

2008

THE LEGISLATIVE ASSEMBLY  
FOR THE AUSTRALIAN CAPITAL TERRITORY

---

(As presented)

(Attorney-General)

# Sexual and Violent Offences Legislation Amendment Bill 2008

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FOR THE AUSTRALIAN CAPITAL TERRITORY

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(As presented)

(Attorney-General)

## **Sexual and Violent Offences Legislation Amendment Bill 2008**

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### **A Bill for**

An Act to amend the *Evidence (Miscellaneous Provisions) Act 1991* and the *Magistrates Court Act 1930* in relation to sexual and violent offences

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The Legislative Assembly for the Australian Capital Territory enacts as follows:

1 **Part 1 Preliminary**

2 **1 Name of Act**

3 This Act is the *Sexual and Violent Offences Legislation Amendment*  
4 *Act 2008*.

5 **2 Commencement**

6 This Act commences on a day fixed by the Minister by written  
7 notice.

8 *Note 1* The naming and commencement provisions automatically commence on  
9 the notification day (see Legislation Act, s 75 (1)).

10 *Note 2* A single day or time may be fixed, or different days or times may be  
11 fixed, for the commencement of different provisions (see Legislation  
12 Act, s 77 (1)).

13 *Note 3* If a provision has not commenced within 6 months beginning on the  
14 notification day, it automatically commences on the first day after that  
15 period (see Legislation Act, s 79).

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1 **Part 2** **Evidence (Miscellaneous**  
2 **Provisions) Act 1991**

3 **3** **Legislation amended—pt 2**

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

6 **4** **Section 37**

7 *substitute*

8 **37** **Definitions—pt 4**

9 In this part:

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

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

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

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

21 *violent offence* means a violent crime under the *Victims of Crime*  
22 *(Financial Assistance) Act 1983*, section 3 (What is a *violent*  
23 *crime?*).

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

4 **5 Division 4.2 heading**

5 *substitute*

6 **Division 4.2 Sexual and violent offence**  
7 **proceedings—general**

8 **6 Meaning of *complainant* and *sexual offence proceeding***  
9 **for div 4.2**  
10 **Section 38 (1)**

11 *substitute*

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

16 **7 Section 38 (4), new note**

17 *insert*

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

21 **8 New sections 38A, 38B, 38C and 38D**

22 *insert*

23 **38A Meaning of *violent offence proceeding*—div 4.2**

24 (1) For this division, a *violent offence proceeding* is—

25 (a) a proceeding for a violent offence; or

- 1 (b) a proceeding in relation to bail for a person charged with a  
2 violent offence, whether or not the person is also charged with  
3 any other offence; or
- 4 (c) a sentencing proceeding for a person convicted of a violent  
5 offence, whether or not the person is also convicted of any  
6 other offence; or
- 7 (d) an appeal or other review (whether by prerogative order or  
8 otherwise) arising out of a proceeding mentioned in  
9 paragraphs (a) to (c); or
- 10 (e) an interlocutory proceeding in, or a proceeding ancillary to, a  
11 proceeding mentioned in paragraphs (a) to (c).
- 12 (2) For subsection (1) (a), a *proceeding for a violent offence* includes—
- 13 (a) a proceeding for a violent offence and any other offence; and
- 14 (b) a proceeding for a violent offence and any other offence as an  
15 alternative to the violent offence; and
- 16 (c) a proceeding for a violent offence that may result in a finding  
17 of guilt (or committal for trial or sentence) for any other  
18 offence.
- 19 (3) To remove any doubt, for this section, a *proceeding* includes a  
20 committal proceeding.

21 **38B Accused may be screened from witness in court**

- 22 (1) This section applies to any of the following people (the *witness*)  
23 giving evidence in a sexual or violent offence proceeding:
- 24 (a) the complainant;
- 25 (b) a similar act witness.

- 1 (2) The court may order that the courtroom be arranged in a way that,  
2 while the witness is giving evidence, the witness cannot see—  
3 (a) the accused person; or  
4 (b) anyone else the court considers should be screened from the  
5 witness.  
6 (3) However, the witness must be visible to—  
7 (a) the presiding judicial officer; and  
8 (b) if the proceeding is a trial by jury—the jury; and  
9 (c) the accused person; and  
10 (d) the accused person’s lawyer; and  
11 (e) if the court has ordered that someone should be screened from  
12 the complainant or similar act witness—the person.

