



Australian Capital Territory

# Royal Commission Criminal Justice Legislation Amendment Act 2018

A2018-46

## Contents

---

	Page
<b>Part 1</b>	<b>Preliminary</b>
1	Name of Act 2
2	Commencement 2
3	Legislation amended 2
<b>Part 2</b>	<b>Crimes Act 1900</b>
4	Maintaining sexual relationship with young person or person under special care New section 56 (3) (c) 3
5	Section 56 (11) 3

---

J2018-52

Authorised by the ACT Parliamentary Counsel—also accessible at [www.legislation.act.gov.au](http://www.legislation.act.gov.au)

	Page
6	3
	New sections 66A and 66B
<b>Part 3</b>	
	<b>Crimes (Sentencing) Act 2005</b>
7	9
	Sentencing—irrelevant considerations Section 34 (2) (d) and examples and note
8	9
	New section 34A
<b>Part 4</b>	
	<b>Evidence (Miscellaneous Provisions) Act 1991</b>
9	10
	New part 2.1 etc
10	11
	Section 5 heading
11	11
	Section 5
12	11
	Section 6
13	12
	Section 8 heading etc
14	12
	Sections 7 and 8 etc
15	13
	Chapter 4
16	68
	Witness with vulnerability may give evidence in closed court Section 102 (4), note
17	69
	Section 102 (5)
18	69
	Dictionary, definition of <i>audiovisual recording</i>
19	69
	Dictionary, new definition of <i>child</i>
20	69
	Dictionary, definition of <i>civil proceeding</i>
21	70
	Dictionary, definition of <i>complainant</i>
22	70
	Dictionary, new definition of <i>counselling</i>
23	70
	Dictionary, definition of <i>counsellor</i>
24	70
	Dictionary, definition of <i>court</i>
25	70
	Dictionary, definition of <i>criminal proceeding</i> , paragraph (b)
26	71
	Dictionary, definition of <i>document recording a protected confidence</i>
27	71
	Dictionary, new definition of <i>family member</i>
28	71
	Dictionary, definition of <i>family violence offence</i>
29	71
	Dictionary, definition of <i>family violence offence proceeding</i>
30	71
	Dictionary, new definition of <i>give evidence</i>
31	72
	Dictionary, definition of <i>give evidence in a proceeding by audiovisual link</i>
<hr/>	
contents 2	A2018-46
Royal Commission Criminal Justice Legislation Amendment Act 2018	

	Page
32	Dictionary, definitions of <i>harm</i> and <i>intellectually impaired</i> 72
33	Dictionary, definition of <i>less serious violent offence</i> 72
34	Dictionary, new definition of <i>less serious violent offence proceeding</i> 72
35	Dictionary, definition of <i>Magistrates Court</i> 72
36	Dictionary, definition of <i>preliminary criminal proceeding</i> 72
37	Dictionary, definition of <i>proceeding</i> , paragraphs (b), (c) and (d) 73
38	Dictionary, definitions of <i>protected confidence</i> and <i>protected confidence evidence</i> 73
39	Dictionary, definition of <i>recorded statement</i> 73
40	Dictionary, definitions of <i>relative</i> and <i>relevant person</i> 73
41	Dictionary, new definition of <i>relevant proceeding</i> 74
42	Dictionary, definition of <i>serious violent offence</i> 74
43	Dictionary, new definition of <i>serious violent offence proceeding</i> 74
44	Dictionary, definition of <i>sexual offence</i> 74
45	Dictionary, definition of <i>sexual offence proceeding</i> 74
46	Dictionary, definitions of <i>sexual or violent offence</i> and <i>sexual or violent offence proceeding</i> 74
47	Dictionary, definition of <i>similar act witness</i> 74
48	Dictionary, new definition of <i>special relationship witness</i> 75
49	Dictionary, definitions of <i>violent offence</i> and <i>violent offence proceeding</i> 75
50	Dictionary, new definition of <i>vulnerable adult</i> 75
51	Dictionary, definition of <i>witness</i> 75
52	Dictionary, definition of <i>witness with a disability</i> 75
53	Dictionary, new definition of <i>witness with disability</i> 75
<b>Part 5</b>	<b>Evidence (Miscellaneous Provisions) Regulation 2009</b>
54	Sections 4 and 5 76
<b>Schedule 1</b>	<b>Consequential amendments</b> 77
<b>Part 1.1</b>	<b>Children and Young People Act 2008</b> 77
<b>Part 1.2</b>	<b>Court Procedures Act 2004</b> 77

Contents

---

		Page
<b>Part 1.3</b>	<b>Crimes (Sentencing) Act 2005</b>	78
<b>Part 1.4</b>	<b>Evidence Act 2011</b>	78
<b>Part 1.5</b>	<b>Supreme Court Act 1933</b>	78



Australian Capital Territory

# Royal Commission Criminal Justice Legislation Amendment Act 2018

**A2018-46**

---

An Act to amend legislation about sexual offences, and for other purposes

---

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

## Part 1 Preliminary

### 1 Name of Act

This Act is the *Royal Commission Criminal Justice Legislation Amendment Act 2018*.

### 2 Commencement

This Act commences on the day after its notification day.

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

### 3 Legislation amended

This Act amends the following legislation:

- [Crimes Act 1900](#)
- [Crimes \(Sentencing\) Act 2005](#)
- [Evidence \(Miscellaneous Provisions\) Act 1991](#)
- [Evidence \(Miscellaneous Provisions\) Regulation 2009](#).

*Note* This Act also amends other legislation (see sch 1).

