

**2019**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**EVIDENCE (MISCELLANEOUS PROVISIONS) AMENDMENT BILL 2019**

**EXPLANATORY STATEMENT**

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# EVIDENCE (MISCELLANEOUS PROVISION) AMENDMENT BILL 2019

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## **Purpose of the Bill**

The *Evidence (Miscellaneous Provisions) Amendment Bill 2019* (the Bill) will establish the legislative framework for the use of intermediaries and ground rules hearings in criminal proceedings. In doing so, it implements recommendations made by the *Royal Commission into Institutional Responses to Child Sexual Abuse* (the Royal Commission), as well as improving access to justice for vulnerable witnesses more broadly.

An intermediary is an independent communication specialist whose role is to assist a person with communication difficulties to communicate their best evidence to police and to the Court.

A ground rules hearing is a pre-hearing process where the Court takes into consideration the communication, support or other needs of a witness, and sets ‘ground rules’ accordingly. Where an intermediary has been appointed, the ground rules hearing provides an opportunity for the intermediary to inform the Court of the communication needs of the witness, and for the Court to make any adjustments that are in the interests of justice.

The Criminal Justice Report of the *Royal Commission into Institutional Responses to Child Sexual Abuse* (the Royal Commission) emphasised that child victims face particular difficulties in accessing justice through the criminal justice system. The Royal Commission heard examples of many child complainants breaking down during cross-examination due to the stress and trauma associated with giving their evidence. The Criminal Justice Report noted that vulnerable witnesses may not have language to describe what happened, and that even if they can articulate that something happened, they struggle to disclose this accurately to strangers in unfamiliar settings. Communication barriers may also make it difficult for children to disclose the abuse with a sufficient level of particularity to assist further investigation and the laying of charges.<sup>1</sup>

At the most fundamental level, in order to participate in the criminal justice process, children must be able to give a comprehensible account of what has happened, understand the questions being asked of them, and provide a comprehensible response.<sup>2</sup> Without this, evidence of any criminal acts perpetrated against them cannot be heard and considered by the criminal justice system. Consequently, the abuse remains unheard and unaddressed.

In addition to limiting the rights of victims, communication barriers between a witness and the justice system critically undermine the system’s ability to hold offenders to account. Child sexual abuse offences are generally committed in private. Typically, the victim is the only witness who can provide direct evidence of the abuse.<sup>3</sup> Ensuring children can communicate their evidence is integral to prosecuting child sexual abuse offences. In the absence of such evidence, offenders may remain at liberty to perpetrate further abuse against

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<sup>1</sup> *Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report*, Parts VII to X and Appendices, pp. 3-6.

<sup>2</sup> *Ibid*, p. 6.

<sup>3</sup> *Ibid*, p. 3.

additional victims.<sup>4</sup> Better methods for hearing the evidence of child abuse victims may also increase offender accountability by encouraging the reporting of such crime, recognising that current system failures can deter victims from making a report

The Royal Commission made a number of recommendations to improve opportunities for victims to provide their best evidence. Many of these have already been implemented, including recent extensions to special measures available for witnesses in court proceedings. This Bill makes further progress towards improving opportunities for witnesses to provide evidence by legislating for intermediaries and ground rules hearings.

In establishing the legal framework for intermediaries and ground rules hearings, the Bill implements the following key recommendations made by the Royal Commission in its Criminal Justice Report:

- Recommendation 59 – which recommends that state and territory governments establish intermediary schemes similar to the Registered Intermediary Scheme in England and Wales; and
- Recommendation 60 – which recommends that state and territory governments ensure ground rules hearings are able to be held and are in fact held in child sexual abuse prosecutions.

It will also contribute to the effective implementation of the following recommendations in the Criminal Justice Report, of which the establishment of an intermediary scheme is one element:

- Recommendation 9 – which makes a number of recommendations about police interviewing practice, including that intermediaries be made available; and
- Recommendation 13 – which recommends, among other things, that police make all appropriate use of any available intermediary scheme responding to victims and survivors with a disability.