13 **38C Cross-examination of complainant or prosecution**  
14 **witness by self-represented accused person—procedure**

- 15 (1) This section applies to any of the following people (a *witness*)  
16 giving evidence for the prosecution in a sexual or violent offence  
17 proceeding:  
18 (a) the complainant;  
19 (b) a child;  
20 (c) a similar act witness;  
21 (d) a witness with a disability.  
22 (2) A self-represented accused person must not personally  
23 cross-examine a witness.

- 1           (3) If the self-represented accused person intends to cross-examine a  
2           witness, the court must—
- 3           (a) tell the person that the person must not cross-examine the  
4           witness personally; and
- 5           (b) if the proceeding is a trial by jury—tell the jury that the person  
6           must not cross-examine the witness personally; and
- 7           (c) ask the person if the person has sought legal representation for  
8           the cross-examination of the witness; and
- 9           (d) if the court is satisfied that the person has not had a reasonable  
10           opportunity to obtain legal representation for the  
11           cross-examination, and the person applies for an adjournment  
12           to obtain the legal representation—adjourn the proceeding; and
- 13           (e) if the court is satisfied that the person had a reasonable  
14           opportunity to obtain legal representation for the  
15           cross-examination, and has not obtained legal representation—
- 16                 (i) order that the person obtain legal representation; and
- 17                 (ii) make any other order the court considers necessary to  
18                 secure legal representation for the person; and
- 19                 (iii) adjourn the proceeding.
- 20           (4) If the court makes an order under subsection (3) (e) (i), the court  
21           must tell the self-represented accused person that if the person  
22           refuses legal representation, or refuses to cooperate with the  
23           person’s legal representative—
- 24           (a) the person may not cross-examine the witness; and
- 25           (b) the person may not adduce evidence from another witness in  
26           relation to a fact in issue to contradict the evidence of the  
27           witness in relation to the fact if the fact in the other witness’s  
28           evidence intended to contradict the witness’s evidence has not  
29           been put to the witness in cross-examination.

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

13 **38D Witness may have support person in court**

- 14 (1) This section applies to any of the following people (a *witness*)
- 15 giving evidence in a sexual or violent offence proceeding:
- 16 (a) the complainant;
- 17 (b) a similar act witness.
- 18 (2) The court must, on application by a party who intends to call a
- 19 witness, order that the witness have a person (a *support person*) in
- 20 the court close to, and within the witness's sight, while the witness
- 21 gives evidence.
- 22 (3) The court may order that a witness have more than 1 support person
- 23 if it considers it is in the interests of justice.
- 24 (4) The support person must not—
- 25 (a) speak for the witness during the proceeding; or
- 26 (b) otherwise interfere in the proceeding.

- 1 (5) Unless the court otherwise orders, the support person must not be, or  
2 be likely to be, a witness or party in the proceeding.
- 3 (6) If the proceeding is a trial by jury, the court must tell the jury that—
- 4 (a) a witness having a support person in the court while giving  
5 evidence is a usual practice; and
- 6 (b) the jury must not draw any inference against the accused  
7 person, or give the evidence more or less weight, because the  
8 support person is present.

## 9 **9 Section 39**

10 *substitute*

### 11 **39 Sexual and violent offence proceeding—evidence to be** 12 **given in closed court**

- 13 (1) This section applies to any of the following people (a *witness*)  
14 giving evidence in a sexual or violent offence proceeding:
- 15 (a) the complainant;
- 16 (b) a similar act witness.
- 17 (2) The court may order that the court be closed to the public while all  
18 or part of the witness's evidence (including evidence given under  
19 cross-examination) is given.
- 20 *Note* The accused is entitled to a fair and public hearing, but the court may  
21 exclude the press and public in certain circumstances (see *Human*  
22 *Rights Act 2004*, s 21 (2)).
- 23 (3) In deciding whether to order that the court be closed to the public,  
24 the court must consider whether—
- 25 (a) the witness wants to give evidence in open court; and
- 26 (b) it is in the interests of justice that the witness give evidence in  
27 open court.

- 1 (4) However, an order under this section does not stop a person  
2 nominated by the witness from being in court when the witness  
3 gives evidence.
- 4 (5) In this section, a reference to a person giving evidence includes the  
5 person giving evidence by the playing of an audiovisual recording  
6 of the evidence at a hearing under division 4.2A (Sexual and violent  
7 offence proceedings—audiovisual recording of police interview  
8 admissible as evidence), division 4.2B (Sexual offence  
9 proceedings—giving evidence at pre-trial hearing) or by the person  
10 giving evidence by audiovisual link under division 4.3 (Sexual and  
11 violent offence proceedings—giving evidence from places other  
12 than courtrooms).

