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**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**SEXUAL AND VIOLENT OFFENCES LEGISLATION AMENDMENT BILL  
2008**

**EXPLANATORY STATEMENT**

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## SEXUAL AND VIOLENT OFFENCES LEGISLATION AMENDMENT BILL 2008

### EXPLANATORY STATEMENT

This explanatory statement relates to the Bill as introduced into the ACT Legislative Assembly.

#### **Overview of Bill**

These amendments are intended to achieve the dual objectives of treating complainants in sexual and violent offence proceedings and other vulnerable witnesses with respect and dignity during the prosecution process, and ensuring a fair trial for an accused.

The amendments recognise that a prosecution for a sexual or violent offence has very serious consequences for an accused, and it is therefore vital to safeguard the minimum guarantees which everyone charged with a criminal offence is entitled to under international human rights law, and in particular the *Human Rights Act 2004*. However, the amendments also recognise that protecting the rights of alleged offenders is not the sole purpose of the criminal justice system. The ACT community has an interest in encouraging the reporting of sexual and violent crimes, and in apprehending and dealing with those who commit them.

The amendments which provide special measures for the giving of evidence in court proceedings, do not affect the right to a presumption of innocence for an accused, under section 22(1) of the *Human Rights Act 2004* as they are solely designed to extract the 'best' evidence possible from witnesses who may otherwise suffer a disadvantage, if required to give evidence without such measures. The interests of justice are served by 'best' evidence which is accurate, reliable, coherent and complete.

#### **Sexual assault offences**

It is widely recognised that sexual assault has a devastating impact on its victims. Notwithstanding any physical injury that may occur as a result of the assault, the emotional impact, in terms of trauma and stress, can be significant and long lasting. The effects of sexual assault are also felt by the victims' families, the health system, and the criminal justice system.

National and international statistics have revealed that sexual assault is notoriously under reported and even where it is reported, only a small proportion ever proceed to trial. Although there is a range of factors for this, the most obvious factor is the victim's expectations of how he or she will be treated by the criminal justice system. This Bill is aimed at alleviating some of those fears and ensuring that potential victims are not discouraged from participating in the prosecution process.

### **Violent offences**

While it is generally accepted that victims of sexual assault offences should be protected from the stress and trauma associated with giving evidence and from the potential for intimidation, there has been a noticeable failure by some legislatures to recognise that victims of other violent offences such as torture, threat to kill, kidnapping and stalking are also susceptible to mistreatment and re-victimisation within the criminal justice process. The amendments in the Bill recognise that victims of certain violent crimes are also deserving of being provided with protection through the use of special measures to aid the giving of evidence to realign the balance of fairness between victims and offenders.

### **Children and the intellectually impaired**

The Bill contains amendments specifically designed to provide special measures for the giving of evidence by children and people who are intellectually impaired. The rationale for introducing these amendments is to obtain the best evidence available from these witnesses. The amendments recognise that the majority of children and people who are intellectually impaired suffer a deficit in their ability to communicate and find it harder to adapt to new environments and situations. The amendments will make it easier for these witnesses to give their evidence and provide greater protection from the stresses of the court process, as well as providing a better balance of fairness between the accused and these witnesses.

The amendments providing special measures for children are consistent with section 11(2) of the *Human Rights Act 2004* which provides that every child has the right to the protection needed by the child by virtue of being a child. The amendments are also consistent with the *United Nations Convention on the Rights of the Child*.

The amendments which provide special measures for people with a disability are consistent with Article 13 of the *United Nations Convention on the Rights of Persons with Disabilities* which requires State parties to ensure effective access to justice for persons with disabilities including by taking measures to enable their participation in proceedings as witnesses. Although yet to be ratified by Australia, it is arguable that it is part of international law which is incorporated into the rights that an individual has in the ACT by force of section 7 of the *Human Rights Act 2004*.

### **Giving evidence at Committal proceeding amendments**

Amendments to the *Magistrates Court Act 1930* permit the admission of a transcript of an audio or visual recording of an interview between police and children or intellectually impaired witnesses, as these witnesses' evidence-in-chief in a committal proceeding. The amendments will reduce the number of times children and intellectually impaired witnesses are required to give evidence throughout the criminal justice system, which will help mitigate the problems that result from inconsistencies and omissions which are unavoidable when a child is forced to recount their story repeatedly. They will also alleviate similar difficulties which can be faced by the intellectually impaired. The defence will be provided with a copy of the transcript and an opportunity to hear and view the recording in order to prepare its case.

Other amendments to the *Magistrates Court Act 1930* prohibit absolutely the calling and cross-examination of alleged victims of sexual offences at a committal proceeding. A written statement or a transcript of a police interview will be admissible as the alleged victim's evidence-in-chief, and there will be no requirement for the victim to attend the committal proceeding to give alternative evidence-in-chief or cross-examination evidence. Cross-examination of alleged victims at committal, which is often more rigorous and intimidating, in the absence of a jury, leads many alleged victims to seek to have the proceedings discontinued for fear of having to go through additional trauma at trial.

### **Admission of pre-recorded police interview**

Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will permit the admission of a pre-recorded audiovisual recording of an interview between police and witnesses as the witness's evidence-in-chief at trial. The amendments would apply to children and adults with an intellectual impairment, who are complainants in sexual or violent offence proceedings. The defence will be provided with a copy of the transcript of the recording, and an opportunity to hear and view the recording in order to prepare its case.