## Part 2 Crimes Act 1900

### 4 Maintaining sexual relationship with young person or person under special care New section 56 (3) (c)

*insert*

- (c) a sexual offence that could be charged and proved under section 66B (Course of conduct charge—child sexual offences) can be 1 of the sexual acts.

### 5 Section 56 (11)

*omit*

immediately

### 6 New sections 66A and 66B

*insert*

#### 66A Failure by person in authority to protect child or young person from sexual offence

- (1) A person commits an offence if—
- (a) the person is a person in authority in a relevant institution (the *first person*); and
  - (b) there is a substantial risk that a sexual offence will be committed—
    - (i) against a child in the institution's care, supervision or control by a person associated with the institution; or
    - (ii) against a young person in the institution's care, supervision or control by another person in authority in the institution; and

- (c) the first person is aware that the risk exists; and
- (d) the first person can, because of the position the person occupies in the institution, reduce or remove the risk; and
- (e) the first person intentionally or negligently fails to reduce or remove the risk.

Maximum penalty: imprisonment for 5 years.

- (2) In a prosecution for an offence against this section—
  - (a) it does not matter that an act or omission constituting the sexual offence happens, or is at risk of happening, outside the ACT if—
    - (i) the child or young person was in the ACT at any time the first person was aware that the risk mentioned in subsection (1) (b) existed; or
    - (ii) the person mentioned in subsection (1) (b) (i) or (ii) was a person associated with, or in authority in, a relevant institution in the ACT at any time the first person was aware that the risk existed; and
  - (b) it is not necessary to prove that a sexual offence has been committed.
- (3) For subsection (1) (e), the first person negligently fails to reduce or remove a risk if that failure involves a great falling short of the standard of care that a reasonable person would exercise in the circumstances.
- (4) The [Criminal Code](#), chapter 2 (other than the applied provisions) does not apply to an offence against this section.
- (5) In this section:  
*applied provisions*—see the [Criminal Code](#), section 10 (1).



**associated**—a person is **associated** with a relevant institution if the person is an adult who—

- (a) owns, manages or controls the institution; or
- (b) is employed or engaged by the institution; or
- (c) works as a volunteer for the institution; or
- (d) engages in a regulated activity with or for the institution.

**child** means a person who is under 16 years old.

**relevant institution** means—

- (a) an entity, other than an individual, that operates facilities for, engages in activities with, or provides services to, children under the entity's care, supervision or control; or
- (b) a group of entities mentioned in paragraph (a) if the entities—
  - (i) interact with each other, share similar characteristics and collectively have a sense of unity; or
  - (ii) are controlled, managed or governed by another entity.

**Examples—par (a)**

schools, religious organisations, hospitals, child care centres, out-of-home carers, sports clubs, youth organisations

**Examples—par (b)**

a group of schools controlled by a religious organisation, a group of youth centres operated by a company, a group of churches sharing the same religious philosophy

**sexual offence** means—

- (a) an offence against—
  - (i) part 3 (Sexual offences); or
  - (ii) any other provision prescribed by regulation; or
- (b) an offence committed in another jurisdiction that would be an offence under paragraph (a) if committed in the ACT.

*young person* means a person who is 16 years old or older, but not yet an adult.

**66B Course of conduct charge—child sexual offences**

- (1) More than 1 incident of the commission of the same child sexual offence may be included in a single charge if, and only if—
- (a) each incident constitutes an offence against the same provision; and
  - (b) each incident relates to the same complainant; and
  - (c) the incidents take place on more than 1 occasion over a stated period; and
  - (d) the incidents, taken together, amount to a course of conduct having regard to—
    - (i) the time at which the incident happened; or
    - (ii) the place at which the incident happened; or
    - (iii) the purpose for which the incident was committed; or
    - (iv) any other relevant matter.
- (2) For subsection (1), more than 1 type of act on different occasions may be alleged.
- Example**  
penetrative sexual intercourse on 1 occasion and oral sexual intercourse on another occasion
- (3) To remove any doubt—
- (a) subsection (1) does not establish a new offence; and
  - (b) a charge under subsection (1) is a charge of a single offence.

- (4) A charge for a child sexual offence under this section must contain particulars that are necessary to give reasonable information about the various incidents of the offence that are alleged to amount to a course of conduct over a stated period.
- (5) However—
- (a) the charge need not include particulars of any specific incident of the offence, including the date, time, place, circumstances or occasion of the incident; and
  - (b) the particulars do not need to distinguish any specific incident of the offence from any other.
- (6) The prosecution must prove beyond reasonable doubt that the incidents of an offence committed by the accused, taken together, amount to a course of conduct having regard to—
- (a) the time at which the incident happened; or
  - (b) the place at which the incident happened; or
  - (c) the purpose for which the incident was committed; or
  - (d) any other relevant matter.
- (7) For subsection (6), it is not necessary to prove an incident with the same degree of specificity as to date, time, place, circumstance or occasion as would be required if the person were charged with the child sexual offence constituted only by that incident.
- (8) Without limiting subsection (7), it is not necessary to prove—
- (a) any particular number of incidents of the offence or the dates, times, places, circumstances or occasions of the incidents; or
  - (b) that there were distinctive features differentiating any of the incidents; or
  - (c) the general circumstances of any particular incident.

