



Australian Capital Territory

Sexual and Violent Offences Legislation Amendment Act 2008

A2008-41

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Australian Capital Territory

Sexual and Violent Offences Legislation Amendment Act 2008

A2008-41

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

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

Part 1 Preliminary

1 Name of Act

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

2 Commencement

- (1) This Act commences on a day fixed by the Minister by written notice.

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

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

- (2) If this Act has not commenced within 9 months beginning on its notification day, it automatically commences on the first day after that period.
- (3) The Legislation Act, section 79 (Automatic commencement of postponed law) does not apply to this Act.

Part 2 Evidence (Miscellaneous Provisions) Act 1991

3 Legislation amended—pt 2

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

4 Section 37

substitute

37 Definitions—pt 4

In this part:

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

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

- (k) section 37 (Abduction of young person);
- (l) section 41 (Exposing or abandoning child).

serious violent offence means—

- (a) an offence against any of the following provisions of the *Crimes Act 1900*:
 - (i) section 12 (Murder);
 - (ii) section 15 (Manslaughter);
 - (iii) section 19 (Intentionally inflicting grievous bodily harm);
 - (iv) section 20 (Recklessly inflicting grievous bodily harm);
 - (v) section 21 (2) (Wounding);
 - (vi) section 23 (2) (Inflicting actual bodily harm);
 - (vii) section 24 (2) (Assault occasioning actual bodily harm);
 - (viii) section 27 (Acts endangering life etc);
 - (ix) section 29 (2) and (3) (Culpable driving of motor vehicle);
 - (x) section 30 (Threat to kill);
 - (xi) section 32 (Demands accompanied by threats);
 - (xii) section 34 (Forcible confinement);
 - (xiii) section 36 (Torture);
 - (xiv) section 38 (Kidnapping);
 - (xv) section 40 (Unlawfully taking child etc);
 - (xvi) section 42 (Child destruction);
 - (xvii) section 43 (Childbirth—grievous bodily harm); and

(b) an offence against any of the following provisions of the *Criminal Code 2002*:

- (i) section 309 (Robbery);
- (ii) section 310 (Aggravated robbery).

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

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

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

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

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

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

5 Division 4.2 heading

substitute

Division 4.2 Sexual and violent offence proceedings—general

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

substitute

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

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

insert

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

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

insert

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

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

- (d) an appeal or other review (whether by prerogative order or otherwise) arising out of a proceeding mentioned in paragraphs (a) to (c); or
 - (e) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c).
- (2) For subsection (1) (a), a *proceeding for a violent offence* includes—
- (a) a proceeding for a violent offence and any other offence; and
 - (b) a proceeding for a violent offence and any other offence as an alternative to the violent offence; and
 - (c) a proceeding for a violent offence that may result in a finding of guilt (or committal for trial or sentence) for any other offence.
- (3) To remove any doubt, for this section, a *proceeding* includes a committal proceeding.

38B Meaning of *relevant person*—div 4.2

- (1) For this division, *relevant person*, in relation to an accused person, means—
- (a) a domestic partner of the accused person; or
- Note* A *domestic partner* need not be an adult (see Legislation Act, s 169).
- (b) a relative of the accused person; or
 - (c) a child of a domestic partner of the accused person; or
 - (d) a parent of a child of the accused person; or
 - (e) someone who is in a domestic relationship with the accused person.

- (2) For this section, a *relative* of an accused person—
- (a) means the accused person's—
 - (i) father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law or mother-in-law; or
 - (ii) son, daughter, grandson, granddaughter, stepson, stepdaughter, son-in-law or daughter-in-law; or
 - (iii) brother, sister, half-brother, half-sister, stepbrother, stepsister, brother-in-law or sister-in-law; or
 - (iv) uncle, aunt, uncle-in-law or aunt-in-law; or
 - (v) nephew, niece or cousin; and
 - (b) if the accused person has or had a domestic partner (other than a spouse)—includes someone who would have been a relative mentioned in paragraph (a) if the accused person had been legally married to the domestic partner; and
- Note* **Domestic partner**—see the Legislation Act, s 169.
- (c) includes—
 - (i) someone who has been a relative mentioned in paragraph (a) or (b) of the accused person; and
 - (ii) anyone else who could reasonably be considered to be a relative of the accused person.

