

2009

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES LEGISLATION AMENDMENT BILL 2009

EXPLANATORY STATEMENT

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CRIMES LEGISLATION AMENDMENT BILL 2009

Outline

The Crimes Legislation Amendment Act 2009 (the Bill) amends a number of laws administered by the Department of Justice and Community Safety. The laws amended include the:

- *Bail Act 1992*
- *Court Procedures Act 2004*
- *Crimes Act 1900*
- *Crimes (Sentence Administration) Act 2005*
- *Crimes (Sentencing Act) 2005*
- *Criminal Code 2002*
- *Criminal Code Regulation 2005*
- *Evidence (Miscellaneous Provisions) Act 1991*
- *Magistrates Court Act 1936*
- *Supreme Court Act 1933*

The *Crimes Legislation Amendment Act 2008* (CLAA) and the *Sexual and Violent Offences Legislation Amendment Act 2008* (SVOLAA) were passed by the Assembly in August 2008, and commenced operation on 30 May 2009. The CLAA makes changes to the *Magistrates Court Act 1930* (MCA) and the *Crimes Act 1900* in order to introduce more efficient and effective criminal justice procedures, while the SVOLA introduces protections for victims of violent and sexual offences in the criminal justice system. The Bill contains technical amendments that will ensure the smooth implementation of the legislation.

Evidence (Miscellaneous Provisions) Act 1991

The minor amendments to the *Evidence (Miscellaneous Provisions) Act 1991* are necessary to ensure that the amendments made to the Act by the SVOLAA will operate as intended.

Section 38D of the *Evidence (Miscellaneous Provisions) Act 1991*, prohibits a self-represented accused person from personally cross-examining certain categories of vulnerable witnesses in sexual and violent offence proceedings. The purpose of this provision is to limit the distress that can be caused to witnesses when confronted by their accuser asking questions directly of them. There is significant public interest in ensuring that witnesses are not subject to procedures that are oppressive, humiliating or distressing. This provision recognises the rights of an accused person to test the evidence of the witness, but places a requirement on the accused person to do this through a third party.

This provision provides that an accused person must make an alternative arrangement in the form of appointing a legal representative to ask questions of the witness. A legal representative can be appointed by the accused person, or alternatively, can be ordered by the court to perform the cross-examination.

A legal representative appointed under this provision will be required to act on the instructions of the accused person. The legal representative would not be required to advise the accused person on the whole case, but only in relation to the cross-examination of the complainant or similar act witness.

To ensure that the requirements imposed by this section are communicated to an accused person, and to avoid any delay in having a matter determined, it will be necessary for the courts to provide this information whenever possible, to accused persons at the preliminary stage of proceedings (e.g. case management hearing or directions hearing).

There is some limited scope that a small number of self-represented accused persons will attend at court on the date of trial without having secured a legal representative for this purpose.

Examples of where this situation may arise include:

- When an accused person was represented at preliminary proceedings but has sacked their lawyer prior to the trial; and
- Where a self-represented accused does not qualify under the Legal Aid Commission 'means test' but is genuinely unable to afford to appoint a legal representative to perform the cross-examination function;
- When the accused person refuses to engage with a legal representative.

The current construction of s 38D will result in the court adjourning a matter in circumstances where the self-represented accused presents at court on the date of trial without a legal representative to perform the cross-examination on his/her behalf. This will lead to inevitable delays in finalising matters, which will detract from the public policy considerations of supporting vulnerable witnesses who are required to give evidence.

Court Appointed Person

New South Wales and Western Australia have an alternative model, whereby the court is permitted to appoint a suitable person to perform the cross-examination on the accused person's behalf. In NSW this provision results in practice in the court calling upon suitable persons such as, the court registrar or a duty solicitor, to step in and act as a conduit between the accused person and the witness. The Commonwealth *Evidence Act 1991* and the NSW

Evidence Act 1995 also contain provisions which maintain that a court appointed person is to be utilised to communicate the accused person's questions to a child witness. This model is being adopted in this Bill.