- (9) To remove any doubt, a person charged under this section may rely on any exception, exemption, proviso, excuse or qualification that applies to the offence with which the person is charged.
- (10) A proceeding for a charge for a child sexual offence under this section must not be started without the consent of the director of public prosecutions.
- (11) However, a person may be arrested for, charged with, or remanded in custody or granted bail for, a child sexual offence before the consent has been given.
- (12) In this section:
  - child sexual offence* means—
    - (a) an offence against a child under this part; or
    - (b) an offence against a child under a sexual offence provision of this Act previously in force.

## Part 3 Crimes (Sentencing) Act 2005

### 7 Sentencing—irrelevant considerations Section 34 (2) (d) and examples and note

*omit*

### 8 New section 34A

*insert*

### 34A Sentencing—sexual offences against children

For a sexual offence against a child, a court—

- (a) must sentence the offender in accordance with sentencing practice, including sentencing patterns, at the time of sentencing; and
- (b) must not reduce the severity of a sentence it would otherwise have imposed on an offender because the offender has good character, to the extent that the offender's good character enabled the offender to commit the offence.

#### Examples—par (b)

- 1 The offender's good character was one reason the offender was selected to supervise children on a camp. The offender began to establish a relationship with children at the camp to obtain their compliance in acts of a sexual nature.
- 2 A child's parents trusted the offender to care for the child because of the offender's authority in their community. The offender held authority in the community in part because of the offender's good character. The offender sexually abused the child including while the child was in the offender's care.

*Note* A sentence is limited to the maximum sentence that applied to the offence when it was committed (see [Human Rights Act 2004](#), s 25 (2)).

## **Part 4 Evidence (Miscellaneous Provisions) Act 1991**

### **9 New part 2.1 etc**

*insert*

## **Part 2.1 Dealing with child witnesses**

### **4A Principles for dealing with child witnesses**

The following general principles apply when dealing with a child witness in a proceeding:

- (a) the child must be treated with dignity, respect and compassion;
- (b) measures should be taken to limit, to the greatest practical extent, the distress and trauma suffered by the child when giving evidence;
- (c) the child should not be intimidated in cross-examination;
- (d) the proceeding should be resolved as quickly as possible.

## **Part 2.2 Evidence of children— audiovisual links**

**10 Section 5 heading**

*substitute*

**5 Definitions—pt 2.2****11 Section 5**

*omit*

chapter

*substitute*

part

**12 Section 6**

*substitute*

**6 Meaning of *give evidence* in a proceeding by audiovisual link—pt 2.2**

In this part:

***give evidence***, in a proceeding by audiovisual link, means to give evidence in the proceeding by audiovisual link from an external place which is linked to the courtroom by an audiovisual link.

**13 Section 8 heading etc**

*omit*

ch 2

*substitute*

pt 2.2

*in*

- section 8 heading
- sections 11 and 12 headings
- section 14 heading

**14 Sections 7 and 8 etc**

*omit*

chapter

*substitute*

part

*in*

- sections 7 and 8
- section 12
- sections 14 and 15



**15 Chapter 4***substitute***Chapter 4 Sexual, violent and family violence offence proceedings****Part 4.1 Kinds of proceedings****37 Meaning of *proceeding*—pt 4.1**

In this part:

*proceeding*, for an offence, includes the following in relation to the offence:

- (a) a trial, including a re-trial;
- (b) a hearing, including a pre-trial hearing;
- (c) a committal hearing;
- (d) a proceeding in relation to bail;
- (e) an interlocutory proceeding;
- (f) a sentencing proceeding;
- (g) an appeal or other review.

**38 Meaning of *family violence offence proceeding*—ch 4**

- (1) In this chapter:

*family violence offence proceeding* means a proceeding for a family violence offence.

(2) In this section:

*family violence offence*—see the *Family Violence Act 2016*, dictionary.

**39 Meaning of *less serious violent offence proceeding*—ch 4**

In this chapter:

*less serious violent offence proceeding* means—

- (a) a proceeding for an offence against any of the following provisions of the *Crimes Act 1900*:
- (i) section 21 (1) (Wounding);
  - (ii) section 22 (Assault with intent to commit other offence);
  - (iii) section 23 (1) (Inflicting actual bodily harm);
  - (iv) section 24 (1) (Assault occasioning actual bodily harm);
  - (v) section 25 (Causing grievous bodily harm);
  - (vi) section 26 (Common assault);
  - (vii) section 28 (Acts endangering health etc);
  - (viii) section 29 (4) and (5) (Culpable driving of motor vehicle);
  - (ix) section 31 (Threat to inflict grievous bodily harm);
  - (x) section 37 (Abduction of young person);
  - (xi) section 41 (Exposing or abandoning child);
  - (xii) section 116 (Destroying or damaging property); or
- (b) a proceeding for an offence against the *Criminal Code*, section 403 (Damaging property); or
- (c) a proceeding for an offence against the *Personal Violence Act 2016*, section 35 (Offence—contravention of protection order).

**40      Meaning of *serious violent offence proceeding*—ch 4**

In this chapter:

*serious violent offence proceeding* means—

- (a) a proceeding for 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 35 (Stalking);
  - (xiv) section 36 (Torture);
  - (xv) section 38 (Kidnapping);
  - (xvi) section 40 (Unlawfully taking child etc);
  - (xvii) section 42 (Child destruction);
  - (xviii) section 43 (Childbirth—grievous bodily harm); or

- (b) a proceeding for an offence against any of the following provisions of the [Criminal Code](#):
  - (i) section 309 (Robbery);
  - (ii) section 310 (Aggravated robbery);
  - (iii) section 311 (Burglary) if the complainant was in the building at the time of the offence;
  - (iv) section 312 (Aggravated burglary) if the complainant was in the building at the time of the offence.