### **Pre-recording of evidence at a pre-trial hearing**

Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will ensure that the evidence of children and adults with an intellectual impairment, who are witnesses in sexual assault proceedings, is taken as close as possible after the commission of an offence. The amendments permit the pre-recording of the entire evidence of these witnesses at a pre-trial hearing, which will be held as soon as possible after a committal proceeding and before the actual trial is held.

The pre-recording of evidence at a pre-trial hearing aims to redress fundamental problems with the criminal justice system and how it deals with children's evidence. Delays in the court process are inevitable, but work against children's ability to recount events long after they occur. For young children and people who are intellectually impaired, the ability to give cogent evidence many months, or years after the event might be beyond their developmental and intellectual capacity, despite the fact that they were able to give coherent descriptions at a time closer to the events in question.

The pre-trial hearing, a unique pre-trial process, is held to facilitate the taking of the witness's evidence, and as such the pre-trial hearing is attended by the judge, the prosecutor, the defence lawyer and the accused. The witness gives their evidence-in-chief in a room separate from the room containing the above mentioned parties, and is then cross-examined and re-examined via audiovisual link. This evidence is recorded, and then later played at the actual trial as a substitute for the witness's oral testimony at trial, eliminating the need for the witness to attend the trial to give evidence.

It is also recognised that there may be occasions when pre-recording other witnesses' evidence might be necessary to ensure that the best evidence of

that witness is taken. For example, it may be necessary for an adult complainant in a sexual offence proceeding to give their evidence at a pre-trial hearing, because of a special vulnerability where they might suffer further severe emotional trauma as to be prevented from giving satisfactory evidence at a later time at trial. Amendments will ensure that the court has the discretion to order pre-recording for such witnesses, where the court is satisfied that it is necessary.

### **Admissibility of pre-recorded evidence in later proceedings**

Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will ensure that any evidence which is pre-recorded, either as part of a police interview or at a pre-trial hearing, which is admissible in a sexual assault or violent offence proceeding, is also admissible in later proceedings, such as a rehearing or appeal, or in another proceeding arising as a result of the original proceeding, for example, in Family Court proceedings. The amendments ensure that where such recorded evidence is admissible in later proceedings, appropriate safeguards remain for the defence to recall the witness to give further evidence if required.

### **Giving evidence via audiovisual link**

Division 4.3 of the *Evidence (Miscellaneous Provisions) Act 1991* currently provides that complainants in sexual offence proceedings give their evidence via audiovisual link in a room separate to the courtroom. Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will extend this special measure to complainants in violent offence proceedings and witnesses in sexual or violent offence proceedings who are giving similar act evidence. The amendments also clarify that where witnesses are giving evidence in this manner, they are not required to view the accused.

### **Arrangements to restrict the view of accused**

Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will provide complainants and similar act witnesses in sexual or violent offence proceedings with some protection, should they choose to exercise their right to give evidence personally in court. The amendments provide the court with the discretion to order arrangements to be made to restrict the view of the accused from the above witnesses. The arrangements must not be made in such a way as to impair the accused's view of the witness.

### **Prohibition on cross-examination in person by self-represented accused**

Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will prohibit a self-represented accused from personally cross-examining the following witnesses in sexual or violent offence proceedings:

- complainants;
- similar act witnesses;
- child witnesses for the prosecution; and
- witnesses for the prosecution who have a mental or physical disability which affects their ability to give evidence.

The prohibition will not remove a self-represented accused's entitlement to cross-examine any of the above witnesses. The self-represented accused will

be able to cross-examine these witnesses through legal representation chosen by them or provided to them, if they are unable to arrange representation.

Section 22(2)(d) of the *Human Rights Act 2004* provides that an accused has the right to defend himself or herself personally, or through legal assistance chosen by him or her. This right is based on Article 14 of the *International Covenant on Civil and Political Rights*. Article 14 has been interpreted by the European Court of Human Rights to provide that the right of self-representation contained within it is not absolute. A state law which obliges a court to appoint, where the interests of justice so require, legal counsel to defend an accused person (even where such representation is against the person's wishes) does not offend this right.

Section 28 of the *Human Rights Act 2004* provides that human rights may be subject to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

The process for establishing whether a limitation on a human right is justifiable is now well established. To satisfy the test set out in section 28 of the *Human Rights Act 2004*, the limitation must fulfil a pressing and substantial social need, pursue a legitimate aim and be proportionate to the aims being pursued.

- ***Fulfil a pressing and substantial social need and pursue a legitimate aim***

Prohibiting a self-represented accused from personally cross-examining specified witnesses in a sexual or violent offence proceeding is intended to overcome a problem which is 'pressing and substantial'. The problem is 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'.<sup>1</sup>

### Sexual offences

The importance of the limitation in relation to sexual offence proceedings is widely recognised in most common law jurisdictions, including the other Australian states and territory. The unique nature of sexual offence proceedings is such that questions dealing with matters of considerable intimacy, relating to sexual approaches, details of sexual acts and the aftermath, may have to be put to an alleged victim. As these questions are likely to cause the alleged victim to feel demeaned or humiliated, requiring or allowing for the accused to put those questions personally offends against the proper administration of justice in ensuring everyone enjoys rights and obligations recognised by law.

For example, in the United Kingdom case of *R v Ralston Edwards*<sup>2</sup> the accused was convicted on two counts of rape but not before cross-examining

<sup>1</sup> *R. v Big M Drug Mart Ltd.*, [1985] 1 SCR. 295, p. 352.