A note will be included to remind a judicial officer that s41 *Evidence Act 1991* (Cth) (which disallows harassing or intimidating questions) and s 59 *Evidence Act 1979*(ACT) (which disallows scandalous or indecent questions) can be disallowed when it is the court appointed person putting the questions to the witness on behalf of the accused.

A court appointed person does not need to be a legal representative and is simply to repeat the questions sought to be put by the accused person to the witness. This model allows the court to rule on the suitability of questions put forward by the accused person and therefore affords protection to a witness from being required to answer inappropriate or indecent questions. Even though the accused person may ask a particular question to be put to the witness, the court can monitor the admissibility of the question in relation to the Commonwealth and ACT Evidence Acts requirements. The court appointed person will be only permitted to ask the question the accused puts to the complainant and must not give the accused legal or other advice.

It is necessary that consideration be given by the court to the suitability of a court appointed person. For example, it could defeat public policy considerations to allow an accused person's friend or relative to step in to perform this function, as their involvement could have an intimidating effect. Suggestions put forward in other jurisdictions who already have this model (NSW, NT and Western Australia) include, a judicial officer's associate, assistant, or a court registrar.

Although it is recognised that a legal representative will provide a professional service for the examination of a witness, some concern remains that certain accused persons will refuse to engage with a legal representative for this purpose. To provide an alternative function through the court appointed model, will ensure that the court has a number of options to assist in facilitating an accused person's ability to ask questions of a witness.

Section 38D is to be amended through the addition of a court appointed person in circumstances where the accused person does not have a legal representative for the purpose of performing the cross-examination.

The court appointed person scheme will sit alongside the current scheme that encourages a self-represented accused to appoint a legal representative; can order the self-represented accused to

appoint a legal representative; or can make any order necessary to ensure that the self-represented accused has a legal representative to perform the cross examination.

The rights of an accused person to appoint a legal representative to perform the cross-examination will be maintained and in circumstances where it is in the interests of justice to secure a legal representative for this process, the court will be permitted to adjourn for this purpose.

Magistrates Court Act 1930

The CLAA introduces new procedures for committal hearings in the Magistrates Court. The Bill makes technical amendments to ensure that the provisions commence and operate as efficiently as possible.

The CLAA also made amendments to section 110 of the MCA, the provision that gives the court the power to hear a criminal charge in the absence of the defendant, to reduce the likelihood of decisions that were incompatible with *Human Rights Act 2004*, section 22(2)(d) that provides the right to be tried in person. The Bill makes further amendments to provide protection for defendants who might not be aware of the proceedings, or the consequences of the proceedings that are dealt with in their absence.

Supreme Court Act 1933

The Bill amends the *Supreme Court Act 1933* to ensure that Court's capacity to deal with alternative verdicts is not affected by the amendments to the jurisdiction of the Magistrates Court introduced in the CLA.

Bail Act 1992, Court Procedures Act 2004, Crimes (Sentencing) Act 2005 and Crimes (Sentence Administration) Act 2005

The Bill makes minor amendments to the *Bail Act 1992*, the *Court Procedures Act 2004* and the *Crimes (Sentence Administration) Act 2005* to clarify amendments to these Acts that the *Children and Young People Act 2008* introduced.

Criminal Code 2002 and Criminal Code Regulation 2005

The Bill amends the default date for the application of the general principles of criminal responsibility contained in Chapter 2 of the Code to allow time for the harmonisation process to continue.

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Detail

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act

Clause 2— Commencement

This clause fixes the date for commencement of the Act.

Clause 3 – Legislation amended

This clause notes that the amended legislation is listed in schedule 1.

Clause 4 – Legislation repealed

This clause notes that two transitional regulations are being repealed. Both are replaced by substantive provisions in this Bill.

Schedule 1 – Legislation amended

Part 1.1 Bail Act 1992

Clause 1.1 – Section 25 (9), new definition of *chief executive*

Section 25A(2) of the *Bail Act 1992* provides for the chief executive responsible for the *Bail Act 1992* and the chief executive responsible for the *Children and Young People Act 2008* to decide who is the appropriate chief executive for the supervision of people aged 18 to under 21 years, who are granted bail for a juvenile offence.