#### 41 **Meaning of *sexual offence proceeding*—ch 4**

In this chapter:

*sexual offence proceeding* means—

- (a) a proceeding for an offence (a *sexual offence*) against any of the following provisions of the [Crimes Act 1900](#):
  - (i) part 3 (Sexual offences);
  - (ii) part 4 (Female genital mutilation);
  - (iii) part 5 (Sexual servitude); or
- (b) a proceeding for an offence against the [Family Violence Act 2016](#), section 43 (Offence—contravention of family violence order) if the family violence order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order; or
- (c) a proceeding for an offence against the [Personal Violence Act 2016](#), section 35 (Offence—contravention of protection order) if the protection order was made because of a sexual offence, or an alleged sexual offence, against the person protected under the order.

## Part 4.2                      What special requirements apply to particular proceedings

### 42                      Definitions—pt 4.2

In this part:

**child**, in a proceeding, means a witness (including a complainant or similar act witness) who was a child—

- (a) at the time the proceeding started; or
- (b) if the witness gives evidence in an audiovisual recording—at the time the recording was made; or
- (c) for a complainant in a sexual offence proceeding—at the time of the offence the subject of the proceeding.

**complainant**, in relation to a proceeding for an offence, means a person—

- (a) against whom the offence is alleged, or has been found, to have been committed; and
- (b) for a family violence offence proceeding—who is also a family member of the accused person.

**family member**—see the *Family Violence Act 2016*, section 9.

**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.

**similar act witness** means a witness in a proceeding for an offence who gives, or intends to give, evidence in the proceeding that—

- (a) relates to an act committed on, or in the presence of, the witness by the accused; and
- (b) is tendency evidence or coincidence evidence under the *Evidence Act 2011*.

**special relationship witness** means—

- (a) in a sexual offence proceeding involving a child complainant—a witness who—
  - (i) is a close family member of the complainant; or
  - (ii) the court considers—
    - (A) has a beneficial supporting relationship with the complainant in the proceeding; and
    - (B) will be able to provide emotional support for the complainant after the proceeding; or
- (b) in a serious violent offence proceeding involving the death of a person—a witness who is a close friend or family member of the person.

**vulnerable adult** means an adult complainant, or similar act witness, in a proceeding for an offence who the court considers—

- (a) has a vulnerability that is likely to affect the complainant's or witness's ability to give evidence because of the circumstances of the proceeding or the complainant's or witness's circumstances; or
- (b) is likely to suffer severe emotional trauma, or be intimidated or distressed, by giving evidence in the proceeding otherwise than in accordance with this part; or

- (c) needs to give evidence as soon as practicable because the complainant or witness is likely to suffer severe emotional trauma, or be intimidated or distressed.

**witness with disability** means a witness in a proceeding for an offence who has a mental or physical disability that affects the person's ability to give evidence.

### 43 Special requirements—particular proceedings

A provision mentioned in column 3 of a table for a proceeding applies to the kind of witness mentioned in column 2 of the table for the proceeding.

*Note 1* An intellectually impaired witness may also be a witness with disability if the witness's impairment affects the witness's ability to give evidence (see s 42, def **witness with disability**).

*Note 2* Section 101 (Child or witness with disability may have support person in court) also applies to a child or witness with disability in other proceedings.

**Table 43.1 Family violence offence proceeding**

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• for a complainant who is intellectually impaired—div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> <li>• for a complainant who is not intellectually impaired or a child on the day recorded evidence is taken—pt 4.5 (Special requirements—family violence offence proceedings)</li> </ul>

column 1 item	column 2 kind of witness	column 3 provisions
2	similar act witness	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> </ul>
3	child	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> </ul>

**Table 43.2 Less serious violent offence proceeding**

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>for a vulnerable adult—div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>for a vulnerable adult—div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> </ul>
2	similar act witness	<ul style="list-style-type: none"> <li>for a vulnerable adult—div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>for a vulnerable adult—div 4.3.5 (Giving evidence by audiovisual link) other than s 69 (Recording evidence given by audiovisual link)</li> </ul>



column 1 item	column 2 kind of witness	column 3 provisions
3	child	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> </ul>

**Table 43.3 Serious violent offence proceeding**

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
2	similar act witness	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
3	child	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>for a proceeding involving the death of a close friend or family member of the witness—div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> </ul>

column 1 item	column 2 kind of witness	column 3 provisions
6	special relationship witness	<ul style="list-style-type: none"> <li>• s 48 (No examination of witness by self-represented accused person)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>

**Table 43.4 Sexual offence proceeding**

column 1 item	column 2 kind of witness	column 3 provisions
1	complainant	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• for a vulnerable adult—div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> <li>• pt 4.4 (Special requirements—sexual offence proceedings)</li> </ul>
2	similar act witness	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• for a vulnerable adult—div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> <li>• pt 4.4 (Special requirements—sexual offence proceedings)</li> </ul>
3	child	<ul style="list-style-type: none"> <li>• div 4.3.2 (Special requirements—general)</li> <li>• div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>• div 4.3.4 (Giving evidence at pre-trial hearing)</li> <li>• div 4.3.5 (Giving evidence by audiovisual link)</li> </ul>

column 1 item	column 2 kind of witness	column 3 provisions
4	intellectually impaired witness	<ul style="list-style-type: none"> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.4 (Giving evidence at pre-trial hearing)</li> </ul>
5	witness with disability	<ul style="list-style-type: none"> <li>div 4.3.2 (Special requirements—general)</li> </ul>
6	special relationship witness	<ul style="list-style-type: none"> <li>div 4.3.3 (Special requirements—audiovisual recording of police interview)</li> <li>div 4.3.4 (Giving evidence at pre-trial hearing)</li> </ul>

#### 44 Court may inform itself about particular witnesses

In deciding whether a person is a witness mentioned in this part, the court is not bound by the rules of evidence and may inform itself as it considers appropriate.