<sup>2</sup> *R v Ralston Edwards* [1997] EWCA Crim 1679, 3 July 1997.

the complainant for six days, wearing the clothes he had worn during the alleged attack. Sparing victims this ordeal, not only will ensure that victims are treated with the respect and dignity they deserve, it would also potentially increase the accuracy of evidence they give during cross-examination. The fear and distress that may be experienced if they are personally cross-examined by an accused may make it impossible for the victim to give their evidence rationally and coherently.

### Violent offences

A 1996 report by the New South Wales Bureau of Crime Statistics and Research found that the vast majority of complainants in criminal proceedings nominated seeing the accused as the worst feature of having to attend court. Being cross-examined by the accused is understandably even more distressing and traumatic for a complainant. There are many parallels between sexual offences and the violent offences to which this measure applies. Complainants in violent offences suffer from the same vulnerabilities commonly recognised as 'unique' to sexual offences. Violent offences invariably involve a power imbalance between the two parties, in favour of the offender. For example, in offences such as stalking, torture and abduction, the offender often obtains a degree of power or dominance over the victim, leaving the victim fearful or intimidated and often feeling ashamed and embarrassed. It is inappropriate that an accused should be able to gain any advantage out of this relationship that may be conferred by personal confrontation. There is a likelihood with many violent offences that the accused and the victim knew each other before the assault occurred, and this can create a potential for the accused to use cross-examination to humiliate the witness further. The nature and seriousness of the violent offences contemplated in the measure ensures that the victims will be vulnerable and therefore worthy of protection against cross-examination in person by the self-represented accused.

### Children and disabled people

In many other common law jurisdictions, including the Australian states and territories, it is recognised that children, by virtue of being a child, are vulnerable and therefore it is appropriate to place limits on the ability of a self-represented accused to cross-examine child witnesses. Child witnesses experience significant difficulties in dealing with the adversarial environment of a courtroom. Children may experience difficulty in fully comprehending the language of legal proceedings and the role of the various participants. Children may not understand the role of cross-examination, and often find it confusing and upsetting. Children can find it particularly distressing when an adult asking the questions is accusing them of lying.

People who have a mental or physical disability that affects their ability to give evidence, like children, are also vulnerable by virtue of being disabled. They are also at a disadvantage, and can be easily intimidated by the accused. The courts will only use this discretion where the particular nature of the disability requires protection from being cross-examined by a self-represented accused.

- ***Proportionate to the aims being pursued***

Proportionality requires that the limit must be:

- necessary and rationally connected to the objective;
- the least restrictive in order to accomplish the object; and
- not have a disproportionately severe effect on the person(s) to whom it applies.

There is a necessary and rational connection between the objective and the measure. It can be said with substantial assurance that it is more likely than not that by prohibiting an accused from personally cross-examining specified witnesses will achieve the objective of removing the potential for the accused to use the cross-examination to re-traumatise the witness further.<sup>3</sup>

The extent of the impairment, by ensuring that a self-represented accused must be legally represented when cross-examining specified witnesses in sexual and violent offence proceedings, is 'no more than is necessary to accomplish the objective.'<sup>4</sup>

It has been suggested that the measure is unnecessary because the courts are provided with powers to control their courtroom. The courts have powers to forbid or disallow any questions which appear to be intended to insult, harass, intimidate or annoy, or which appear to be offensive. However, these powers are used sparingly. In cases where an accused is self-represented, the courts may be reluctant to control cross-examination because of the need to be and be seen to be fair to an accused person who is unfamiliar with legal procedure. It may also be difficult for the court to detect words, gestures or body language which were a feature of the relationship between the complainant and the accused which could be used by the accused to intimidate the complainant during cross-examination.

The use of an intermediary to relay the questions is also inadequate, as the complainant would still see and hear the accused and intermediary discussing the distressing subject matter before the agreed question is put to the complainant. A legal representative avoids this situation.

The limitation strikes a fair balance between the general interests of the community, and the requirements of the protection of an individual's fundamental rights.<sup>5</sup> The measure will not impose an excessive or unreasonable burden on certain individuals.<sup>6</sup>

The amendments do not seek to remove the accused's right to represent themselves absolutely, as the accused will continue to be able to represent themselves in all other aspects of the proceeding. The accused will also not be forced to accept legal representation for the cross-examination by choosing not to cross-examine the witness.

<sup>3</sup> *Leary v United States*, 395 US 6 (1969).

<sup>4</sup> *De Freitas v Minister for Agriculture, Fisheries, Lands and Housing* (1999) 1 AC 69.

<sup>5</sup> *Soering v United Kingdom* (1989) 11 EHRR 439.

<sup>6</sup> *Sporrong and Lonroth v Sweden* (1983) 5 EHRR 35.



The limitation which requires the accused to be legally represented should they choose to cross-examine a particular witness, will not endanger the fairness of the trial, indeed in most cases, the accused's right to a fair trial would be enhanced through the provision of legal expertise. The High Court has stated that it is in the best interests not only of the accused but also of the administration of justice that an accused be legally represented, particularly when the offence charged is serious.<sup>7</sup>

In *McInnes v The Queen*,<sup>8</sup> Justice Murphy emphasised the difficulties faced by accused persons who conduct their own defence:

*When an accused is unrepresented, he is disadvantaged, not merely because almost always he lacks the knowledge and skills of a professional advocate but also because there is a profound difference between the conduct of a case by an accused and its conduct by an advocate. It appears in the cross-examination of a witness whose version of the events conflicts with that of the accused. It is also manifest in the address to the jury: an accused cannot really assume the role of a dispassionate advocate who may compare the various parts of the evidence, including the accused's, put alternative conflicting propositions, and advance arguments that, although on the evidence the accused is probably guilty, he is not guilty beyond reasonable doubt. In practice, this cannot be done by the accused who is forced simply to maintain his innocence, otherwise he risks destroying his credibility.<sup>9</sup>*

The difficulties described above can be alleviated by providing the accused with a legal representative for the purpose of the cross-examination. The legal representative will have an obligation to act in the interests of the accused and will be subject to conducting the cross-examination in the manner instructed by the accused. The possibility of prejudice to the accused is reduced by providing that the court is required to make appropriate warnings to the jury about the drawing of adverse inferences and the weight they give to the evidence.