13 **10 Section 40 heading**

14 *substitute*

15 **40 Sexual offence proceeding—prohibition of publication of**  
16 **complainant's identity**

17 **11 New divisions 4.2A and 4.2B**

18 *insert*

19 **Division 4.2A Sexual and violent offence**  
20 **proceedings—audiovisual recording**  
21 **of police interview admissible as**  
22 **evidence**

23 **40A Meaning of *complainant*—div 4.2A**

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

1     **40B     Meaning of *sexual offence proceeding*—div 4.2A**

- 2           (1) For this division, a *sexual offence proceeding* is—
- 3               (a) a proceeding for a sexual offence; or
- 4               (b) a sentencing proceeding for a person convicted of a sexual
- 5                     offence, whether or not the person is also convicted of any
- 6                     other offence; or
- 7               (c) a proceeding under the *Domestic Violence and Protection*
- 8                     *Orders Act 2001* in relation to a sexual offence; or
- 9               (d) a proceeding under the *Victims of Crime (Financial Assistance)*
- 10                    *Act 1983* in relation to a sexual offence; or
- 11               (e) a proceeding by way of an inquest or inquiry in the Coroner’s
- 12                     Court in relation to a sexual offence; or
- 13               (f) an appeal arising out of a proceeding mentioned in
- 14                     paragraphs (a) to (e).
- 15           (2) For subsection (1) (a), a *proceeding for a sexual offence* includes—
- 16               (a) a proceeding for a sexual offence and any other offence; and
- 17               (b) a proceeding for a sexual offence and any other offence as an
- 18                     alternative to the sexual offence; and
- 19               (c) a proceeding for a sexual offence that may result in a finding of
- 20                     guilt (or committal for trial or sentence) for any other offence.

21     **40C     Meaning of *violent offence proceeding*—div 4.2A**

- 22           (1) For this division, a *violent offence proceeding* is—
- 23               (a) a proceeding for a violent offence; or
- 24               (b) a sentencing proceeding for a person convicted of a violent
- 25                     offence, whether or not the person is also convicted of any
- 26                     other offence; or

- 1 (c) a proceeding under the *Domestic Violence and Protection*  
2 *Orders Act 2001* in relation to a violent offence; or
- 3 (d) a proceeding under the *Victims of Crime (Financial Assistance)*  
4 *Act 1983* in relation to a violent offence; or
- 5 (e) a proceeding by way of an inquest or inquiry in the Coroner's  
6 Court in relation to a violent offence; or
- 7 (f) an appeal arising out of a proceeding mentioned in  
8 paragraphs (a) to (e).
- 9 (2) For subsection (1) (a), a *proceeding for a violent offence* includes—
- 10 (a) a proceeding for a violent offence and any other offence; and
- 11 (b) a proceeding for a violent offence and any other offence as an  
12 alternative to the violent offence; and
- 13 (c) a proceeding for a violent offence that may result in a finding  
14 of guilt (or committal for trial or sentence) for any other  
15 offence.

16 **40D Meaning of *witness*—div 4.2A**

- 17 (1) For this division, a *witness* is the complainant in a sexual offence or  
18 a violent offence proceeding who—
- 19 (a) is a child; or
- 20 (b) is intellectually impaired.
- 21 (2) In this section:
- 22 *intellectually impaired*—a person is *intellectually impaired* if the  
23 person has—
- 24 (a) an appreciably below average general intellectual function; or
- 25 (b) a cognitive impairment (including dementia or autism) arising  
26 from an acquired brain injury, neurological disorder or a  
27 developmental disorder; or

1 (c) any other intellectual disability.

2 **40E Meaning of *audiovisual recording*—div 4.2A**

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

6 (2) The audiovisual recording must include the following:

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

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

9 (c) the times when any break in questioning started and ended, and  
10 the reason for the break;

11 (d) the name of each person present during any part of the  
12 recording;

13 (e) for each person present during any part of the recording—the  
14 part when the person was present.

15 (3) The audiovisual recording must—

16 (a) be certified by a prescribed person as an accurate record of the  
17 witness answering the questions; and

18 (b) not be edited or changed, unless the court hearing the  
19 proceeding in which the recording is tendered otherwise  
20 orders.