#### 45 Failure to comply with ch 4

- (1) If the evidence of a witness is not given in accordance with this chapter, the evidence is not inadmissible for that reason only.
- (2) Failure to comply with this chapter in relation to a proceeding does not affect the validity of the proceeding.

## Part 4.3 Special requirements—general

### Division 4.3.1 Preliminary—pt 4.3

#### 46 Definitions—pt 4.3

In this part:

*relevant proceeding*, in a provision of this part, means a proceeding to which the provision applies under section 43.

*witness*, in a provision of this part, means a witness to whom the provision applies under section 43.

### **Division 4.3.2 Special requirements—general**

#### **47 Accused may be screened from witness in court**

- (1) A court may order in a relevant proceeding that the courtroom be arranged in a way that, while a 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.
- (2) 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 a person should be screened from the complainant or a similar act witness—the person; and
  - (f) the prosecutor.

#### **48 No examination of witness by self-represented accused person**

- (1) A witness in a relevant proceeding must not be examined personally by the accused person but may be examined instead by—
  - (a) the accused person’s legal representative; or
  - (b) if the accused person does not have a legal representative—a person appointed by the court.

- (2) If the accused person does not have a legal representative, the court must, as soon as practicable, tell the person—
- (a) about the terms of subsection (1); and
  - (b) that the person may not present 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.
- (3) A person appointed by the court for subsection (1) (b) may ask the witness only the questions that the accused person asks the person to put to the witness, and must not independently give the accused person legal or other advice.
- Note* If the court considers a question to be unduly annoying, harassing, intimidating etc, the court must disallow it or tell the witness that it need not be answered (see *Evidence Act 2011*, s 41 (1) (Improper questions)).
- (4) If the accused person does not have a legal representative, the court may, if it considers it is in the interests of justice, do 1 or more of the following:
- (a) adjourn the relevant proceeding to enable the person to obtain a legal representative to conduct the examination;
  - (b) make—
    - (i) an order that the person obtain legal representation; and
    - (ii) any other order the court considers necessary to secure legal representation for the person.
- (5) If the relevant proceeding is a trial by jury, the court must tell the jury that—
- (a) the accused person may not examine the witness personally; and

- (b) obtaining, or being provided with, legal representation to examine the witness, or having the accused person's questions put to the witness by a person appointed by the court, 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 examination is not conducted personally by the accused person.
- (6) In this section:  
*examine* includes cross-examine and re-examine.

#### **49 Witness may have support person in court**

- (1) A court must, in a relevant proceeding, 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 the witness, and within the witness's sight, while the witness gives evidence.
- (2) The court may order that a witness have more than 1 support person if it considers it is in the interests of justice.
- (3) The support person must not—
  - (a) speak for the witness during the relevant proceeding; or
  - (b) otherwise interfere in the proceeding.
- (4) Unless the court otherwise orders, the support person must not be, or be likely to be, a witness or party in the proceeding.
- (5) If the relevant 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.

**50 Evidence to be given in closed court**

- (1) A court in a relevant proceeding 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 1* Section 73 allows the court to close the court so that pre-trial evidence can be given in sexual offence proceedings.

*Note 2* 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)).

- (2) 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.
- (3) However, an order under this section does not stop the following people from being in court while the witness gives evidence:
- (a) a person nominated by the witness;
  - (b) a person who attends the relevant 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 74).

- (4) In this section, a reference to a person giving evidence in a relevant proceeding includes the person giving evidence by the playing of an audiovisual recording of the evidence in the proceeding under this part.

### Division 4.3.3      **Special requirements—audiovisual recording of police interview**

#### **51      Meaning of *audiovisual recording*—div 4.3.3**

- (1) For this division, an *audiovisual recording* is an audiovisual recording that is of a witness in a relevant proceeding answering questions of a prescribed person in relation to the investigation of an offence the subject of the proceeding.
- (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 relevant proceeding in which the recording is tendered otherwise orders.

**Example—court ordering change**

editing the recording to omit inadmissible material



**52 Police interview audiovisual recording may be admitted as evidence**

- (1) An audiovisual recording may—
  - (a) be played at the hearing of a relevant proceeding for the offence the subject of the proceeding; 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, while the audiovisual recording is played at the hearing.
- (4) This section is subject to section 56.
- (5) In this section:  
*hearing* includes a pre-trial hearing.

**53 Police interview audiovisual recording—notice**

- (1) This section applies if the prosecutor in a relevant proceeding intends to tender an audiovisual recording as evidence.
- (2) The prosecutor must give to the accused person or the person's lawyer—
  - (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 chief police officer;
  - (c) the person responsible (the *responsible person*) for arranging access to each recording.
- (4) For subsection (3) (c), the notice must state the responsible person by—
  - (a) naming the person; or
  - (b) stating the occupant of a position prescribed by regulation.

**54 Police interview 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.

**55 Police interview audiovisual recording—access to accused person**

- (1) This section applies if an accused person, or the person's lawyer, gives notice under section 54 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 54.
- (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.

**56 Police interview audiovisual recording—admissibility**

- (1) An audiovisual recording is admissible in a relevant proceeding only if—
  - (a) notice is given under section 53; 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 53 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 relevant 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.
- (4) In this section:  
*hearing* includes a pre-trial hearing.