While the Bill is primarily intended to improve the experience of victims of child sexual abuse in the criminal justice system, it will also deliver clear benefits to other witnesses, the accused and the Court. The Bill does this by providing the Court with a broad discretion to order a ground rules hearing or appoint an intermediary for any witness with a communication difficulty, including an accused person. In addition, high quality communication with witnesses and obtaining accurate and complete testimony, can ensure that not only the complainant, but also the accused experiences a fair trial. Obtaining clear, accurate testimony also improves the Court's ability to deliver justice more effectively. This has been shown to be the case in other jurisdictions where similar legislation has been

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<sup>4</sup> Ibid, p. 5.

implemented, such as in NSW, Victoria and elsewhere.<sup>5</sup> Therefore, in addition to making strides towards a fairer justice system for victims of child sexual abuse, the Bill also benefits other witnesses, the accused, and the Court more broadly.

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<sup>5</sup> Judy Cashmore and Rita Shackel (2018), *Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report*, prepared for Victims Services, NSW Department of Justice, p. 56; Amy Watts (2014), *Report to Investigate Models of Intermediaries for Child Victims and Witnesses in the Criminal Justice System in England, Ireland, Austria and Norway*, Report for The Winston Churchill Memorial Trust of Australia, p. 17; Royal Commission into Institutional Responses to Child Sexual Abuse (2016), *Criminal Justice*, Consultation Paper, p. 382.

## **Human Rights Considerations**

The Royal Commission was established in January 2013 to investigate institutions that have failed to protect children or respond to allegations of child sexual abuse. The Royal Commission showed that countless children have been sexually abused in many institutions in Australia, and that society's institutions have failed to protect them and hold perpetrators to account. The Royal Commission found that<sup>6</sup>

*The impacts of child sexual abuse are different for each victim. For many victims, the abuse can have profound and lasting impacts. They experience deep, complex trauma, which can pervade all aspects of their lives, and cause a range of effects across their lifespans. Other victims do not perceive themselves to be profoundly harmed by the experience.*

*Some impacts on victims are immediate and temporary, while others can last throughout adulthood. Some emerge later in life; others abate only to re-emerge or manifest in response to triggers or events. As victims have new experiences or enter new stages of development over their life courses, the consequences of abuse may manifest in different ways.*

The issue of child sexual abuse raises important human rights issues and engages many rights under the *Human Rights Act 2004* (HR Act). Child sexual abuse violates children's most basic rights including the right to protection from torture and cruel, inhuman or degrading treatment (s 10 HR Act), the right to protection of family and children (s 11 HR Act), and the right to liberty and security of person (s 12 HR Act).

The ACT Government has obligations under international human rights law to address these violations. International human rights law places obligations on governments to "respect, protect and fulfil" rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.<sup>7</sup>

The ECHR has held that the positive obligation on States extends to imposing a duty to protect children from sexual abuse under Article 3 of the European Convention on Human

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<sup>6</sup> Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report*, Volume 3, Impacts, p. 9-11. Available at: <https://www.childabuseroyalcommission.gov.au/impacts>

<sup>7</sup> Colvin, M & Cooper, J, 2009 *'Human Rights in the Investigation and Prosecution of Crime'* Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 *'Positive obligations under the European Convention on Human Rights'*, Council of Europe.

Rights (the Convention) (the right to protection from torture and cruel, inhuman or degrading treatment). In particular, in the case of *E and Others v United Kingdom*,<sup>8</sup> the ECHR found that prolonged sexual abuse meets the threshold of an Article 3 violation, and that “a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”.