21 **Example—court ordering change**

22 editing the recording to omit inadmissible material

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

- 1     **40F     Audiovisual recording may be admitted as evidence**
- 2             (1) An audiovisual recording may—
- 3                     (a) be played at the hearing of a proceeding for the sexual or
- 4                             violent offence to which it relates; and
- 5                     (b) if the recording is played at the hearing—be admitted as the
- 6                             witness’s evidence in chief in the proceeding as if the witness
- 7                             gave the evidence at the hearing in person.
- 8             (2) However, the court may refuse to admit all or any part of the
- 9                     audiovisual recording.
- 10            (3) The witness must not be in the courtroom, or visible to anyone in
- 11                     the courtroom by audiovisual link, when the audiovisual recording
- 12                     is played at the hearing.
- 13            (4) This section is subject to section 40J.
- 14     **40G     Audiovisual recording—notice**
- 15             (1) This section applies if the prosecutor in a sexual or violent offence
- 16                     proceeding intends to tender an audiovisual recording as evidence.
- 17             (2) The prosecutor must give to the accused person—
- 18                     (a) written notice that the prosecutor intends to tender the
- 19                             audiovisual recording; and
- 20                     (b) a copy of a transcript of the recording.
- 21             (3) The notice must state the following:
- 22                     (a) each audiovisual recording the prosecutor intends to tender;
- 23                     (b) that the accused person and the person’s lawyer are entitled to
- 24                             see and listen to each recording at a police station or
- 25                             somewhere else decided by the commissioner of police;
- 26                     (c) the name of the person responsible (the *responsible person*) for
- 27                             arranging access to each recording.

1    **40H       Audiovisual recording—notice for access**

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

7    **40I       Audiovisual recording—access to accused person**

- 8           (1) This section applies if an accused person, or the person’s lawyer,  
9           gives notice under section 40H requesting access to an audiovisual  
10          recording.
- 11          (2) The responsible person must give the person who gave notice access  
12          to see and listen to the audiovisual recording as soon as practicable  
13          after receiving the notice under section 40H.
- 14          (3) The person who gave notice may have access to an audiovisual  
15          recording more than once.
- 16          (4) The accused person, and the person’s lawyer, must not be given, or  
17          take a copy of, an audiovisual recording.

18   **40J       Audiovisual recording—admissibility**

- 19          (1) An audiovisual recording is admissible in a sexual or violent offence  
20          proceeding only if—
- 21               (a) notice is given under section 40G; and
- 22               (b) a copy of a transcript of the recording is given to the accused  
23               person, or the person’s lawyer, a reasonable time before the  
24               start of the hearing of the proceeding; and
- 25               (c) the accused person, and the person’s lawyer, are given a  
26               reasonable opportunity to see and listen to the recording.

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

12 **40K Audiovisual recording—jury trial**

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



1     **40O     Meaning of *sexual offence proceeding*—div 4.2B**

- 2           (1) For this division, a *sexual offence proceeding* is—
- 3               (a) a proceeding for a sexual offence; or
- 4               (b) a sentencing proceeding for a person convicted of a sexual
- 5               offence, whether or not the person is also convicted of any
- 6               other offence; or
- 7               (c) a proceeding under the *Domestic Violence and Protection*
- 8               *Orders Act 2001* in relation to a sexual offence; or
- 9               (d) a proceeding under the *Victims of Crime (Financial Assistance)*
- 10              *Act 1983* in relation to a sexual offence; or
- 11              (e) a proceeding by way of an inquest or inquiry in the Coroner’s
- 12              Court in relation to a sexual offence; or
- 13              (f) an appeal arising out of a proceeding mentioned in
- 14              paragraphs (a) to (e).
- 15           (2) For subsection (1) (a), a *proceeding for a sexual offence* includes—
- 16               (a) a proceeding for a sexual offence and any other offence; and
- 17               (b) a proceeding for a sexual offence and any other offence as an
- 18               alternative to the sexual offence; and
- 19               (c) a proceeding for a sexual offence that may result in a finding of
- 20               guilt (or committal for trial or sentence) for any other offence.

21     **40P     Meaning of *witness*—div 4.2B**

- 22           (1) For this division, a *witness* is a prosecution witness in a sexual
- 23           offence proceeding who—
- 24               (a) is a child; or
- 25               (b) is intellectually impaired; or

- 1 (c) is a complainant who the court considers must give evidence as  
2 soon as practicable because the complainant is likely to—
- 3 (i) suffer severe emotional trauma; or  
4 (ii) be intimidated or distressed.
- 5 (2) In this section:
- 6 *intellectually impaired*—a person is *intellectually impaired* if the  
7 person has—
- 8 (a) an appreciably below average general intellectual function; or  
9 (b) a cognitive impairment (including dementia or autism) arising  
10 from an acquired brain injury, neurological disorder or a  
11 developmental disorder; or  
12 (c) any other intellectual disability.