**57 Police interview audiovisual recording—jury trial**

- (1) This section applies if—
  - (a) a relevant 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.

**58 Transcript of police interview audiovisual recording—  
access to court**

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

**59 Police interview 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 possesses the recording, or does something with the recording, in connection with—
  - (a) the investigation of, or a proceeding for, an offence in relation to which the recording is prepared; or

- (b) a re-hearing, re-trial or appeal in relation to the proceeding; or
- (c) another proceeding in which the recording is or may be admitted in evidence under section 56.

### **Division 4.3.4 Giving evidence at pre-trial hearing**

#### **60 Witness may give evidence at pre-trial hearing**

- (1) A witness in a relevant proceeding may give evidence at a pre-trial hearing.
- (2) The evidence must be given by audiovisual link from an external place that is linked to the courtroom by an audiovisual link.
- (3) However, the witness's evidence in chief given at a pre-trial hearing may include an audiovisual recording under division 4.3.3 (Special requirements—audiovisual recording of police interview).
- (4) If an audiovisual recording under division 4.3.3 is played at the pre-trial hearing, the witness must not be visible to anyone in the courtroom by audiovisual link while the audiovisual recording is played.
- (5) While the witness is at the external place to give evidence, the place is taken for all purposes (other than subsection (4)) to be part of the courtroom.
- (6) While the witness is at the external 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.

**61 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 an external place to give evidence, only the following people may be present at the place:
  - (a) a support person under section 49 (1) or section 101;
  - (b) anyone else the court considers appropriate.
- (3) Each person who is present at the external place where the witness is to give evidence must be recorded on the audiovisual recording recorded under section 62.
- (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.

**62 Evidence of witness at pre-trial hearing to be evidence at hearing**

- (1) The evidence of a witness in a relevant proceeding (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 51.

- (3) The audiovisual recording of the witness's evidence must—
  - (a) be played at the hearing of the relevant 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 while the audiovisual recording is played at the hearing.

**63 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 relevant proceeding.
- (2) The accused person may apply to the court for an order that the witness attend the hearing of the relevant 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 relevant 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 relevant proceeding is heard and an external place are linked by an audiovisual link, a witness recalled to give evidence under this section must give evidence by audiovisual link under division 4.3.5, 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 relevant proceeding may be unreasonably delayed; or

- (ii) there is a substantial risk that the court will not be able to ensure that the proceeding is conducted fairly.
- (6) While the witness is at the external place to give evidence, the place is taken for all purposes (other than section 62 (4)) to be part of the courtroom in which the hearing is held.

#### **64 Evidence of witness at pre-trial hearing—jury trial**

- (1) This section applies if—
  - (a) a relevant 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.

#### **65 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 relevant 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 relevant 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
  - (c) a proceeding for another offence arising from the same, or the same set of, circumstances; or
  - (d) a civil proceeding arising from the offence.

**66 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.

**Division 4.3.5 Giving evidence by audiovisual link****67 Meaning of *give evidence*—div 4.3.5**

- (1) In this division:

*give evidence*, in a relevant proceeding by audiovisual link, means to give evidence in the proceeding by audiovisual link from an external place which is linked to the courtroom by an audiovisual link.
- (2) For this division, it does not matter whether evidence is to be, or is being, given on oath or otherwise.

**68 Giving evidence by audiovisual link**

- (1) This section applies if—
  - (a) a witness is to give evidence in a relevant proceeding; and
  - (b) the proceeding is to be heard in a courtroom; and
  - (c) the courtroom and the external place are linked by an audiovisual link.
- (2) The witness's evidence must be given by audiovisual link unless the court otherwise orders.

- (3) The court may make an order under subsection (2) only if satisfied that—
- (a) the witness prefers to give evidence in the courtroom; or
  - (b) if the order is not made—
    - (i) the relevant proceeding may be unreasonably delayed; or
    - (ii) there is a substantial risk that the court will not be able to ensure that the proceeding is conducted fairly.
- (4) While the witness is at the external place to give evidence, the place is taken for all purposes (other than section 52 (3)) to be part of the courtroom.
- (5) While the witness is at the external 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.

## **69 Recording evidence given by audiovisual link**

- (1) This section applies if a witness gives evidence in a relevant proceeding by audiovisual link under section 68.
- (2) The witness's evidence given by audiovisual link must be recorded as an audiovisual recording.
- (3) The recording is admissible as the witness's evidence in a related proceeding unless the court in the related proceeding otherwise orders.

- (4) However, the court in the related proceeding may—
- (a) refuse to admit any part of the 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.
- (5) A party to a related proceeding may apply to the court for an order that the witness attend the hearing to give further evidence.
- (6) 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 recording was made; 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.
- (7) In this section:
- related proceeding*, in relation to the relevant proceeding in which the evidence given by audiovisual link was recorded, 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
  - (c) a proceeding for another offence arising from the same, or the same set of, circumstances; or
  - (d) a civil proceeding arising from the offence.

## **70 Consequential orders—div 4.3.5**

- (1) This section applies if a witness is to give evidence in a relevant proceeding by audiovisual link.