In conclusion, the amendments which prohibit a self-represented accused from personally cross-examining specified witnesses meets the test of a reasonable limit as detailed in the *Human Rights Act 2004*.

### **Support people**

Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will provide the following witnesses with an entitlement to have a person of their choosing, seated close by and within their sight, to provide emotional support while they are giving evidence:

- complainants in sexual assault or violent offence proceedings;
- similar act witnesses in sexual assault or violent offence proceedings;
- child witnesses in all court proceedings; and
- witnesses in all court proceedings who have a mental or physical disability which affects their ability to give evidence.

<sup>7</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 300 (Mason CJ and McHugh J). See also *McInnis v The Queen* (1979) 143 CLR 575 at 579 (Barwick CJ), at 582 (Mason J) and at 586-588 (Murphy J).

<sup>8</sup> *McInnes v The Queen* (1979) 143 CLR 575.

<sup>9</sup> *McInnes v The Queen* (1979) 143 CLR 575 at 590.

The support person is not a legal advocate or representative of the witness, and will not be permitted to speak on behalf of the witness during, or intervene in, the court proceeding.

### **Closure of the court**

Currently, section 39 of the *Evidence (Miscellaneous Provisions) Act 1991* provides that while a complainant gives evidence in a sexual offence proceeding, the court may order that the court be closed to the public. Amendments to the *Evidence (Miscellaneous Provisions) Act 1991* will extend the scope of this protection to include complainants in violent offence proceedings, as well as witnesses in sexual and violent offence proceedings, who are giving similar act evidence about acts alleged to have been committed upon them by the accused. Amendments will also provide the court with the discretion to order the court to be closed for other witnesses identified as having a special disability where this would be in the interests of justice.

Section 21(2) of the *Human Rights Act 2004* recognises that there are certain circumstances where it may be appropriate for the public to be excluded from all or part of a trial. The amendments identify these circumstances as considerations the court must take into account when the court exercises the discretion to close the court.

Closing the court to the public can assist to reduce the embarrassment that witnesses might experience when they are giving evidence of highly personal details. For example, complainants in sexual offence proceedings are required to reveal precise and explicit details of their sexual assault, which can be extremely embarrassing and humiliating to give before a court, which is full of strangers, full of the accused's family and friends, or full of children on school excursions. Closing the court to the public can also assist to protect the private lives of parties to the proceeding. For example, a complainant in a violent offence proceeding who is in a relationship with the accused could justify the court ordering closure to ensure that the private lives of these parties are respected.

## PART 1 - Preliminary

**Amendment 1 – Name of Act** – states the title of the Act as the *Sexual and Violent Offences Legislation Amendment Act 2008*.

**Amendment 2 – Commencement** – sets out the commencement date for the Act. The Act will commence on a day fixed by the Minister by written notice. The *Legislation Act 2001* provides that if an Act, or any provision of an Act, has not commenced within six months beginning on the notification day, the Act or provisions will automatically commence on the first day after that period.

## PART 2 – Evidence (Miscellaneous Provisions) Act 1991

**Amendment 3 – Legislation amended – pt 2** – provides that part 2 amends the *Evidence (Miscellaneous Provisions) Act 1991*.

**Amendment 4 – Section 37** – substitutes a new section 37 to insert new definitions for the following terms in part 4:

- **sexual offence**;
- **similar act witness**;
- **violent offence**; and
- **witness with a disability**.

**Sexual offence** is defined to mean any of the offences contained in part 3 (Sexual offences), part 4 (Female genital mutilation) or part 5 (Sexual servitude) of the *Crimes Act 1900*.

**Similar act witness** is defined to mean a witness in a sexual or violent offence proceeding who gives, or intends to give, tendency or coincidence evidence that relates to an act committed on them by the accused.

**Violent offence** is defined to mean any of the violent crimes contained in section 3 of the *Victims of Crime (Financial Assistance) Act 1983*.

**Witness with a disability** is defined to mean a person, giving evidence in a proceeding, who has a mental or physical disability, which affects their ability to give evidence.

**Amendment 5 – Division 4.2 heading** – substitutes a new heading for division 4.2 as a consequence of amendments 8 and 9 which extend the scope of existing division 4.2 to cover violent offence proceedings in addition to sexual offence proceedings.

**Amendment 6 – Meaning of *complainant* and *sexual offence proceeding* for div 4.2 Section 38(1)** – substitutes new subsection (1) to insert a new definition of **complainant** as a consequence of amendments 8 and 9 which extend the scope of existing division 4.2 to cover violent offence proceedings in addition to sexual offence proceedings. **Complainant** is defined to mean a

person, or people, against whom a sexual or violent offence the subject of the proceeding is alleged, or has been found, to have been committed.