Examples—par (c) (ii)

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

- 2 a person regarded and treated by the accused person as a relative, for example, as an uncle or aunt

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

- (3) In this section:

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

38C Accused may be screened from witness in court

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

Examples—par (c) (ii)

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

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

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

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

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

Examples—par (c) (ii)

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

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

- (2) This section also applies to a child or witness with a disability (the *witness*) giving evidence for the prosecution in a sexual or violent offence proceeding.
- (3) A self-represented accused person must not personally cross-examine a witness.
- (4) If the self-represented accused person intends to cross-examine a witness, the court must—
 - (a) tell the person that the person must not cross-examine the witness personally; and
 - (b) if the proceeding is a trial by jury—tell the jury that the person must not cross-examine the witness personally; and
 - (c) ask the person if the person has sought legal representation for the cross-examination of the witness; and
 - (d) if the court is satisfied that the person has not had a reasonable opportunity to obtain legal representation for the cross-examination, and the person applies for an adjournment to obtain the legal representation—adjourn the proceeding; and
 - (e) if the court is satisfied that the person had a reasonable opportunity to obtain legal representation for the cross-examination, and has not obtained legal representation—
 - (i) order that the person obtain legal representation; and

- (ii) make any other order the court considers necessary to secure legal representation for the person; and
 - (iii) adjourn the proceeding.
- (5) If the court makes an order under subsection (4) (e) (i), the court must tell the self-represented accused person that if the person refuses legal representation, or refuses to cooperate with the person's legal representative—
 - (a) the person may not cross-examine the witness; and
 - (b) the person may not adduce evidence from another witness in relation to a fact in issue to contradict the evidence of the witness in relation to the fact if the fact in the other witness's evidence intended to contradict the witness's evidence has not been put to the witness in cross-examination.
- (6) If the proceeding is a trial by jury, the court must tell the jury that—
 - (a) a self-represented accused person obtaining, or being provided with, legal representation to cross-examine the witness is a usual practice; and
 - (b) the jury must not draw any inference against the accused person, or give the evidence more or less weight, because the cross-examination is not conducted personally by the self-represented accused person.
- (7) In this section:
self-represented accused person, in a sexual or violent offence proceeding, means an accused person who is not represented by a legal practitioner in the proceeding.

38E Witness may have support person in court

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

Examples—par (c) (ii)

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

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

- (2) The court must, on application by a party who intends to call a witness, order that the witness have a person (a *support person*) in the court close to, and within the witness's sight, while the witness gives evidence.
- (3) The court may order that a witness have more than 1 support person if it considers it is in the interests of justice.

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

9 Section 39

substitute

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

- (1) This section applies to the complainant or a similar act witness (the *witness*) giving evidence in—
 - (a) a sexual offence proceeding; or
 - (b) a violent offence proceeding in relation to a serious violent offence; or
 - (c) a violent offence proceeding in relation to a less serious violent offence if—
 - (i) the witness is a relevant person in relation to the accused person; or

- (ii) the court considers that the witness has a disability that affects the witness's ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

Examples—par (c) (ii)

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

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

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

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

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

- (a) the witness wants to give evidence in open court; and
- (b) it is in the interests of justice that the witness give evidence in open court.

- (4) However, an order under this section does not stop the following people from being in court when the witness gives evidence:

- (a) a person nominated by the witness;
- (b) a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer.

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

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

10 Section 40 heading

substitute

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

11 New divisions 4.2A and 4.2B

insert

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

40A Meaning of *complainant*—div 4.2A

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

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

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

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

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

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

40D Meaning of *witness*—div 4.2A

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

- (c) any other intellectual disability.