Clause 1.1 is a technical clause that defines “chief executive” for the purposes of section 25. This definition clarifies that in section 25, ‘chief executive’ could mean the chief executive responsible for the *Children and Young People Act 2008* as decided under section 25A (2), or the chief executive responsible for the *Bail Act 1992*.

The section is intended to ensure that a flexible approach can be taken to arrangements to supervise people aged 18 to under 21 years, who are granted bail for a juvenile offence.

Clause 1.2 - New section 25A (3) and (4)

This clause is intended to clarify the process for the supervision of bail conditions for a person when the offence was committed as a young person.

New Section 25A (3) sets out that if the chief executive responsible for the *Children and Young People Act 2008* is responsible for the supervision of an accused person, the accused person is to be dealt with as if they were a person under 18 years of age.

New Section 25A (4) sets out that if the chief executive responsible for the *Bail Act 1992* is responsible for the supervision of an accused person; the accused person is to be dealt with as if they were an adult.

Part 1.2 Court Procedures Act 2004

Clause 1.3 – Section 71 (5) (b)

This is a technical clause that clarifies that a proceeding may relate to more than one offence.

Clauses 1.4 and 1.5 - Section 72 (4), and Section 71 (7), new definition

These are technical clauses to insert the definition of a “victim of an offence” into sections 71 and 72 of the *Court Procedures Act 2004* by referring to the definition contained in section 47 of the *Crimes (Sentencing) Act 2005*.

Part 1.3 Crimes Act 1900

Clause 1.6 – Section 375A (4), examples and note

This clause omits the examples inserted in order to reduce the possibility that the exercise of the Magistrates’ discretion under this section may be hampered by the examples.

Clause 1.7 - New section 600 (2) and (3)

This clause inserts a provision to clarify that, for the purposes of the transitional provision relating to the commencement of the *Crimes Legislation Amendment Act 2008*, a hearing has commenced if the defendant has entered a plea, and if it is a plea of not guilty, evidence has been taken. If statements have been tendered or oral evidence has been given, then a hearing has started.

Part 1.4 Crimes (Sentence Administration) Act 2005

Clauses 1.8 and 1.10 – Section 95 (1), section 96 (1)

These are technical clauses that delete the reference to a young offender in order that the definition inserted later in each section can operate effectively.

Clauses 1.9, 1.11 and 1.12 – New sections 95 (3), 96(3) and section 102(4) and note

These clauses provide a definition of ‘offender’ in order to remove confusion about the situation that applies when a young offender is under the control of the Chief Executive of the Department of Justice and Community Safety due to their age.

Clause 1.13 – Section 320F (2)

This clause amends section 320 F (2) and inserts new subsections (3) and (4). This clause clarifies how a young offender is to be dealt with, according to whether it is the chief executive responsible for the administration of the *Children and Young People Act 2008*, or the chief executive responsible for

the administration of the *Crimes (Sentence Administration) Act 2005* who is responsible for the young offender.

If the person is allocated to the chief executive responsible for this Act, then the person's sentence is administered as an adult. Although for the purposes of resentencing if necessary, the person is still defined as a young offender under the *Crimes (Sentencing) Act 2005*.

If the young offender is allocated to the chief executive responsible for the *Children and Young People Act 2008*, then the provisions that apply to young offenders in the Act continue to apply to that person.

The following is an illustrative example of what is meant by new section 320 F (3) and (4), and is not intended to be an exhaustive example.

Person Y has committed an offence when they were 17 years and 9 months old. Person Y is convicted of that offence and given a good behaviour order. While serving the good behaviour order, Person turns 18 years old. A decision is made under section 320 F (2) that the responsible chief executive for matters that relate to Person Y and their sentence will be administered by the chief executive who has responsibility for the *Crimes (Sentence Administration) Act 2005*.

If Person Y breaches their good behaviour order, the chief executive will use section 102, and the sentencing court will re-sentence Person Y as a young offender under the *Crimes (Sentencing) Act 2005*.