**Amendment 7 – Section 38(4), new note** – inserts a new note into subsection (4) as a consequence of amendment 33.

**Amendment 8 – New sections 38A, 38B, 38C and 38D** – inserts new sections 38A, 38B, 38C and 38D into division 4.2 of the Act.

New section 38A defines ***violent offence proceeding*** for division 4.2 to clarify which court proceedings will be considered a violent offence proceeding for the purposes of division 4.2.

New section 38B – *Accused may be screened from witness in court*

New section 38B permits the court to arrange the courtroom to provide that complainants and similar act witnesses, in sexual or violent offence proceedings, are not required to view the accused or anyone else the court orders, while they are giving evidence in the proceeding.

The court will not arrange the courtroom to prevent the following people from viewing the complainant or similar act witness while they are giving their evidence:

- the judicial officer;
- the jury;
- the accused and their lawyer; and
- any other person the court orders.

New section 38C – *Cross-examination of complainant or prosecution witness by self-represented accused person – procedure*

New section 38C prohibits a self-represented accused from personally cross-examining any of the following witnesses for the prosecution in a sexual or violent offence proceeding:

- complainant;
- child;
- similar act witness;
- witness with a disability.

New section 38C sets out a special procedure to enable the self-represented accused to cross-examine the above witnesses. The accused will be provided with a reasonable opportunity to obtain legal representation for the purposes of the cross-examination. If the accused remains unrepresented, the court must order that the accused be legally represented for the cross-examination, and may make any other orders necessary to secure this representation. This procedure is similar to the procedure in the *Family Law Act 1975* (Commonwealth) which, in practice, results in the court requesting the relevant Legal Aid body to provide legal representation.

A legal practitioner provided to the accused for the purpose of conducting the cross-examination is obliged to act in the best interests of the accused. However, if the accused refuses the legal representation provided, or otherwise fails to co-operate, the court must then warn the accused that he or she will not be allowed to cross-examine the witness. The warning must also explain that a failure to cross-examine the witness will mean 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 court is required to warn the jury that this procedure is a usual practice, and that they must not draw any adverse inferences against the accused, or give the evidence more or less weight.

#### *New section 38D – Witness may have support person in court*

New section 38D provides an entitlement to a complainant or a similar act witness in a sexual or violent offence proceeding to have a support person seated close to, and within their sight, while they are giving evidence.

The court will make the order for the entitlement following an application being made by the party intending to call the complainant or similar act witness. The court will have the discretion to order more than one support person where this would be in the interests of justice. The witness will be able to choose who their support person will be, however, unless the court otherwise orders, the support person must not be, or be likely to be, a witness or party in the proceeding.

It is not necessary, or practical, for the same support person to be present for the witness throughout the giving of their evidence. For example, where the giving of evidence takes place over a series of days, a different support person can be present on each day.

The support person is not a legal advocate or representative of the witness, and will not be permitted to speak on behalf of the witness during, or intervene in, the court proceeding.

The court is required to warn the jury that the presence of a support person or people is a usual practice, and that they must not draw any adverse inferences against the accused, or give the evidence more or less weight.

#### **Amendment 9 – Section 39** – substitutes a new section 39 into the Act.

New section 39 provides the court with the discretion to order the court to be closed to the public while a complainant or similar act witness in a sexual or violent offence proceeding is giving evidence.

The court must consider whether the complainant or similar act witness wants to give their evidence in open court, and whether this would be in the interests

of justice, before they exercise this discretion. The court is also referred to section 21(2) of the *Human Rights Act 2004* which lists circumstances in which the public may be excluded without infringing on the accused's right to a fair and public hearing.

Where an order is made to close the court to the public, the order does not prevent a person nominated by the complainant or similar act witness from remaining in the court. For example, this could include a support person under new sections 38D and 81C.

Where an order is made to close the court to the public, the order will apply regardless of the method which is used to facilitate the giving of the evidence by the complainant or similar act witness. The order will apply when:

- an audiovisual recording of a police interview is being played as the complainant's evidence-in-chief in a sexual or violent offence proceeding under new division 4.2A where the complainant is a child or is intellectually impaired;
- an audiovisual recording of evidence recorded at a pre-trial hearing is being played as the complainant's or similar act witness's entire evidence in a sexual offence proceeding under new division 4.2B where the complainant or similar act witness is a child or is intellectually impaired or the complainant suffers from a special disability; and
- the witness is giving evidence via audiovisual link in a room separate from the courtroom in a sexual or violent offence proceeding under new division 4.3.

**Amendment 10 – Section 40 heading** – substitutes a new heading to section 40 for consistency as a consequence of amendments 8 and 9. The substance of section 40 has not been amended by this Act.

**Amendment 11 – New divisions 4.2A and 4.2B** – inserts new divisions 4.2A and 4.2B into the Act.

*New division 4.2A – Sexual and violent offence proceedings – audiovisual recording of police interview admissible as evidence*

New division 4.2A contains new sections 40A to 40M to permit an audiovisual recording between the police and certain witnesses to be admitted into evidence as the evidence-in-chief of the witness.

New section 40A defines **complainant** for division 4.2A of the Act.

**Complainant** is defined to mean a person against whom a sexual or violent offence the subject of the proceeding is alleged, or has been found to have been committed.

New section 40B defines **sexual offence proceeding** for division 4.2A to clarify which court proceedings will be considered a sexual offence proceeding for the purposes of division 4.2A.

New section 40C defines **violent offence proceeding** for division 4.2A to clarify which court proceedings will be considered a violent offence proceeding for the purposes of division 4.2A.