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

- (1) For this division, an *audiovisual recording* is an audiovisual recording that is of a witness answering questions of a prescribed person in relation to the investigation of a sexual or violent offence.
- (2) The audiovisual recording must include the following:
- (a) the date when, and the place where, the recording was made;
 - (b) the times when the recording started and ended;
 - (c) the times when any break in questioning started and ended, and the reason for the break;
 - (d) the name of each person present during any part of the recording;
 - (e) for each person present during any part of the recording—the part when the person was present.
- (3) The audiovisual recording must—
- (a) be certified by a prescribed person as an accurate record of the witness answering the questions; and
 - (b) not be edited or changed, unless the court hearing the proceeding in which the recording is tendered otherwise orders.

Example—court ordering change

editing the recording to omit inadmissible material

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

40F Audiovisual recording may be admitted as evidence

- (1) An audiovisual recording may—
 - (a) be played at the hearing of a proceeding for the sexual or violent offence to which it relates; and
 - (b) if the recording is played at the hearing—be admitted as the witness’s evidence in chief in the proceeding as if the witness gave the evidence at the hearing in person.
- (2) However, the court may refuse to admit all or any part of the audiovisual recording.
- (3) The witness must not be in the courtroom, or visible to anyone in the courtroom by audiovisual link, when the audiovisual recording is played at the hearing.
- (4) This section is subject to section 40J.

40G Audiovisual recording—notice

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

40H Audiovisual recording—notice for access

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

40I Audiovisual recording—access to accused person

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

40J Audiovisual recording—admissibility

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

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

40K Audiovisual recording—jury trial

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

40L Transcript of audiovisual recording—access to court

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

40M Audiovisual recording—offences

- (1) A person commits an offence if the person, without authority—
- (a) possesses an audiovisual recording; or
 - (b) supplies, or offers to supply, an audiovisual recording to another person; or
 - (c) plays, copies or erases, or allows someone else to play, copy or erase, an audiovisual recording.

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

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

Division 4.2B Sexual offence proceedings—giving evidence at pre-trial hearing**40N Meaning of *complainant*—div 4.2B**

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

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

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

40P Meaning of *witness*—div 4.2B

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

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

40Q Witness to give evidence at pre-trial hearing

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

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

40R Who may be present at pre-trial hearing

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

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

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

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

40T Witness may be required to attend hearing

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

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

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

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

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

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

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

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

40W Audiovisual recording of child's evidence—admissibility

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

12 Division 4.3 heading

substitute

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

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

substitute

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

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

insert

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

15 **New section 41A**

insert

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

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

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

16 Section 42

substitute

42 When does div 4.3 apply?

- (1) This division applies if the complainant or a similar act witness (the ***witness***) is to give evidence in any of the following proceedings, whether the evidence is to be given on oath or otherwise:
- (a) a sexual offence proceeding;
 - (b) a violent offence proceeding in relation to a serious violent offence;
 - (c) a violent offence proceeding in relation to a less serious violent offence if—
 - (i) the witness is a relevant person in relation to the accused person; or

- (ii) the court considers that the witness has a disability that affects the witness's ability to give evidence because of the circumstances of the proceeding or the witness's circumstances.

Examples—par (c) (ii)

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

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

- (2) In this section:

relevant person—see section 38B.

17 Section 43

substitute

43 Giving evidence from place other than courtroom

- (1) This section applies if the courtroom where a sexual or violent offence proceeding is heard and another place are linked by an audiovisual link.
- (2) The evidence of the complainant and each similar act witness must be given by audiovisual link from the other place unless the court otherwise orders.
- (3) The court may make an order under subsection (2) only if satisfied—
 - (a) that—
 - (i) for the complainant—the complainant prefers to give evidence in the courtroom; and

- (ii) for a similar act witness—the witness prefers to give evidence in the courtroom; or
- (b) if the order is not made—
 - (i) the sexual or violent offence proceeding may be unreasonably delayed; or
 - (ii) there is a substantial risk that the court will not be able to ensure that the sexual or violent offence proceeding is conducted fairly.
- (4) While the complainant or similar act witness is at the other place to give evidence, the place is taken for all purposes to be part of the courtroom.
- (5) While the complainant or similar act witness is at the other place to give evidence—
 - (a) the accused person must not be at the place; and
 - (b) the witness must not be able to see or hear the accused person; and
 - (c) the accused person must be able to see and hear the witness give evidence; and
 - (d) the accused person must be able to communicate with the person’s lawyer.