- (2) The court may make any order it considers appropriate—
  - (a) to ensure that the relevant proceeding is conducted fairly; or
  - (b) to allow the witness to identify a person or thing; or
  - (c) to allow the witness to take part in a view or to watch a demonstration or experiment; or
  - (d) to allow part of the proceeding to be heard at an external place.
- (3) The court may make any other order it considers appropriate, including, for example, an order stating—
  - (a) who may be with the witness at the external place; or
  - (b) who must not be with the witness at the external place; or
  - (c) who, in the courtroom, is to be able, or must not be able, to be heard, or seen and heard, by the witness and people in the external place with the witness; or
  - (d) who, in the courtroom, is to be able to see and hear the witness and anyone else in the external place with the witness; or
  - (e) how the audiovisual link is to operate.
- (4) The court may order that a person be excluded from the external place while the witness is giving evidence.
- (5) The court may direct that an order under this section apply only to a particular part of the relevant proceeding.

## **71 Making of orders—div 4.3.5**

- (1) The court may make an order under this division in a relevant proceeding on its own initiative or on the application of—
  - (a) a party to the proceeding; or
  - (b) a witness.

- (2) For the purpose of making an order under this division, the court is not bound by the rules of evidence and may inform itself as it considers appropriate.

**72 Jury warning about inferences from witness giving evidence by audiovisual link**

- (1) This section applies if—
- (a) a witness gives evidence in a relevant proceeding by audiovisual link; and
  - (b) the proceeding is before a jury.
- (2) The judge must warn the jury to the effect that the jury should not draw any inference against an accused person in the relevant proceeding from the fact that the evidence of the witness is given by audiovisual link.

**Part 4.4 Special requirements—sexual offence proceedings**

**Division 4.4.1 Sexual offence proceedings—general**

**73 Certain evidence to be given in closed court**

- (1) This section applies if a witness—
- (a) gives evidence at a pre-trial hearing in a sexual offence proceeding under section 60; or
  - (b) is eligible to give evidence at a pre-trial hearing in a sexual offence proceeding under section 60 but does not give the evidence at the pre-trial hearing.

- (2) On application, the court may order that the court be closed to the public while the witness gives the evidence, or while the witness's recorded evidence is played, in the proceeding.

*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 make an order under subsection (2), the court must—
- (a) consider whether it is in the interests of justice that the witness give evidence in open court; but
  - (b) give paramount consideration to whether the witness wants to give evidence in open court.
- (4) If the court makes an order under subsection (2), only the following people may be present in the courtroom when the witness gives the evidence, or when the witness's recorded evidence is played, in the proceeding:
- (a) the presiding judicial officer;
  - (b) the prosecutor;
  - (c) the accused person;
  - (d) the accused person's lawyer;
  - (e) for a proceeding before a jury—the jury members;
  - (f) anyone else the court considers appropriate.
- (5) An order under subsection (2) does not stop the following people from being present in the courtroom while the witness gives the evidence, or while the witness's recorded evidence is played:
- (a) a support person under section 49 (1) or section 101 (2);

- (b) if the witness agrees—a person who is preparing a news report of the proceeding and who is authorised to attend the court for that purpose by the person’s employer.
- (6) If the witness is at an external place to give the evidence, only the following people may be present at the place:
  - (a) a support person under section 49 (1) or section 101 (2);
  - (b) anyone else the court considers appropriate.

#### **74 Prohibition of publication of complainant’s identity**

- (1) A person must not publish, in relation to a sexual offence proceeding—
  - (a) the complainant’s name; or
  - (b) protected identity information about the complainant; or
  - (c) a reference or allusion that discloses the complainant’s identity; or
  - (d) a reference or allusion from which the complainant’s identity might reasonably be worked out.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.

- (2) It is a defence to a prosecution for an offence against this section if the person establishes that the complainant consented to the publication before the publication happened.
- (3) An offence against this section is a strict liability offence.
- (4) In this section:

*protected identity information* means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person.



## **Division 4.4.2      Sexual offence proceedings— evidence of complainant’s sexual reputation and activities**

### **75      Immunity of sexual reputation**

Evidence of the complainant’s sexual reputation is not admissible in a sexual offence proceeding.

### **76      General immunity of evidence of complainant’s sexual activities**

- (1) Evidence of the sexual activities of the complainant is not admissible in a sexual offence proceeding without leave of the court dealing with the proceeding.
- (2) Subsection (1) does not apply to evidence of the specific sexual activities of the complainant with an accused person in the sexual offence proceeding.

### **77      Application for leave under s 76**

Application for leave under section 76 in a sexual offence proceeding must be made—

- (a) in writing; and
- (b) if the proceeding is before a jury—in the absence of the jury; and
- (c) in the absence of the complainant, if an accused person in the proceeding requests.

### **78      Decision to give leave under s 76**

- (1) The court must not give leave under section 76 unless satisfied that the evidence—
  - (a) has substantial relevance to the facts in issue; or

(b) is a proper matter for cross-examination about credit.

- (2) Evidence (*sexual activity evidence*) that relates to, or tends to establish, the fact that the complainant was accustomed to engage in sexual activities is not to be regarded as having a substantial relevance to the facts in issue because of any inference it may raise about general disposition.
- (3) Sexual activity evidence is not to be regarded as being a proper matter for cross-examination about credit unless the evidence, if accepted, would be likely to substantially impair confidence in the reliability of the complainant's evidence.
- (4) If the court gives leave under section 76, it must give written reasons for its decision.
- (5) In this section:

*proper matter for cross-examination about credit*—evidence is a *proper matter for cross-examination about credit* if the credibility rule under the *Evidence Act 2011*, section 102 does not apply to the evidence because of that [Act](#), section 103 (Exception—cross-examination as to credibility).

