this division must be recorded as an audiovisual recording.
- (2) The evidence in chief of the witness may include an audiovisual recording under section 40E (Meaning of *audiovisual recording*—div 4.2A).
- (3) The audiovisual recording of the witness's evidence must—
- (a) be played at the hearing of the sexual offence proceeding for which the pre-trial hearing was held; and
 - (b) be admitted in evidence as the witness's evidence at the hearing as if the witness gave the evidence at the hearing in person.

- (4) The witness must not be in the courtroom when the audiovisual recording is played at the hearing.

40T Witness may be required to attend hearing

- (1) This section applies if an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.
- (2) The accused person may apply to the court for an order that the witness attend the hearing of the sexual offence proceeding to give further evidence.
- (3) The court must not make the order unless satisfied that—
- (a) if the witness had given evidence in person at the hearing of the sexual offence proceeding, the witness could be recalled; and
 - (b) it is in the interests of justice to make the order.
- (4) If the courtroom where the proceeding is heard and another place are linked by an audiovisual link, a witness recalled to give evidence under this section must give evidence by audiovisual link under division 4.3 (Sexual and violent offence proceedings—giving evidence from places other than courtrooms), unless the court otherwise orders.
- (5) The court may make an order under subsection (4) only if satisfied that—
- (a) the witness prefers to give evidence in the courtroom; or
 - (b) if the order is not made—
 - (i) the sexual offence proceeding may be unreasonably delayed; or
 - (ii) there is a substantial risk that the court will not be able to ensure that the sexual offence proceeding is conducted fairly.

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- (6) While the witness is at the other place to give evidence, the place is taken for all purposes to be part of the courtroom.

40U Evidence of witness at pre-trial hearing—jury trial

- (1) This section applies if—
- (a) a sexual offence proceeding is a trial by jury; and
 - (b) an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of the proceeding.
- (2) The court must tell the jury that—
- (a) the witness gave the evidence by audiovisual link at a pre-trial hearing; and
 - (b) admission of the audiovisual recording is a usual practice; and
 - (c) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the evidence was given in that way.

40V Recording of witness's evidence at pre-trial hearing admissible in related hearing

- (1) This section applies if an audiovisual recording of a witness's evidence given at a pre-trial hearing is admitted in evidence at the hearing of a sexual offence proceeding.
- (2) The recording is admissible as the witness's evidence in a related proceeding unless the court in the related proceeding otherwise orders.
- (3) However, the court in the related proceeding may—
- (a) refuse to admit all or any part of the audiovisual recording in evidence; and

- (b) if the court refuses to admit part of the recording in evidence—
order that the part that is not admitted be deleted from the recording.
- (4) A party in the related proceeding may apply to the court for an order that the witness attend the hearing to give further evidence.
- (5) The court must not make the order unless satisfied that—
 - (a) the applicant has become aware of something that the applicant did not know or could not reasonably have known when the audiovisual recording was recorded; and
 - (b) if the witness had given evidence in person at the hearing, the witness could be recalled; and
 - (c) it is in the interests of justice to make the order.
- (6) In this section:
related proceeding, in relation to the proceeding in which the audiovisual recording was admitted in evidence, means—
 - (a) a re-hearing or re-trial of, or appeal from, the hearing of the proceeding; or
 - (b) another proceeding in the same court as the proceeding for the offence, or another offence arising from the same, or the same set of, circumstances; or
 - (c) a civil proceeding arising from the offence.

40W Audiovisual recording of child's evidence—admissibility

- (1) This section applies if—
 - (a) a child has given evidence under this division; and
 - (b) the evidence is recorded as an audiovisual recording; and
 - (c) the child turns 18 years old before the audiovisual recording is admitted in evidence.

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- (2) The admissibility of the audiovisual recording as evidence is not affected only because the child turns 18 years old.

12 Division 4.3 heading

substitute

Division 4.3 Sexual and violent offence proceedings—giving evidence from places other than courtrooms

13 Meaning of *complainant* and *sexual offence proceeding* for div 4.3 Section 41 (1)

substitute

- (1) For this division, the *complainant*, in relation to a sexual or violent offence proceeding, is the person, or any of the people, against whom a sexual or violent offence the subject of the proceeding is alleged, or has been found, to have been committed.

14 Section 41 (4), new note

insert

Note A complainant is not required to attend and give evidence at a committal proceeding in relation to a sexual offence (see *Magistrates Court Act 1930*, s 90AA (11)).