The Convention on the Rights of the Child (CRC), to which Australia is a signatory, further articulates States’ human rights obligations to protect children. Article 34 of the CRC states that:

*States parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.*

Article 19 of the CRC further states that:

*(1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*

*(2) Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.*

It is incumbent on all parts of society to do what they can to protect children from abuse. The Royal Commission made recommendations for legislative change to improve the criminal justice system and society’s response to child sexual abuse. This Bill implements a number of those recommendations. In doing so, the Bill engages and places limitations on a number of human rights in the HR Act. These limitations are appropriate having regard to the human rights of children to safety, protection and justice.

Broadly, the Bill engages, and places limitations on, the following HR Act rights:

- Section 8 – Recognition and equality before the law
- Section 21 – Right to a fair trial
- Section 22 – Rights in criminal proceedings

The Bill also engages, and supports, the following HR Act rights:

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<sup>8</sup> No. 33218/96, 26 November 2002.

- Section 10 – Protection from torture and cruel, inhuman or degrading treatment;
- Section 11 – Protection of family and children;
- Section 18 – Right to liberty and security of person
- Section 21 – Right to a fair trial

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. The limitations on human rights in the Bill meet each of these requirements, as is discussed in detail below. The limitations are reasonable and justified for the purpose of improving access to justice for vulnerable witnesses and deterring child sexual abuse.

## **Detailed human rights discussion**

### **Rights engaged and supported**

The primary purpose of the Bill is to ensure access to justice for vulnerable witnesses (particularly child complainants in sexual offence proceedings) and to deter child sexual abuse. This purpose supports the right to protection from torture and cruel, inhuman or degrading treatment (s 10 HR Act), the right to protection of family and children (s 11 HR Act), and the right to liberty and security of person (s 18 HR Act). The Bill gives effect to these rights by making amendments that assist child complainants in sexual offence proceedings to seek justice.

In addition, the Bill makes a number of amendments that engage and support the right to a fair trial (s 21 HR Act). The right to a fair trial has been found to include a ‘triangulation of interests’ which include those of the accused, the victim and his or her family, and the public.<sup>9</sup> The Bill gives effect to this right by enhancing the ability of child complainants and other vulnerable witnesses to provide evidence.

For an accused, high quality communication with witnesses and obtaining accurate and complete testimony ensures that they too experience a fair trial. In addition, the Bill provides the Court with a discretion to order a ground rules hearings or appoint an intermediary for a defendant with a communication difficulty, allowing them to also benefit from the provisions in the Bill.

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<sup>9</sup> *Ragg v Magistrates’ Court of Victoria and Corcoris* [2008] VSC 1 (24 January 2008) (Bell J)



## **Rights engaged and limited**

### ***Section 8 – Recognition and equality before the law***

This right requires that everyone is equal before the law and is entitled to the equal protection of the law without discrimination. This right is engaged because intermediaries (and by extension, ground rules hearings) are made available to certain categories of witness as a matter of course and others only at the discretion of the Court. The provisions operate such that child complainants in sexual offence proceedings and child witnesses in homicide proceedings will have an intermediary appointed subject to exceptions; however, other types of witnesses (including defendants) can only have an intermediary appointed at the discretion of the Court.

The purpose of prescribing certain witnesses as having a default ‘entitlement’ to an intermediary is to ensure that those who are most vulnerable do not miss out on the assistance they need. The Royal Commission provided ample evidence as to why child complainants in sexual offence proceedings should have access to an intermediary as a matter of course. That evidence has been discussed in detail above. This default entitlement has been extended to child witnesses in homicide proceedings in recognition of the severe trauma children can experience when witnessing homicides. It is difficult to conceptualise a situation in which a child complainant in a sexual offence proceeding or a child witness in a homicide proceeding would *not* benefit from an intermediary.

The nature and extent of the limitation is minimised by allowing an application to be made to the Court for a ground rules hearing or intermediary for any witness (including defendants) with a communication difficulty. In doing so, the amendments expand the current rights of accused, complainants, and other witnesses. Under this scheme, any witness with a communication difficulty could potentially benefit from greater access to justice.