13 **40Q Witness to give evidence at pre-trial hearing**

- 14 (1) A witness must give the witness's evidence at a pre-trial hearing by  
15 audiovisual link from a place that—
- 16 (a) is not the courtroom in which the pre-trial hearing is held; but  
17 (b) is linked to the courtroom by an audiovisual link.
- 18 (2) However, the witness's evidence in chief given at a pre-trial hearing  
19 may include an audiovisual recording under division 4.2A (Sexual  
20 and violent offence proceedings—audiovisual recording of police  
21 interview admissible as evidence).
- 22 (3) If an audiovisual recording under division 4.2A is played at the  
23 pre-trial hearing, the witness must not be visible to anyone in the  
24 courtroom by audiovisual link when the audiovisual recording is  
25 played.

- 1           (4) While the witness is at the place to give evidence, the place is taken  
2           for all purposes to be part of the courtroom in which the pre-trial  
3           hearing is held.
- 4           (5) While the witness is at the place to give evidence—
- 5                 (a) the accused person must not be at the place; and
- 6                 (b) the witness must not be able to see or hear the accused person;  
7                 and
- 8                 (c) the accused person must be able to see and hear the witness  
9                 give evidence; and
- 10                (d) the accused person must be able to communicate with the  
11                person's lawyer.

12   **40R       Who may be present at pre-trial hearing**

- 13           (1) Only the following people may be present in the courtroom at the  
14           pre-trial hearing:
- 15                 (a) the presiding judicial officer;
- 16                 (b) the prosecutor;
- 17                 (c) the accused person;
- 18                 (d) the accused person's lawyer;
- 19                 (e) anyone else the court considers appropriate.
- 20           (2) While the witness is at a place to give evidence, only the following  
21           people may be present at the place:
- 22                 (a) a support person under section 38D (2) or section 81C;
- 23                 (b) anyone else the court considers appropriate.
- 24           (3) Each person who is present at the place where the witness is to give  
25           evidence must be recorded on the audiovisual recording recorded  
26           under section 40S.

- 1 (4) The judicial officer who presides at the pre-trial hearing need not be  
2 the judicial officer who presides at the trial at which the audiovisual  
3 recording of the witness's evidence is tendered.

4 **40S Evidence of witness at pre-trial hearing to be evidence at**  
5 **hearing**

- 6 (1) The evidence of a witness (including cross-examination and  
7 re-examination) given under this division must be recorded as an  
8 audiovisual recording.
- 9 (2) The evidence in chief of the witness may include an audiovisual  
10 recording under section 40E (Meaning of *audiovisual recording*—  
11 div 4.2A).
- 12 (3) The audiovisual recording of the witness's evidence must—
- 13 (a) be played at the hearing of the sexual offence proceeding for  
14 which the pre-trial hearing was held; and
- 15 (b) be admitted in evidence as the witness's evidence at the  
16 hearing as if the witness gave the evidence at the hearing in  
17 person.
- 18 (4) The witness must not be in the courtroom when the audiovisual  
19 recording is played at the hearing.

20 **40T Witness may be required to attend hearing**

- 21 (1) This section applies if an audiovisual recording of a witness's  
22 evidence given at a pre-trial hearing is admitted in evidence at the  
23 hearing of a sexual offence proceeding.
- 24 (2) The accused person may apply to the court for an order that the  
25 witness attend the hearing of the sexual offence proceeding to give  
26 further evidence.

- 1 (3) The court must not make the order unless satisfied that—
- 2 (a) if the witness had given evidence in person at the hearing of
- 3 the sexual offence proceeding, the witness could be recalled;
- 4 and
- 5 (b) it is in the interests of justice to make the order.
- 6 (4) If the courtroom where the proceeding is heard and another place
- 7 are linked by an audiovisual link, a witness recalled to give evidence
- 8 under this section must give evidence by audiovisual link under
- 9 division 4.3 (Sexual and violent offence proceedings—giving
- 10 evidence from places other than courtrooms), unless the court
- 11 otherwise orders.
- 12 (5) The court may make an order under subsection (4) only if satisfied
- 13 that—
- 14 (a) the witness prefers to give evidence in the courtroom; or
- 15 (b) if the order is not made—
- 16 (i) the sexual offence proceeding may be unreasonably
- 17 delayed; or
- 18 (ii) there is a substantial risk that the court will not be able to
- 19 ensure that the sexual offence proceeding is conducted
- 20 fairly.
- 21 (6) While the witness is at the other place to give evidence, the place is
- 22 taken for all purposes to be part of the courtroom.