However, if a decision was made under section 320F (2) that Person Y was allocated to the chief executive responsible for the *Children and Young People Act 2008*, and the young offender breached their good behaviour order, the chief executive would use section 320G of this Act.

Clause 1.14 - Section 320G (3), new definition of *young offender*

This clause inserts a new definition of 'young offender' to provide clarity about the situation that applies when a young offender is under the control of the Chief Executive of the Department of Justice and Community Safety due to their age.

Part 1.5 Crimes (Sentencing) Act 2005

Clause 1.15 – Section 133M(2)(a), note

This clause amends the note in section 133M (2) to inserts the words "or found guilty" to ensure that education and training conditions can be made for young offenders who are found guilty but have no conviction recorded.

Clause 1.16 and 1.17 – Section 133P heading and section 133Z heading

The heading for these provisions are amended to include the words ‘or found guilty’ so that it is clear that the sections apply to young offenders who are found guilty but have no conviction recorded.

Part 1.6 Criminal Code 2002

Clause 1.18– Section 10(1), definition of *default application date*

This clause amends the default application date of the general principles of criminal responsibility contained in Chapter 2 of the *Criminal Code 2002* from 1 July 2009 until 1 July 2013.

Part 1.7 Criminal Code Regulation 2005

Clause 1.19 – Section 4A

This clause omits a regulation which amended the default application date of chapter 2 of the *Criminal Code 2002*, as the date is now amended in section 10(1) of the *Criminal Code 2002*.

Part 1.8 Evidence (Miscellaneous Provisions) Act 1991

Clauses 1.20, 1.22 – 1.23, 1.30, 1.32

These clauses replaces the word ‘disability’ with the word ‘vulnerability’ to more appropriately describe the class of witness that the protections were originally intended to apply to. The reference to disability in this section was not intended to have a narrow interpretation by only capturing people with a mental or physical disability.

Clause 1.21 – Section 38D

This clause substitutes a new section 38D into the Act.

Section 38D(1) prohibits a self-represented accused from personally examining any of the following witnesses in a sexual or violent offence proceeding:

- complainant or similar act witness in a sexual assault or serious violent offence proceeding;
- complainant or similar act witness in a less serious violent offence proceeding if the court is satisfied that:
 - the complainant or similar act witness is a relevant person in relation to the accused; or
 - the complainant or witness has a vulnerability that affects their ability to give evidence because of the circumstances of the proceeding or the witness’s circumstances.

Section 38D(2) stipulates that this section applies to a child or witness with a disability who is required to give evidence for the prosecution in a sexual or violent offence proceeding.

Section 38D(3) provides that the above witnesses cannot be examined personally by an accused person but facilitates two alternatives for this examination to occur. Examination of witnesses will include the evidence-in-chief, cross-examination and re-examination.

Section 38D(3)(a) maintains the ability of an accused person to examine a witness through a legal representative, appointed by, or provided to, them if necessary. A legal practitioner appointed by, or provided to, the accused person for the purpose of conducting the evidence-in-chief, the cross-examination or re-examination of a witness, is obliged to act in the best interests of the accused.

Section 38D(3)(b) enables the court to appoint a person for examination of the above witnesses in circumstances where the accused person does not have a legal representative for this purpose.

A court appointed person does not need to be a legal representative. It is necessary that consideration be given by the court to the suitability of a court appointed person. For example, it could defeat public policy considerations to allow an accused person's friend or relative to step in to perform this function, as their involvement could have an intimidating effect. In other jurisdictions that already have this model (NSW, NT and Western Australia), a judicial officer's associate, assistant, or a court registrar may be appointed.

Section 38D(4) will ensure that in circumstances where the accused person does not have a legal representative, the court must as soon as practicable tell the person about the requirements set out in subsection (3) and that the accused will not be able to adduce evidence from another witness in relation to a fact in issue to contradict the evidence of the witness.