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

omit

complainant

substitute

complainant or similar act witness

19 Section 44

omit

sexual offence

substitute

sexual or violent offence

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

omit

sexual offence

substitute

sexual or violent offence

21 Section 45 (1)

omit

or the complainant

substitute

, the complainant or a similar act witness

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

omit

sexual offence

substitute

sexual or violent offence

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

omit

If the complainant's evidence

substitute

If the evidence of the complainant or a similar act witness

24 Section 47 (2)

omit

sexual offence

substitute

sexual or violent offence

25 New part 4A*insert***Part 4A Evidence in any proceedings****81B Meaning of *witness with a disability*—pt 4A**

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

81C Witness may have support person in court

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

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

81D Evidence given in closed court

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

Examples

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

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

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

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

- (3) In deciding whether to order that the court be closed to the public, the court must consider whether—
- (a) the witness wants to give evidence in open court; and
 - (b) it is in the interests of justice that the witness give evidence in open court.
- (4) However, an order under this section does not stop the following people from being in court when the witness gives evidence:
- (a) a person nominated by the witness;
 - (b) a person who attends the proceeding to prepare a news report of the proceeding and is authorised to attend for that purpose by the person's employer.
- Note* Publishing certain information in relation to sexual offence proceedings is an offence (see s 40).
- (5) In this section, a reference to a person giving evidence includes the person giving evidence by the playing of an audiovisual recording of the evidence at a hearing under division 4.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence) or division 4.2B (Sexual offence proceedings—giving evidence at pre-trial hearing).

26 New part 10

insert

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

150 Application of amendments

The amendments to this Act made by the *Sexual and Violent Offences Legislation Amendment Act 2008*, part 2 do not apply to a proceeding if the hearing of the proceeding has started before the commencement of that part.

151 Expiry—pt 10

This part expires 1 year after the day it commences.

27 Dictionary, new definition of *audiovisual recording*

insert

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

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

substitute

complainant—

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

sexual offence proceeding—

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

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

29 Dictionary, new definitions

insert

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

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

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

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

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

violent offence proceeding—

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

witness—

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

witness with a disability—

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

Part 3 Magistrates Court Act 1930

30 Legislation amended—pt 3

This part amends the *Magistrates Court Act 1930*.

31 Procedure if informant proposes to tender written statements to court Section 90 (7)

substitute

- (7) Before the taking of the preliminary examination, the accused person or the person's lawyer may ask the informant to allow the accused person or lawyer to—
- (a) inspect the documents and things (if any) mentioned in the list given to the accused person under subsection (2) (d); and
 - (b) if a statement is in the form of a transcript of a recording as mentioned in section 90AA (3A)—listen to or view the recording.
- (8) The informant must comply with a request made under subsection (7).
- (9) However, this section does not entitle the accused person or the person's lawyer to be given or make a copy of the recording.

32 Written statements may be admitted in evidence Section 90AA (3)

omit

A written statement

substitute

Subject to subsection (3A), a written statement

33 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.

34 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.

(12) In this section:

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

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

proceeding for a sexual offence includes proceeding for a sexual offence and any other offence.

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

35 New chapter 12

insert

Chapter 12 Transitional—Sexual and Violent Offences Legislation Amendment Act 2008

460 Application of amendments

The amendments to this Act made by the *Sexual and Violent Offences Legislation Amendment Act 2008*, part 3 do not apply to a proceeding if the hearing of the proceeding has started before the commencement of that part.

461 Expiry—ch 12

This part expires 1 year after the day it commences.

Endnotes

1 Presentation speech

Presentation speech made in the Legislative Assembly on 3 July 2008.

2 Notification

Notified under the Legislation Act on 8 September 2008.

3 Republications of amended laws

For the latest republication of amended laws, see www.legislation.act.gov.au.

I certify that the above is a true copy of the Sexual and Violent Offences Legislation Amendment Bill 2008, which was passed by the Legislative Assembly on 21 August 2008.

Clerk of the Legislative Assembly

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