The limitation is the least restrictive possible. Broadly speaking, there are three alternative options for achieving the purpose of making intermediaries available for child complainants in sexual offence proceedings and child witnesses in homicide proceedings. The first, is to simply prescribe those witness categories and not provide a discretion to appoint intermediaries for other witnesses. This is a more restrictive approach as it reduces even further the likelihood that other witnesses will access the same rights as prescribed witnesses. The second option is to allow all witnesses access to an intermediary. This is impractical and not in keeping with the policy rationale of the intermediary scheme which is to assist *vulnerable* witnesses. The third alternative option is to develop legislative guidelines for the Court to consider in determining a witness is vulnerable and appointing an intermediary accordingly. However, this option may inadvertently constrain the scope of witnesses that may access an intermediary. It also takes discretion away from the Court, whereas the Court may be better placed to make assessments of whether it is appropriate to appoint an intermediary on a case by case basis. Accordingly, the legislative framework in the Bill is the least restrictive way possible to ensure intermediaries and ground rules hearings are used for

child complainants in sexual offence proceedings and child witnesses in homicide proceedings.

### ***Section 21 and Section 22 – Fair Trial and Rights in Criminal Proceedings***

Sections 21 and 22 are closely connected. Section 21 provides a right to a fair trial broadly, in which criminal charges are decided by a competent, independent and impartial Court or tribunal after a fair and public hearing. Section 22 provides that anyone charged with a criminal offence is entitled to a number of minimum guarantees. Of particular relevance to this Bill are the following minimum guarantees:

- the right to be tried without unreasonable delay (section 22(2)(c)); and
- the right to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses (section 22(2)(f)).

The concept of providing intermediaries and having ground rules hearings may, on its face, appear to limit the right to be tried without unreasonable delay. Arguments may be made that holding ground rules hearings may delay proceedings, and the directions made during ground rules hearings may serve to delay proceedings even further. Similarly, it could be argued that the use of an intermediary could serve to delay proceedings by virtue of the added time required to communicate through the third party. However, the evidence from intermediary schemes in the United Kingdom and in New South Wales, as well as the Royal Commission's report indicate that the use of intermediaries may result in more efficient proceedings.<sup>10</sup> This is as a result of the witness being able to communicate more clearly, and therefore, the case being made out or disproved, more quickly—aiding the efficiency and fairness of the trial. Therefore, while a limitation in terms of delay is possible, the evidence is that the amendments may have the contrary effect.

The provisions also limit the right to examine witnesses. At the ground rules hearing, a court may make a range of directions about how a witness can be questioned and what they can and cannot be asked. In addition, the intermediary may ask questions in certain ways.

The purpose of the limitations is to ensure witnesses are able to give their best evidence, which in turn, enhances the fairness of the trial. It also serves to reduce the trauma associated with giving evidence.

The provisions in the Bill are the least restrictive means possible to achieve this purpose. The Royal Commission considered a broad range of options for ensuring witnesses are able to give their best evidence in a manner that reduces the trauma associated with providing evidence. In its comprehensive assessment it considered that this purpose could not be

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<sup>10</sup> Judy Cashmore and Rita Shackel (2018), *Evaluation of the Child Sexual Offence Evidence Pilot: Final Outcome Evaluation Report*, prepared for Victims Services, NSW Department of Justice, p. 63; Tasmania Law Reform Institute (2018), *Facilitating Equal Access to Justice: An Intermediary/Communication Assistant Scheme for Tasmania?*, Final Report No. 23, p. 40; *Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Criminal Justice Report*, Parts VII to X and Appendices, p. 76.

adequately met without implementing ground rules hearings and an intermediary scheme. While implementation of these is necessary to achieve the purpose, the extent of the limitations have been restricted insofar as possible through the following:

- the Court can make a direction at a ground rules hearing only where it considers it in the interests of justice to do so;
- intermediaries are *independent officers of the Court* who have a legislated duty to act impartially when assisting communication with the witness;
- evidence of a witness given in the presence of an intermediary must be given in circumstances in which the Court and any lawyer appearing in the proceeding are able to see and hear the witness giving evidence and communicate with the intermediary; and
- the Court has a discretion to not appoint an intermediary where it is not in the interests of justice to do so.