15 New section 41A

insert

41A Meaning of *violent offence proceeding*—div 4.3

- (1) For this division, a *violent offence proceeding* is—
(a) a proceeding for a violent offence; or

- (b) a sentencing proceeding for a person convicted of a violent offence, whether or not the person is also convicted of any other offence; or
 - (c) a proceeding under the *Domestic Violence and Protection Orders Act 2001* in relation to a violent offence; or
 - (d) a proceeding under the *Victims of Crime (Financial Assistance) Act 1983* in relation to a violent offence; or
 - (e) a proceeding by way of an inquest or inquiry in the Coroner's Court in relation to a violent offence; or
 - (f) an appeal or other review arising out of a proceeding mentioned in paragraphs (a) to (e).
- (2) For subsection (1) (a), a ***proceeding for a violent offence*** includes—
- (a) a proceeding for a violent offence and any other offence; and
 - (b) a proceeding for a violent offence and any other offence as an alternative to the violent offence; and
 - (c) a proceeding for a violent offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (3) To remove any doubt, for this section, a ***proceeding*** includes a committal proceeding.

16 Section 42

substitute

42 When does div 4.3 apply?

- (1) This division applies if the complainant or a similar act witness (the *witness*) is to give evidence in any of the following proceedings, whether the evidence is to be given on oath or otherwise:
- (a) a sexual offence proceeding;
 - (b) a violent offence proceeding in relation to a serious violent offence;
 - (c) a violent offence proceeding in relation to a less serious violent offence if—
 - (i) the witness is a relevant person in relation to the accused person; or
 - (ii) the court considers that the witness has a disability that affects the witness's ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

Examples—par (c) (ii)

- 1 the witness is likely to suffer severe emotional trauma because of the nature of the alleged offence
- 2 the witness is intimidated or distressed because of the witness's relationship to the accused person

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) In this section:

relevant person—see section 38B.

17 Section 43

substitute

43 Giving evidence from place other than courtroom

- (1) This section applies if the courtroom where a sexual or violent offence proceeding is heard and another place are linked by an audiovisual link.
- (2) The evidence of the complainant and each similar act witness must be given by audiovisual link from the other place unless the court otherwise orders.
- (3) The court may make an order under subsection (2) only if satisfied—
 - (a) that—
 - (i) for the complainant—the complainant prefers to give evidence in the courtroom; and
 - (ii) for a similar act witness—the witness prefers to give evidence in the courtroom; or
 - (b) if the order is not made—
 - (i) the sexual or violent offence proceeding may be unreasonably delayed; or
 - (ii) there is a substantial risk that the court will not be able to ensure that the sexual or violent offence proceeding is conducted fairly.
- (4) While the complainant or similar act witness is at the other place to give evidence, the place is taken for all purposes to be part of the courtroom.
- (5) While the complainant or similar act witness is at the other place to give evidence—
 - (a) the accused person must not be at the place; and

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- (b) the witness must not be able to see or hear the accused person;
and
- (c) the accused person must be able to see and hear the witness
give evidence; and
- (d) the accused person must be able to communicate with the
person's lawyer.

18 Consequential orders under div 4.3 Section 44

omit

complainant

substitute

complainant or similar act witness

19 Section 44

omit

sexual offence

substitute

sexual or violent offence

20 Making of orders under div 4.3 Section 45 (1)

omit

sexual offence

substitute

sexual or violent offence

21 Section 45 (1)

omit

or the complainant

substitute

, the complainant or a similar act witness

**22 Jury to be warned about adverse inferences
Section 46**

omit

sexual offence

substitute

sexual or violent offence

**23 Failure to comply with div 4.3
Section 47 (1)**

omit

If the complainant's evidence

substitute

If the evidence of the complainant or a similar act witness

24 Section 47 (2)

omit

sexual offence

substitute

sexual or violent offence

25 New part 4A

insert

Part 4A Evidence in any proceedings

81B Meaning of *witness with a disability*—pt 4A

For this part, a *witness with a disability* is a person who gives evidence in a proceeding and has a mental or physical disability that affects the person's ability to give evidence.

81C Witness may have support person in court

- (1) This section applies to any of the following people (a *witness*) giving evidence in a proceeding:
 - (a) a child;
 - (b) a witness with a disability.
- (2) The court must, on application by a party that intends to call a witness, order that the witness have a person (a *support person*) in the court close to, and within the witness's sight, while the witness gives evidence.
- (3) The court may order that a witness have more than 1 support person if it considers it is in the interests of justice.
- (4) The support person must not—
 - (a) speak for the witness during the proceeding; or
 - (b) otherwise interfere in the proceeding.
- (5) Unless the court otherwise orders, the support person must not be, or be likely to be, a witness or party in the proceeding.

- (6) If the proceeding is a trial by jury, the court must tell the jury that—
- (a) a witness having a support person in the court while giving evidence is a usual practice; and
 - (b) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the support person is present.

81D Evidence given in closed court

- (1) This section applies to a person (the *witness*) giving evidence in a proceeding if the court considers that the person has a disability that affects the person's ability to give evidence because of—
- (a) the circumstances of the proceeding; or
 - (b) the person's circumstances.