The purpose of the second warning is to ensure that the accused is put on notice about the implications of the rule in *Browne v Dunn* [1894]¹. The rule in *Browne v Dunn* is intended to ensure 'fairness in adversary proceedings by ensuring that a witness is given the opportunity to respond to a contradictory version of events which may be given by a witness for the other side'. In a criminal trial, this means that if the defence intends to lead evidence which challenges the evidence of a prosecution witness, the defence must cross-examine the prosecution witness on the contradictory version of events, so that the prosecution witness has the opportunity to comment on it. Therefore, the court must also warn the accused that a failure to cross-examine the witness will mean that there is a possibility that the accused may not adduce evidence from another witness, in relation to a fact in issue, with the intention of contradicting the evidence of the witness who the accused is unable to cross-examine, because the fact has not been put to the witness during cross-examination. The question of whether an accused can in fact adduce such evidence will always be a question for the trial judge or magistrate to decide, based on the circumstances of that particular case. The warning puts the

¹ *Browne v Dunn* [1894] 6 R 67.

accused on notice about the issue, but does not override the court's discretion in deciding how the issue is to be determined.

Section 38D(5) provides that a person appointed by the court under section (3)(b) may only ask the questions that the accused person requests the person to put to the witness, and must not independently give the accused person legal or other advice. A court appointed person does not need to be a legal representative and is simply to repeat the questions sought to be put by the accused person to the witness. This model allows the court to rule on the suitability of questions put forward by the accused person and therefore affords protection to a witness from being required to answer inappropriate or indecent questions. Even though the accused person may ask a particular question to be put to the witness, the court can monitor the admissibility of the question in relation to the Commonwealth and ACT Evidence Acts requirements.

Two notes have been included about the operation of section 41 of the *Evidence Act 1991* (Cth) (harassing or intimidating questions) and section 59 of the *Evidence Act 1971* (ACT) (scandalous or indecent questions) which enable the court to disallow inappropriate questions which are put to a witness.

Section 38D(6) allows the court to adjourn proceedings to allow a self-represented accused to secure legal representation only where it considers it is in the interests of justice to do so. The court may also make any other orders necessary to secure this representation. This amendment ensures that the right of an accused person to have access to legal representation will be appropriately maintained.

Section 38D(7) provides the jury warnings that must be given because a self-represented accused person is not entitled to personally examine particular witnesses.

Section 38D(8) introduces a new provision to clarify that 'examine' in this section includes evidence-in-chief, cross-examination and re-examination.

Clause 1.24 - Section 40M (2)

This clause substitutes a new subsection (2) to clarify that the offence provision in section 40M does not apply to those people who are exercising any function considered necessary for the purposes of the investigation, prosecution and defence of the offence which is the subject of the recording.

Clause 1.25 - Section 40Q heading

This clause substitutes a new heading consequential on the amendments made in clauses 1.17 and 1.18 (below).

Clause 1.26 - New section 40Q (1A)

This clause inserts a new subsection (1A) into section 40Q to clarify that pre-trial hearings are not mandatory.

Clause 1.27 – Section 40Q (1)

This clause substitutes a new subsection (1) into section 40Q to clarify that when a witness is giving evidence at a pre-trial hearing they must do so at a place separate from the courtroom but connected to it by audiovisual link.

Clauses 1.28, 1.29 and 1.31 - Sections 40Q(4), 40T(6), 43(4)

These clauses insert the phrases in sections 40Q (4), 40T (6) and 43 (4) to clarify the circumstances in which the CCTV room (the place which is separate from the courtroom but connected to it by audiovisual link where certain witnesses must give their evidence) is considered part of the courtroom. The clarification removes the possibility that the witness will be removed from the CCTV room when restrictions on the viewing and presence of the witness in the courtroom apply.

Clause 1.33 - New section 150 (2) and (3)

This clause inserts new subsections (2) and (3) into section 150 to further clarify when the amendments to the *Evidence (Miscellaneous Provisions) Act 1991* made by the *Sexual and Violent Offence Legislation Amendment Act 2008* apply. New subsection (2) and (3) provide that the amendments apply to cases where no evidence has been taken in the case, excluding cases where evidence has been taken in interlocutory or bail applications.