These features serve to ensure that the least restrictive approach possible has been taken to allowing witnesses to benefit from ground rules hearings and intermediaries, and consequently, enabling witnesses to provide their best evidence in a manner that reduces trauma.

# **Evidence (Miscellaneous Provisions) Amendment Bill 2019**

## **Detail**

### **Part 1 – Preliminary**

#### **Clause 1 — Name of Act**

This is a technical clause that names the short title of the Act. The name of the Act will be the *Evidence (Miscellaneous Provisions) Amendment Act 2019*.

#### **Clause 2 — Commencement**

This clause provides that the Act will commence on a day fixed by the Minister by written notice, no later than six months after the notification day.

#### **Clause 3 — Legislation Amended**

This clause lists the legislation amended by the Bill. The Bill will amend the *Evidence (Miscellaneous Provisions) Act 1991* and the *Evidence (Miscellaneous Provisions) Regulation 2009*.

### **Part 2 – Evidence (Miscellaneous Provisions) Act 1991**

This part amends the *Evidence (Miscellaneous Provision) Act 1991* (EMPA) to establish the legal framework for ground rules hearings and the use of intermediaries.

#### **Clause 4 – New chapters 1A and 1B**

##### **Chapter 1A Ground rules hearings – criminal proceedings**

###### **New Section 4AA – Definitions—ch 1A**

This section defines key terms for the chapter.

###### **New Section 4AB – Direction to hold ground rules hearing**

This section sets out that a court may, at any time, direct that a ground rules hearing be held for any witness in a criminal proceeding where it is in the interests of justice to do so. A court can make a direction to hold a ground rules hearing on its own initiative, or on the application of the DPP, the accused person or the witness.

A court must direct that a ground rules hearing be held for a witness in a criminal proceeding if an intermediary has been appointed for the witness in the proceeding.

This section also clarifies that an application for a ground rules hearing can be made orally or in writing to afford the maximum flexibility to the process.

#### New Section 4AC – Ground rules hearings—time limits

This section mandates that a ground rules hearing must occur prior to a witness giving evidence in the proceeding.

Subsection (2) allows the Court to extend the time for holding a ground rules hearing if it is in the interests of justice to do so. For example, it may not become apparent until part way through a proceeding that the witness has a communication difficulty and would benefit from an intermediary. In this situation the Court may extend the time for holding a ground rules hearing.

#### New Section 4AD – Ground rules hearings—who must attend

The purpose of this section is to ensure that the relevant legal representatives and the intermediary are present for the ground rules hearing. A witness is not required to attend the ground rules hearing. In this regard, the Court may make an order that a witness for whom an intermediary is appointed not attend a ground rules hearing. The reason for allowing the Court to order that a witness not attend, is to facilitate transparent discussion about any communication difficulties the witness may have. Discussion about the barriers may be inhibited by the presence of the witness in some circumstances.

#### New Section 4AE – Ground rules hearings—intermediary’s report

This section requires an intermediary to provide the Court with a report about the communication needs of the witness before the ground rules hearing. The report will be based on an assessment of the witness. The purpose of the report is to provide a basis on which the Court can make appropriate directions.

#### New Section 4AF – Ground rules hearings—directions

This section allows a court to make a range of directions where it considers it in the interests of justice to do so.

This section also requires that, if an intermediary has provided a report to the Court under section 4E, the Court must consider the matters mentioned in the report in making the direction.

### **Chapter 1B Witness intermediaries – criminal proceedings**

#### New Section 4AG – Definitions

This section defines key terms for the chapter.