Examples

- 1 the person is likely to suffer severe emotional trauma because of the nature of the alleged offence
- 2 the person is intimidated or distressed because of the person's relationship to the accused person

Note An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see Legislation Act, s 126 and s 132).

- (2) The court may order that the court be closed to the public while all or part of the witness's evidence (including evidence under cross-examination) is given.

Note The accused is entitled to a fair and public hearing, but the court may exclude the press and public in certain circumstances (see *Human Rights Act 2004*, s 21 (2)).

Endnotes

7 Uncommenced amendments

- (3) In deciding whether to order that the court be closed to the public, the court must consider whether—
- (a) the witness wants to give evidence in open court; and
 - (b) it is in the interests of justice that the witness give evidence in open court.
- (4) However, an order under this section does not stop the following people from being in court when the witness gives evidence:
- (a) a person nominated by the witness;
 - (b) a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer.

Note Publishing certain information in relation to sexual offence proceedings is an offence (see s 40).

- (5) In this section, a reference to a person giving evidence includes the person giving evidence by the playing of an audiovisual recording of the evidence at a hearing under division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence) or division 4.2B (Sexual offence proceedings—giving evidence at pre-trial hearing).

26 New part 10

insert

Part 10 Transitional—Sexual and Violent Offences Legislation Amendment Act 2008

150 Application of amendments

The amendments to this Act made by the *Sexual and Violent Offences Legislation Amendment Act 2008*, part 2 do not apply to a

proceeding if the hearing of the proceeding has started before the commencement of that part.

151 Expiry—pt 10

This part expires 1 year after the day it commences.

27 Dictionary, new definition of *audiovisual recording*

insert

audiovisual recording, for division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence)—see section 40E.

28 Dictionary, definitions of *complainant* and *sexual offence proceeding*

substitute

complainant—

- (a) for division 4.2 (Sexual and violent offence proceedings—general)—see section 38; and
- (b) for division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence)—see section 40A; and
- (c) for division 4.2B (Sexual offence proceedings—giving evidence at pre-trial hearing)—see section 40N; and
- (d) for division 4.3 (Sexual and violent offence proceedings—giving evidence from places other than courtrooms)—see section 41; and
- (e) for division 4.4 (Evidence of complainant’s sexual reputation and activities)—see section 48; and
- (f) for division 4.6 (Sexual offence proceedings—directions and warnings to juries)—see section 68.

sexual offence proceeding—

- (a) for division 4.2 (Sexual and violent offence proceedings—general)—see section 38; and
- (b) for division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence)—see section 40B; and
- (c) for division 4.2B (Sexual offence proceedings—giving evidence at pre-trial hearing)—see section 40O; and
- (d) for division 4.3 (Sexual and violent offence proceedings—giving evidence from places other than courtrooms)—see section 41; and
- (e) for division 4.4 (Evidence of complainant’s sexual reputation and activities)—see section 48; and
- (f) for division 4.6 (Sexual offence proceedings—directions and warnings to juries)—see section 68.

29 Dictionary, new definitions*insert*

less serious violent offence, for part 4 (Evidence in criminal proceedings)—see section 37.

relevant person, for division 4.2 (Sexual and violent offence proceedings—general)—see section 38B.

serious violent offence, for part 4 (Evidence in criminal proceedings)—see section 37.

similar act witness—for part 4 (Evidence in criminal proceedings)—see section 37.

violent offence, for part 4 (Evidence in criminal proceedings)—see section 37.

violent offence proceeding—

- (a) for division 4.2 (Sexual and violent offence proceedings—general)—see section 38A; and
- (b) for division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence)—see section 40C; and
- (c) for division 4.3 (Sexual and violent offence proceedings—giving evidence from places other than courtrooms)—see section 41A.

witness—

- (a) for division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence)—see section 40D; and
- (b) for division 4.2B (Sexual offence proceedings—giving evidence at pre-trial hearing)—see section 40P.

witness with a disability—

- (a) for part 4 (Evidence in criminal proceedings)—see section 37; and
- (b) for part 4A (Evidence in any proceedings)—see section 81B.

Endnotes

7 Uncommenced amendments

**Crimes Legislation Amendment Act 2008 A2008-44 sch 1
pt 1.9**

**Part 1.9 Evidence (Miscellaneous
Provisions) Act 1991**

[1.56] Section 38 (4)

omit

committal proceeding

substitute

committal hearing

[1.57] Section 38 (4), note

omit

[1.58] Section 38A (3)

omit

committal proceeding

substitute

committal hearing

[1.59] Section 41 (4)

omit

committal proceeding

substitute

committal hearing

[1.60] Section 41 (4), note

omit

[1.61] Section 41A (3)

omit

committal proceeding

substitute

committal hearing

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