New section 40D defines **witness** for division 4.2A of the Act. **Witness** is defined to mean a complainant in a sexual offence or a violent offence proceeding who is a child or a witness who is **intellectually impaired**.

**Intellectually impaired** is defined to mean a person who has:

- an appreciably below average general intellectual function; or
- a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder or a developmental disorder; or
- any other intellectual disability.

New section 40E defines **audiovisual recording** for division 4.2A of the Act. **Audiovisual recording** is defined to mean an audiovisual recording that is of a complainant (child or intellectually impaired person) answering questions of a prescribed person in relation to the investigation of a sexual or violent offence.

The recording must contain the following:

- the date when, and place where, the recording was made;
- the times when the recording started and ended;
- the times when any break in questioning started and ended, and the reason for the break;
- the name of each person present during any part of the recording; and
- the part when each person was present during any part of the recording.

The audiovisual recording must be certified by as an accurate record of the questioning by the prescribed person and must not be edited or changed, unless the court otherwise orders.

New section 40F provides that an audiovisual recording of a complainant (child or intellectually impaired person) answering questions in relation to the investigation of a sexual or violent offence is admissible in evidence as the complainant's evidence-in-chief in a proceeding. When the recording is being played as the complainant's evidence-in-chief in a proceeding, the complainant is not to be seated in the courtroom, or be otherwise visible to the court.

New sections 40G to 40J provide the procedure for giving notice which must be followed for the audiovisual recording to be admissible as evidence.

The prosecutor must provide written notice to the accused if the prosecution intends to tender the recording as evidence. The prosecutor must also provide a copy of the transcript of the recording at this time. Upon receipt of the notice, the accused or their lawyer must give written notice to the responsible person to have access to view and hear the recording. The responsible person must provide access as soon as practicable after receiving

such notice. The accused or their lawyer is entitled to see and hear the recording as many times as they request. The accused and their lawyer are not entitled to be given or to take a copy of the recording.

An audiovisual recording will only be admissible if notice has been given by the prosecutor, a copy of the transcript has been provided at a reasonable time before the start of the proceeding in which the recording will be tendered, and the accused and their lawyer have been given a reasonable opportunity to view and hear the recording.

If the prosecution fails to provide notice, the court may still admit the recording into evidence if a copy of the transcript has been provided at a reasonable time before the start of the proceeding, the court is adjourned to enable the accused and their lawyer a reasonable opportunity to view and hear the recording, and it is in the interests of justice to admit the recording. The recording will also be admitted, where notice has not been given, if the parties consent to the recording being admitted.

New section 40K requires the court to warn the jury that admitting a recording is a usual practice and that they must not draw any inference against the accused, or give the evidence more or less weight. A transcript of the recording may be made available to the jury.

New section 40L provides that a transcript of the audiovisual recording may also be made available to the court.

New section 40M inserts an offence to protect against the misuse of an audiovisual recording by a person without authority. Misuse of the recording has a maximum penalty of 100 penalty units, imprisonment for one year or both.

New division 4.2B – *Sexual offence proceedings – giving evidence at pre-trial hearing*

New division 4.2B contains new sections 40N to 40W to permit the entire evidence of certain witnesses to be pre-recorded at a pre-trial hearing and to allow this pre-recorded evidence to be admitted into evidence at trial.

New section 40N defines **complainant** for division 4.2B of the Act. **Complainant** is defined to mean a person against whom a sexual offence the subject of the proceeding is alleged, or has been found, to have been committed.

New section 40O defines **sexual offence proceeding** for division 4.2B to clarify which court proceedings will be considered a sexual offence proceeding for the purposes of division 4.2B.

New section 40P defines **witness** for division 4.2B of the Act. **Witness** is defined to mean a prosecution witness who is a child, or an **intellectually impaired** person, or a complainant who the court considers must give



evidence as soon as practicable because they are likely to suffer severe emotional trauma or be intimidated or distressed.

***Intellectually impaired*** is defined to mean a person who has:

- an appreciably below average general intellectual function; or
- a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder or a developmental disorder; or
- any other intellectual disability.

New section 40Q provides that a witness (child, intellectually impaired, or complainant under court order) giving evidence at a pre-trial hearing, must give this evidence in a room separate to the courtroom, but connected to it by audiovisual link. The place, where the witness is giving their evidence, is taken to be a part of the courtroom when the evidence is being given. While the witness is at this place, giving evidence by audiovisual link, the accused must not be at that place, and the witness is not required to view or hear the accused. However, the accused is entitled to view and hear the witness, and must at all times be able to communicate with their lawyer.

New section 40R provides that the only people authorised to be in the courtroom at a pre-trial hearing include the presiding judicial officer, the prosecutor, the accused, the accused's lawyer, and anyone else the court considers appropriate. The only people authorised to be at the place, where the witness (child, intellectually impaired person, or complainant under court order) gives their evidence include support people or anyone else the court considers appropriate. The recording must reveal everyone who is present at the place while the witness gives their evidence. It is not necessary, or practical, for the judicial officer presiding at the pre-trial hearing and the judicial officer presiding at the sexual offence proceeding to be the same person.

New section 40S provides that the entire evidence (evidence-in-chief, cross-examination and re-examination evidence) of a witness (child, intellectually impaired, or complainant under court order), which is taken at a pre-trial hearing, must be recorded. The prosecution can elect to include an audiovisual recording of a police interview (under new division 4.2A) as part of the recorded evidence. The audiovisual recording of the entire evidence recorded at the pre-trial hearing must be played at the sexual offence proceeding and admitted into evidence as a substitute for the witness giving oral evidence at this proceeding.