#### New Section 4AH – Panel of witness intermediaries

This section creates the power for the intermediaries administrator to establish and maintain an intermediaries panel, including the power to remove and replace members. The intermediaries administrator can appoint people who have a tertiary or other qualification in specific fields as prescribed in the regulation or by legislation. The administrator can also appoint people if they have qualifications, training, experience or skills that the administrator considers are suitable to exercise the functions of a witness intermediary.

#### New Section 4AI – Functions of witness intermediaries

This section outlines the functions of intermediaries. These are to prepare reports for the purposes of ground rules hearings, and to facilitate communication between the witness and the person putting questions to the witness.

This section also makes clear that an intermediary appointed for a witness is an officer of the court and must act impartially when assisting communication with the witness.

#### New Section 4AJ – Appointment of witness intermediary—generally

This section outlines the process for appointing intermediaries. A court may appoint an intermediary for a witness with a communication difficulty on its own initiative, or on the application of the DPP, the witness, or the accused person.

The section lists mental or physical disabilities that impede speech as examples of communication difficulties, although the examples are not intended to be exhaustive.

The section also outlines when an intermediary must not be appointed. The Court must not appoint an intermediary where the witness is aware of their right to make an application for an intermediary and is able and wishes to give evidence without the assistance of an intermediary. The policy intent of this provision is to preserve the agency of the witness and respect their wishes as long as they are able to give evidence on their own.

Under subsection (3) the Court is not bound by the rules of evidence and may inform itself as it considers appropriate.

#### New Section 4AK – Appointment of witness intermediary—prescribed witnesses

This section mandates that a court must appoint an intermediary in a criminal proceeding for a witness proscribed by regulation. However, in order to ensure a fair trial, the Court need not appoint an intermediary for a witness if there is no one available who meets the needs of the witness and satisfies the requirements of a witness intermediary, or if it is not in the interests of justice to appoint an intermediary.

This section also provides that the Court must not appoint an intermediary for a witness if the Court is satisfied that the witness is aware of their right to an intermediary and is able to, and wishes to, give evidence without an intermediary.

Under subsection (4) the Court is not bound by the rules of evidence and may inform itself as it considers appropriate.

New Section 4AL – Appointment of witness intermediary—suitability of the intermediary for the witness etc

This section ensures that a court may appoint an intermediary in a criminal proceeding only if the intermediaries administrator is satisfied the intermediary has qualifications, training, experience or skills suitable for the witness.

This section also requires that, if the intermediary is a relative, friend or acquaintance of the witness, a person who has previously assisted the person in a professional capacity or a part to (or potential witness) in the proceeding, the Court must also be satisfied that the appointment is necessary and in the interests of justice.

This section ensures that an intermediary who has a pre-existing relationship with the witness can only be appointed as an intermediary where there is no other suitable intermediary reasonably available and it is in the interests of justice. This provision is intended to be used rarely, and only where there are a limited number of people who are able to communicate with the witness and no other options are available. Examples of rare circumstances where the Court may consider it is in the interests of justice to allow a person known to the witness to be an intermediary may include where the witness is an Aboriginal or Torres Strait Islander and there are limited Aboriginal and Torres Strait Islander people able to communicate with the witness; or where the witness has a very specific communication difficulty requiring a highly specialised clinical professional and that professional has a long standing professional relationship with the witness.

Given the small size of the ACT as a jurisdiction, a blanket prohibition on anyone who is a relative, friend or acquaintance would be too limiting. For this reason, the Court has discretion to appoint such individuals if there is no other suitable intermediary reasonably available and it is in the interests of justice.

Importantly, an intermediary who is known to the witness must still communicate accurately and act impartially, or risk imprisonment. There are a number of offences that apply to intermediaries that communicate in a way that is false or misleading under the consequential amendments to the *Criminal Code 2002*.

Under subsection (2) the Court is not bound by the rules of evidence and may inform itself as it considers appropriate.