23 **40U Evidence of witness at pre-trial hearing—jury trial**

- 24 (1) This section applies if—
- 25 (a) a sexual offence proceeding is a trial by jury; and
- 26 (b) an audiovisual recording of a witness's evidence given at a
- 27 pre-trial hearing is admitted in evidence at the hearing of the
- 28 proceeding.

- 1           (2) The court must tell the jury that—
- 2                 (a) the witness gave the evidence by audiovisual link at a pre-trial
- 3                         hearing; and
- 4                 (b) admission of the audiovisual recording is a usual practice; and
- 5                 (c) the jury must not draw any inference against the accused
- 6                         person, or give the evidence more or less weight, because the
- 7                         evidence was given in that way.

8       **40V       Recording of witness's evidence at pre-trial hearing**

9       **admissible in related hearing**

- 10           (1) This section applies if an audiovisual recording of a witness's
- 11                 evidence given at a pre-trial hearing is admitted in evidence at the
- 12                 hearing of a sexual offence proceeding.
- 13           (2) The recording is admissible as the witness's evidence in a related
- 14                 proceeding unless the court in the related proceeding otherwise
- 15                 orders.
- 16           (3) However, the court in the related proceeding may—
- 17                 (a) refuse to admit all or any part of the audiovisual recording in
- 18                         evidence; and
- 19                 (b) if the court refuses to admit part of the recording in evidence—
- 20                         order that the part that is not admitted be deleted from the
- 21                         recording.
- 22           (4) A party in the related proceeding may apply to the court for an order
- 23                 that the witness attend the hearing to give further evidence.
- 24           (5) The court must not make the order unless satisfied that—
- 25                 (a) the applicant has become aware of something that the applicant
- 26                         did not know or could not reasonably have known when the
- 27                         audiovisual recording was recorded; and

- 1 (b) if the witness had given evidence in person at the hearing, the  
2 witness could be recalled; and
- 3 (c) it is in the interests of justice to make the order.
- 4 (6) In this section:
- 5 *related proceeding*, in relation to the proceeding in which the  
6 audiovisual recording was admitted in evidence, means—
- 7 (a) a re-hearing or re-trial of, or appeal from, the hearing of the  
8 proceeding; or
- 9 (b) another proceeding in the same court as the proceeding for the  
10 offence, or another offence arising from the same, or the same  
11 set of, circumstances; or
- 12 (c) a civil proceeding arising from the offence.

13 **40W Audiovisual recording of child's evidence—admissibility**

- 14 (1) This section applies if—
- 15 (a) a child has given evidence under this division; and
- 16 (b) the evidence is recorded as an audiovisual recording; and
- 17 (c) the child turns 18 years old before the audiovisual recording is  
18 admitted in evidence.
- 19 (2) The admissibility of the audiovisual recording as evidence is not  
20 affected only because the child turns 18 years old.

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**12 Division 4.3 heading**

*substitute*

**Division 4.3 Sexual and violent offence proceedings—giving evidence from places other than courtrooms****13 Meaning of *complainant* and *sexual offence proceeding* for div 4.3  
Section 41 (1)**

*substitute*

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

**14 Section 41 (4), new note**

*insert*

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

**15 New section 41A**

*insert*

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

- (1) For this division, a *violent offence proceeding* is—
- (a) a proceeding for a violent offence; or
  - (b) a sentencing proceeding for a person convicted of a violent offence, whether or not the person is also convicted of any other offence; or

- 1 (c) a proceeding under the *Domestic Violence and Protection*  
2 *Orders Act 2001* in relation to a violent offence; or
- 3 (d) a proceeding under the *Victims of Crime (Financial Assistance)*  
4 *Act 1983* in relation to a violent offence; or
- 5 (e) a proceeding by way of an inquest or inquiry in the Coroner's  
6 Court in relation to a violent offence; or
- 7 (f) an appeal or other review arising out of a proceeding  
8 mentioned in paragraphs (a) to (e).
- 9 (2) For subsection (1) (a), a *proceeding for a violent offence* includes—
- 10 (a) a proceeding for a violent offence and any other offence; and
- 11 (b) a proceeding for a violent offence and any other offence as an  
12 alternative to the violent offence; and
- 13 (c) a proceeding for a violent offence that may result in a finding  
14 of guilt (or committal for trial or sentence) for any other  
15 offence.
- 16 (3) To remove any doubt, for this section, a *proceeding* includes a  
17 committal proceeding.