Part 1.9 Magistrates Court Act 1930

Clause 1.34 - Section 90AA (3) (b)

This clause omits the requirements that written statements that are to be admitted as evidence on a committal hearing include a statement that the person making the statement is over the age of 18 years of age or over 14 and under 18 years of age. This requirement is no longer appropriate, given the amendments to the *Evidence Act 1995* which address the competence of witnesses and cover the admissibility of statements of young people. The removal of this provision will reduce confusion about whether young people under the age of 14 can provide police with a written statement.

Clause 1.35 - Section 90AA (11A)

This amendment corrects a typographical error that restricted the protections available to victims of sexual assault to cases involving sexual assault. It is intended that the protections against cross examination of sexual assault complainants be extended to all proceedings, not just those involving sexual assault offences.

Clause 1.36 - Section 94 (a) and (b), except notes

This clause re-frames the new single committal test into language consistent with the manner in which the previous two committals tests operated, without changing the policy intent of the provision. It has been drafted after feedback from Magistrates.

Clause 1.37 - Section 97 (a)

This amendment clarifies that the offence type to which the provision was intended to apply is an indictable offence.

Clause 1.38 - Section 110 (1A)

This clause omits the provision inserted into section 110 of the *Magistrates Court Act 1936* by the *Crimes Legislation Amendment Act 2008*. That provision was inserted to ensure that defendants could not be tried in their absence unless a Magistrate was satisfied that the defendant was aware of the proceedings and had made a fully informed decision not to attend the proceedings. The provision was inserted in response to concerns that decisions made in the absence of the defendant were incompatible with the *Human Rights Act 2004*, section 22(2)(d) that provides the right to be tried in person. Subsequent to the amendment concerns have been raised that while this amendment will protect one right, it may engage other human rights, including the right to liberty. Magistrates have expressed concerns that if they are unable to proceed with minor matters in the absence of the defendant they may have to issue warrants of arrest in order to enforce the law. The execution of these warrants by police could mean that defendants who are facing charges that do not carry a penalty of imprisonment could be held in custody on arrest warrants, which could be seen as an unfair limitation on their right to liberty.

This section is omitted and broader protections that address the same human rights are included in the section through the amendments contained in clause 1.30.

Clause 1.39 - New section 110 (7) and (8)

This clause provides protection for defendants whose matters are dealt with in their absence under section 110 of the *Magistrates Court Act 1936*, who might not be aware of the proceedings, or the consequences of the proceedings that are dealt with in their absence. The clause provides that they may not be sentenced to a period of imprisonment in their absence, and inserts a provision that requires the court to re-open a case if the defendant can establish that they didn't know about the hearing, the consequences of not attending the hearing, or had a reasonable excuse for not attending the hearing. While this reflects what currently happens in practice, by enshrining these powers in legislation, the clause provides protection of human rights for the future, in a proportionate manner.

Clause 1.40 – Section 451

This clause clarifies that the transitional arrangements for the reforms to the committal jurisdiction only apply to cases where no oral or written evidence, other than evidence in interlocutory or bail applications, has been taken. The clause also clarifies that in those cases where the new provisions do not apply, the previous provisions of the *Magistrates Court Act* continue to apply.

This clause also inserts new section 451A, which is a transitional provision to clarify that statements taken before the commencement of the amending

legislation that might not be attested in the exact manner required by the amendment, are still admissible for the purposes of section 90AA.

Clause 1.41 - Chapter 12

This is a technical clause that removes the transition provisions for the *Sexual and Violent Offences Legislation Amendment Act 2008* as they have been replaced by subsequent amendments in the *Crimes Legislation Amendment Act 2008*.

Part 1.10 Supreme Court Act 1933

Clause 1.42 - New section 68G

This clause ensures that the Court can still find an alternative verdict in accordance with provisions such as sections 48B and 49 of the *Crimes Act 1900*, despite the fact that some of the offences that are available in the range of aggravation are now summary offences following the amendments introduced in the *Crimes Legislation Amendment Act 2008*.