New Section 4AM – Witness to give evidence in presence of intermediary

This section mandates that the witness must give their evidence in the presence of an intermediary if one has been appointed. This section also sets out that the Court, lawyers and any jurors (if there are any) must be able to see and hear the witness giving evidence including any assistance given by the intermediary. The accused will be able to hear and see the accused subject to any other provisions in the Act or any other direction or order of the Court. In relation to a court and lawyers, they must also be able to communicate with the intermediary.

Subsection (3) requires the Court to tell the jury that a witness giving evidence in the presence of an intermediary is usual practice and that the jury must not draw any negative inference against the accused person, or give the evidence more or less weight, because the intermediary is present.

Subsection (4) makes clear that an order that the Court be closed to the public does not stop an intermediary for a witness being in court while the witness gives evidence.

#### New Section 4AN – Relationship to other provisions of this Act

This section clarifies that this part does not affect the operation of any other provision in the EMPA.

#### **Clause 5 – Meaning of *proceeding*—pt 4.1 Section 37, definition of *proceeding*, paragraph (b)**

This is a consequential amendment that includes ground rules hearings as a ‘proceeding’ under section 37.

#### **Clause 6 – Special requirements—particular proceedings section 43, new note**

This section inserts a note in section 43 of the EMPA (setting out which types of existing special requirements can be made available to which types of vulnerable witnesses) to clarify that the Court may also appoint an intermediary for a witness under the new provisions.

#### **Clause 7 – Dictionary, new definitions**

This section is a consequential amendment of the Dictionary in the EMPA, as a result of new Chapter 1A and Chapter 1B.

#### **Clause 8 – Dictionary, definition of *witness***

This section is a consequential amendment to a definition in the Dictionary of the EMPA, as a result of new Chapter 1A and Chapter 1B.

### **Part 3 – Evidence (Miscellaneous Provisions) Regulation 2009**

This part makes consequential amendments to the Evidence (Miscellaneous Provisions) Regulation 2009 to prescribe witnesses for whom a court must appoint an intermediary.

#### **Clause 9 – New part 1 heading**

This clause inserts a new heading titled ‘Part 1 Preliminary’.

#### **Clause 10 – New section 2**

This clause is a technical amendment that to clarify that the dictionary at the end of the regulation is a part of the regulation.



## **Clause 5 – New part 2**

This clause inserts a new Part 2 into the regulation.

### **Part 2 Witness intermediaries**

New Section 3A Intermediaries administrator—Act, s 4AG (2), definition of *intermediaries administrator*

This section prescribes the Victims of Crime Commissioner as the intermediaries administrator.

New Section 3B Prescribed witnesses—Act, s 4AK (1)

This section prescribes witnesses for proceedings in which a witness intermediary must be used.

## **Clauses 6, 7, 8 – various**

These clauses are consequential amendments as a result of new Chapter 1A and Chapter 1B of the EMPA.

## **Schedule 1 – Consequential amendments**

### **Part 1.1 – Criminal Code 2002**

[1.1], [1.2], [1.3], [1.4], [1.5], [1.6], [1.7], [1.8], [1.9], [1.10], [1.11], [1.12], [1.13], [1.14], [1.15], [1.16], [1.17] – various

These clauses are consequential amendments as a result of new Chapter 1A and Chapter 1B of the EMPA.

The amendments relate broadly to ensuring the same rules and protections apply to a witness intermediary as any other type of witness or interpreter. It is important to note that an intermediary is much more than an interpreter and is able to provide a full range of advice about communication needs of a witness.

### **Part 1.2 – Evidence Act 2011**

[1.18], [1.19], [1.20], [1.21], [1.22], [1.23], [1.24], [1.25], [1.26], [1.27], [1.28] – various

These clauses are consequential amendments as a result of new Chapter 1A and Chapter 1B of the EMPA.

The amendments relate broadly to ensuring there is appropriate guidance in the *Evidence Act 2011* to allow a witness intermediary to swear an oath or make an affirmation.