18 **16 Section 42**

19 *substitute*

20 **42 When does div 4.3 apply?**

21 This division applies if the complainant or a similar act witness is to  
22 give evidence in a sexual or violent offence proceeding, whether the  
23 evidence is to be given on oath or otherwise.

**17 Section 43***substitute***43 Giving evidence from place other than courtroom**

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

- 1 (5) While the complainant or similar act witness is at the other place to  
2 give evidence—
- 3 (a) the accused person must not be at the place; and
- 4 (b) the witness must not be able to see or hear the accused person;  
5 and
- 6 (c) the accused person must be able to see and hear the witness  
7 give evidence; and
- 8 (d) the accused person must be able to communicate with the  
9 person's lawyer.

10 **18 Consequential orders under div 4.3**  
11 **Section 44**

12 *omit*

13 complainant

14 *substitute*

15 complainant or similar act witness

16 **19 Section 44**

17 *omit*

18 sexual offence

19 *substitute*

20 sexual or violent offence

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

3 *omit*

4 sexual offence

5 *substitute*

6 sexual or violent offence

7 **21 Section 45 (1)**

8 *omit*

9 or the complainant

10 *substitute*

11 , the complainant or a similar act witness

12 **22 Jury to be warned about adverse inferences**  
13 **Section 46**

14 *omit*

15 sexual offence

16 *substitute*

17 sexual or violent offence

18 **23 Failure to comply with div 4.3**  
19 **Section 47 (1)**

20 *omit*

21 If the complainant's evidence

22 *substitute*

23 If the evidence of the complainant or a similar act witness

1 **24 Section 47 (2)**

2 *omit*

3 sexual offence

4 *substitute*

5 sexual or violent offence

6 **25 New part 4A**

7 *insert*

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

9 **81B Meaning of *witness with a disability*—pt 4A**

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

13 **81C Witness may have support person in court**

14 (1) This section applies to any of the following people (a *witness*)  
15 giving evidence in a proceeding:

16 (a) a child;

17 (b) a witness with a disability.

18 (2) The court must, on application by a party that intends to call a  
19 witness, order that the witness have a person (a *support person*) in  
20 the court close to, and within the witness's sight, while the witness  
21 gives evidence.

22 (3) The court may order that a witness have more than 1 support person  
23 if it considers it is in the interests of justice.

- 1 (4) The support person must not—  
2 (a) speak for the witness during the proceeding; or  
3 (b) otherwise interfere in the proceeding.
- 4 (5) Unless the court otherwise orders, the support person must not be, or  
5 be likely to be, a witness or party in the proceeding.
- 6 (6) If the proceeding is a trial by jury, the court must tell the jury that—  
7 (a) a witness having a support person in the court while giving  
8 evidence is a usual practice; and  
9 (b) the jury must not draw any inference against the accused  
10 person, or give the evidence more or less weight, because the  
11 support person is present.

12 **81D Evidence given in closed court**

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

18 **Examples**

- 19 1 the person is likely to suffer severe emotional trauma because of the nature  
20 of the alleged offence  
21 2 the person is intimidated or distressed because of the person's relationship to  
22 the accused person

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

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

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

7 (3) In deciding whether to order that the court be closed to the public,  
8 the court must consider whether—

9 (a) the witness wants to give evidence in open court; and

10 (b) it is in the interests of justice that the witness give evidence in  
11 open court.

12 (4) However, an order under this section does not stop a person  
13 nominated by the witness from being in court when the witness  
14 gives evidence.

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

21 **26 Dictionary, new definition of *audiovisual recording***

22 *insert*

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

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1 **27 Dictionary, definitions of *complainant* and *sexual offence***  
2 ***proceeding***

3 *substitute*

4 *complainant*—

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

19 *sexual offence proceeding*—

- 20 (a) for division 4.2 (Sexual and violent offence proceedings—  
21 general)—see section 38; and
- 22 (b) for division 4.2A (Sexual and violent offence proceedings—  
23 audiovisual recording of police interview admissible as  
24 evidence)—see section 40B; and
- 25 (c) for division 4.2B (Sexual offence proceedings—giving  
26 evidence at pre-trial hearing)—see section 40O; and

- 1 (d) for division 4.3 (Sexual and violent offence proceedings—  
2 giving evidence from places other than courtrooms)—see  
3 section 41; and
- 4 (e) for division 4.4 (Evidence of complainant’s sexual reputation  
5 and activities)—see section 48; and
- 6 (f) for division 4.6 (Sexual offence proceedings—directions and  
7 warnings to juries)—see section 68.