New section 40T ensures that even where an audiovisual recording of a witness's evidence is played as the witness's evidence in a sexual offence proceeding, the accused may make an application to the court for an order that the witness attend the proceeding to give further evidence. Where the court makes such an order, the witness must give their further evidence in a room separate from the courtroom, but linked to it by audiovisual link.

New section 40U requires the court to warn the jury that admission of

pre-recorded evidence taken at a pre-trial hearing is a usual practice, and that they must not draw any adverse inferences against the accused, or give the evidence more or less weight.

New section 40V provides that an audiovisual recording of evidence recorded at a pre-trial hearing which is later admitted into evidence in a sexual offence proceeding is admissible as evidence in a related proceeding, unless the court in the related proceeding otherwise orders.

The court in the related proceeding is not prevented from ruling on the admissibility of the recording and may order any editing of the recording. The court in the related proceeding can also order that the witness attend the related proceeding to give further evidence. The court can make such an order in the following circumstances:

- the applicant has become aware of something new;
- the witness could have been recalled if they had given their evidence in person at the hearing (as opposed to having the recording of their evidence played);
- it is in the interests of justice to make the order.

**Related proceeding** is defined to mean any of the following:

- a re-hearing or re-trial of, or appeal from, the hearing of the sexual offence proceeding in which the audiovisual recording was admitted; or
- 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
- a civil proceeding arising from the sexual offence.

New section 40W ensures that the admissibility of an audiovisual recording of a child's evidence recorded at a pre-trial hearing, is not affected if the child turns 18 before the recording is admitted into evidence in a sexual offence proceeding or in a related proceeding.

**Amendment 12 – Division 4.3 heading** – substitutes a new heading to division 4.3 as a consequence of amendments 15 to 17 which extend the scope of existing division 4.3 to cover violent offence proceedings in addition to sexual offence proceedings.

**Amendment 13 – Meaning of *complainant* and *sexual offence proceeding* for div 4.3 Section 41(1)** – substitutes new subsection (1) to insert a new definition of **complainant** as a consequence of amendments 15 to 17 which extend the scope of existing division 4.3 to cover violent offence proceedings in addition to sexual offence proceedings. **Complainant** is defined to mean a person, or people, against whom a sexual or violent offence the subject of the proceeding is alleged, or has been found, to have been committed.

**Amendment 14 – Section 41(4), new note** – inserts a new note into subsection (4) as a consequence of amendment 33.

**Amendment 15 – New section 41A** – inserts new section 41A into the Act.

New section 41A defines the term *violent offence proceeding* for division 4.3 to clarify which court proceedings will be considered a violent offence proceeding for the purposes of division 4.3.

**Amendment 16 – Section 42** – substitutes a new section 42 to provide that division 4.3 applies whether the evidence given by a complainant or a similar act witness in a sexual or violent offence proceeding is to be given on oath or otherwise.

**Amendment 17 – Section 43** – substitutes a new section 43 into the Act.

New section 43 provides that the evidence of complainants and similar act witnesses, in sexual or violent offence proceedings, must be given from a place which is separate from the courtroom, but connected to it by audiovisual link, unless the court otherwise orders. The place, where the complainant or similar act witness are giving their evidence, is taken to be a part of the courtroom when the evidence is being given.

The court can only order against the taking of evidence in this fashion if the complainant or similar act witness prefers to give evidence in the courtroom, or the proceeding may be unreasonably delayed, or there is a substantial risk that the proceeding would not be conducted fairly.

While the complainant or similar act witness is at the place, giving evidence by audiovisual link, the accused must not be at that place, and the witness is not required to view or hear the accused. However, the accused is entitled to view and hear the witness, and must at all times be able to communicate with their lawyer.

**Amendment 18 – Consequential orders under div 4.3 Section 44** – amends section 44 to replace the word ‘complainant’ with the words ‘complainant or similar act witness’.

**Amendment 19 – Section 44** – amends section 44 to replace the words ‘sexual offence’ with the words ‘sexual or violent offence’.

**Amendment 20 – Making of orders under div 4.3 Section 45(1)** – amends subsection (1) to replace the words ‘sexual offence’ with the words ‘sexual or violent offence’.

**Amendment 21 – Section 45(1)** – amends subsection (1) to replace the words ‘or the complainant’ with the words ‘, the complainant or a similar act witness’.

**Amendment 22 – Jury to be warned about adverse inferences Section 46** – amends section 46 to replace the words ‘sexual offence’ with the words ‘sexual or violent offence’.

**Amendment 23 – Failure to comply with div 4.3 Section 47(1)** – amends subsection (1) to replace the words ‘If the complainant’s evidence’ with the words ‘If the evidence of the complainant or a similar act witness’.

**Amendment 24 – Section 47(2)** – amends subsection (2) to replace the words ‘sexual offence’ with the words ‘sexual or violent offence’.

**Amendment 25 – New part 4A** – inserts a new part 4A into the Act. New part 4 contains new sections 81B, 81C and 81D.

New section 81B defines the term **witness with a disability** for part 4A. **Witness with a disability** is defined to mean a person who has a mental or physical disability, which affects their ability to give evidence.

New section 81C – *Witness may have support person in court*

New section 81C provides an entitlement to children and people with a disability in all court proceedings to have a support person seated close to, and within their sight, while they are giving evidence.