## 8 **28 Dictionary, new definitions**

- 9 *insert*
- 10 *similar act witness*—for part 4 (Evidence in criminal  
11 proceedings)—see section 37.
- 12 *violent offence*, for part 4 (Evidence in criminal proceedings)—see  
13 section 37.
- 14 *violent offence proceeding*—
- 15 (a) for division 4.2 (Sexual and violent offence proceedings—  
16 general)—see section 38A; and
- 17 (b) for division 4.2A (Sexual and violent offence proceedings—  
18 audiovisual recording of police interview admissible as  
19 evidence)—see section 40C; and
- 20 (c) for division 4.3 (Sexual and violent offence proceedings—  
21 giving evidence from places other than courtrooms)—see  
22 section 41A.
- 23 *witness*—
- 24 (a) for division 4.2A (Sexual and violent offence proceedings—  
25 audiovisual recording of police interview admissible as  
26 evidence)—see section 40D; and
- 27 (b) for division 4.2B (Sexual offence proceedings—giving  
28 evidence at pre-trial hearing)—see section 40P.

- 1            ***witness with a disability***—
- 2            (a) for part 4 (Evidence in criminal proceedings)—see section 37;
- 3            and
- 4            (b) for part 4A (Evidence in any proceedings)—see section 81B.

1 **Part 3 Magistrates Court Act 1930**

2 **29 Legislation amended—pt 3**

3 This part amends the *Magistrates Court Act 1930*.

4 **30 Procedure if informant proposes to tender written**  
5 **statements to court**  
6 **Section 90 (7)**

7 *substitute*

8 (7) Before the taking of the preliminary examination, the accused  
9 person or the person's lawyer may ask the informant to allow the  
10 accused person or lawyer to—

11 (a) inspect the documents and things (if any) mentioned in the list  
12 given to the accused person under subsection (2) (d); and

13 (b) if a statement is in the form of a transcript of a recording as  
14 mentioned in section 90AA (3A)—listen to or view the  
15 recording.

16 (8) The informant must comply with a request made under  
17 subsection (7).

18 (9) However, this section does not entitle the accused person or the  
19 person's lawyer to be given or make a copy of the recording.

20 **31 Written statements may be admitted in evidence**  
21 **Section 90AA (3)**

22 *omit*

23 A written statement

24 *substitute*

25 Subject to subsection (3A), a written statement

**32 New section 90AA (3A)**

*insert*

(3A) A written statement that is in the form of a transcript of a recording made by a police officer may be admitted in evidence by the court if—

(a) the transcript is of a recording of an interview with a person during which the person was questioned by the police officer in connection with the investigation of an offence the subject of the proceeding; and

(b) the person—

(i) is a child; or

(ii) is intellectually impaired; and

(c) a police officer certifies that the statement is an accurate transcript of the recording.

**33 New section 90AA (11) and (12)**

*insert*

(11) However—

(a) a person must not be required to attend and give evidence at a preliminary examination in relation to a sexual offence (whether or not the examination relates also to another offence) if the person is a complainant in relation to the sexual offence; and

(b) subsections (4), (7), (8) and (10) do not apply to a written statement made by the person.

- 1 (12) In this section:
- 2 *intellectually impaired*—a person is *intellectually impaired* if the
- 3 person has—
- 4 (a) an appreciably below average general intellectual function; or
- 5 (b) a cognitive impairment (including dementia or autism) arising
- 6 from an acquired brain injury, neurological disorder or a
- 7 developmental disorder; or
- 8 (c) any other intellectual disability.
- 9 *proceeding for a sexual offence* includes proceeding for a sexual
- 10 offence and any other offence.
- 11 *sexual offence* means an offence against the *Crimes Act 1900*,
- 12 part 3 (Sexual offences), part 4 (Female genital mutilation) or part 5
- 13 (Sexual servitude).

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## Endnotes

**1 Presentation speech**

Presentation speech made in the Legislative Assembly on 2008.

**2 Notification**

Notified under the Legislation Act on 2008.

**3 Republications of amended laws**

For the latest republication of amended laws, see [www.legislation.act.gov.au](http://www.legislation.act.gov.au).

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