The court will make the order for the entitlement following an application being made by the party intending to call the child or disabled person. The court will have the discretion to order more than one support person where this would be in the interests of justice. The child or disabled person will be able to choose who their support person will be, however, unless the court otherwise orders, the support person must not be, or be likely to be, a witness or a party in the proceeding.

It is not necessary, or practical, for the same support person to be present for the child or disabled person throughout the giving of their evidence. For example, where the giving of evidence takes place over a series of days, a different support person can be present on each day.

The support person is not a legal advocate or representative of the witness, and will not be permitted to speak on behalf of the witness during, or intervene in, the court proceeding.

The court is required to warn the jury that the presence of a support person or people is a usual practice, and that they must not draw any adverse inferences against the accused, or give the evidence more or less weight.

New section 81D – *Evidence given in closed court*

New section 81D provides the court with the discretion to order the court to be closed to the public while a witness, who has a disability, which affects their ability to give evidence, is giving evidence in any court proceeding.

The court can only exercise the discretion in relation to witnesses the court is satisfied suffer from a disability, which affects their ability to give evidence, because of the particular circumstances of the proceeding, or the particular

circumstances of the witness. Guidance is provided to the court to identify appropriate witnesses, which would fall within this category. For example, a witness's ability to give evidence may be affected, because they are so intimidated or distressed because of the nature of their relationship with the accused.

The court must consider whether the witness wants to give their evidence in open court, and whether this would be in the interests of justice, before they exercise this discretion. The court is also referred to section 21(2) of the *Human Rights Act 2004* which lists circumstances in which the public may be excluded without infringing on the accused's right to a fair and public hearing.

Where an order is made to close the court to the public, the order does not prevent a person nominated by the witness from remaining in the court. For example, this could include a support person under new section 81C.

Where an order is made to close the court to the public, the order will apply regardless of the method which is used to facilitate the giving of the evidence by the witness. The order will apply when an audiovisual recording of a police interview is being played as the evidence-in-chief of a child or an intellectually impaired complainant under new division 4.2A in a sexual or violent offence proceeding. The order will also apply when an audiovisual recording of evidence recorded at a pre-trial hearing is being played as the witness's entire evidence in a sexual offence proceeding under new division 4.2B where the witness is a child or is intellectually impaired.

**Amendment 26 – Dictionary, new definition of *audiovisual recording*** – inserts a new definition of ***audiovisual recording*** into the Dictionary of the Act. The new definition provides a cross-reference to new section 40E where ***audiovisual recording*** is defined.

**Amendment 27 – Dictionary, definitions of *complainant*, and *sexual offence proceeding*** – substitutes new definitions of ***complainant*** and ***sexual offence proceeding*** into the Dictionary of the Act. The new definitions provide cross-references to the sections in the Act where the terms are defined.

**Amendment 28 – Dictionary, new definitions** – inserts new definitions of ***similar act witness***, ***violent offence***, ***violent offence proceeding***, ***witness*** and ***witness with a disability*** into the Dictionary of the Act. The new definitions provide cross-references to the sections in the Act where the terms are defined.

### **PART 3 – Magistrates Court Act 1930**

**Amendment 29 – Legislation amended – pt 3** – provides that part 3 amends the *Magistrates Court Act 1930*.

**Amendment 30 – Procedure if informant proposes to tender written statements to court Section 90(7)** – substitutes a new subsection (7) into

the Act to provide that where an accused or their lawyer requests to inspect any document or thing under subsection (2)(d), they can also request to listen to or view a recording made by a police officer if a written statement is in the form of a transcript of such a recording.

New subsection (8) ensures that the informant must comply with any requests made under the new subsection (7), and new subsection (9) provides that the accused and their lawyer are not entitled to be given, or make a copy of, the recording.

**Amendment 31 – Written statements may be admitted in evidence**

**Section 90AA(3)** – amends subsection (3) to replace the words ‘A written statement’ with the words ‘Subject to subsection (3A), a written statement’ as a consequence of amendment 32.

**Amendment 32 – New section 90AA(3A)** – inserts new subsection (3A) into the Act. New subsection (3A) provides that a written statement can be in the form of a transcript of a recording made by a police officer.

A written statement, in the form of a transcript, can only be admitted into evidence provided the following conditions are met:

- the transcript is of a recording of an interview between a person and a police officer in connection with the investigation of a criminal offence;
- the person is a child or a person who is intellectually impaired; and
- the police officer certifies that the statement is an accurate transcript of the recording.

**Amendment 33 – New section 90AA(11) and (12)** – inserts new subsections (11) and (12) into section 90AA.

New subsection (11) provides that a complainant in relation to a sexual offence is not required to attend, and give evidence at, a preliminary hearing in relation to the offence. A written statement (including a statement in the form of a transcript of a recording made by a police officer) will be admitted as the complainant’s evidence-in-chief, and no further evidence will be required to be given.

New subsection (12) defines the terms ***intellectually impaired, proceeding for a sexual offence*** and ***sexual offence*** for section 90AA.

***Intellectually impaired*** is defined to mean a person who has:

- an appreciably below average general intellectual function; or
- a cognitive impairment (including dementia or autism) arising from an acquired brain injury, neurological disorder or a developmental disorder; or
- any other intellectual disability.

***Proceeding for a sexual offence*** is defined to mean a proceeding for a sexual offence and any other offence.

**Sexual offence** is defined to mean any of the offences contained in part 3 (Sexual offences), part 4 (Female genital mutilation) or part 5 (Sexual servitude) of the *Crimes Act 1900*.