### **Division 4.4.3            Sexual offence proceedings—    protection of counselling    communications**

#### **79            Definitions—div 4.4.3**

In this division:

*civil proceeding* does not include a criminal proceeding.

*counselling* means counselling, therapy or treatment for an emotional or psychological condition, whether or not the counselling, therapy or treatment is provided for remuneration.

***counsellor*** means a person who—

- (a) has undertaken training or study, or has experience, relevant to the process of counselling people who have suffered harm; or
- (b) is supervised by someone to whom paragraph (a) applies.

***criminal proceeding*** means—

- (a) a proceeding for any offence; or
- (b) a sentencing proceeding for a person convicted or found guilty of any offence; or
- (c) an appeal or other review (whether by prerogative order or otherwise) arising out of a proceeding mentioned in paragraph (a) or (b); or
- (d) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c);

but does not include a preliminary criminal proceeding.

***document recording a protected confidence*** includes—

- (a) a copy, reproduction, republication, duplicate or summary of, or extract from, a document recording a protected confidence; and
- (b) the part of a document recording a protected confidence; and
- (c) the part of a document containing a report, observation, opinion, advice, recommendation or anything else in relation to a protected confidence that is—
  - (i) made or given by the person who made the protected confidence; or
  - (ii) made or given by a third party mentioned in section 79A (4) in whose presence the protected confidence is made; and

- (d) a copy, reproduction, republication, duplicate or summary of, or extract from, the part of a document mentioned in paragraph (b) or (c).

***harm*** includes—

- (a) actual physical harm; and
- (b) stress or shock; and
- (c) prejudice to privacy; and
- (d) emotional or psychological harm, including, for example, shame, humiliation and fear; and
- (e) damage to reputation; and
- (f) financial loss.

***preliminary criminal proceeding*** means—

- (a) a committal proceeding for any offence; or
- (b) a proceeding in relation to bail for a person charged with any offence; or
- (c) an appeal or other review (whether by prerogative order or otherwise) arising out of a proceeding mentioned in paragraph (a) or (b); or
- (d) an interlocutory proceeding in, or a proceeding ancillary to, a proceeding mentioned in paragraphs (a) to (c).

***proceeding*** means a civil or criminal proceeding.

***protected confidence***—see section 79A (1).

***protected confidence evidence*** means—

- (a) oral or written evidence that would disclose a protected confidence; or
- (b) a document recording a protected confidence; or

- (c) oral or written evidence that would disclose the contents of a document recording a protected confidence.

**79A Meaning of *protected confidence*—div 4.4.3**

- (1) For this division, a *protected confidence* is a counselling communication made by, to or about a person against whom a sexual offence was, or is alleged to have been, committed (the *counselled person*).
- (2) A counselling communication is a protected confidence even if—
  - (a) it is made before the happening, or alleged happening, of the acts constituting the sexual offence; or
  - (b) it is not made in relation to—
    - (i) the sexual offence or any sexual offence; or
    - (ii) a condition arising from the sexual offence or any sexual offence.
- (3) For this section, a *counselling communication* is a communication made in circumstances that give rise to a reasonable expectation of confidentiality or a duty of confidentiality—
  - (a) by the counselled person to a counsellor for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
  - (b) to or about the counselled person by the counsellor for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
  - (c) by the counselled person to a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or

- (d) to the counselled person by a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor; or
  - (e) about the counselled person by a third party mentioned in subsection (4) for the purpose, or in the course, of the counselling relationship between the counselled person and the counsellor to—
    - (i) the counselled person; or
    - (ii) the counsellor; or
    - (iii) another third party to whom subsection (4) applies; or
  - (f) about the counselled person by a counsellor to someone else who has also been a counsellor for the counselled person; or
  - (g) about the counselled person to a counsellor by someone else who has also been a counsellor for the counselled person.
- (4) For this section, in deciding whether a communication was made in circumstances that gave rise to a reasonable expectation of confidentiality, it does not matter that the communication was made in the presence of a third party, if the third party was present to assist or encourage communication between the counselled person and counsellor or otherwise assist the counselling process.

**Examples—third parties**

- 1 a parent, partner, carer, spiritual adviser or other supportive person
- 2 a person present at the request of the counsellor to take notes of the counselling session

- (5) In this section:

*sexual offence* includes alleged sexual offence.

**79B When does div 4.4.3 apply?**

This division applies to a protected confidence made before or after the commencement of this division.

**79C Immunity for protected confidences in preliminary criminal proceedings**

- (1) A protected confidence must not be disclosed in, or for the purposes of, a preliminary criminal proceeding.
- (2) Without limiting subsection (1)—
  - (a) a person cannot be required (whether by subpoena, application, notice or any other procedure), in or in relation to a preliminary criminal proceeding, to produce a document recording a protected confidence; and
  - (b) protected confidence evidence is not admissible in the preliminary criminal proceeding.

**Example—par (a)**

A person could not be required to disclose a protected confidence in response to a request for production of documents in a preliminary criminal proceeding.

**79D General immunity for protected confidences**

- (1) This section applies in relation to a proceeding.
- (2) A protected confidence must not be disclosed in, or for the purposes of, the proceeding unless the court dealing with the proceeding gives leave for the disclosure.
- (3) Without limiting subsection (2)—
  - (a) a person cannot be required (whether by subpoena, application, notice or any other procedure), in or in relation to the proceeding, to produce a document recording a protected confidence, unless the court gives leave; and

- (b) protected confidence evidence is not admissible in the proceeding, unless the court gives leave.

**Example—par (a)**

A person could not be required to disclose a protected confidence in response to a request for production of documents in a proceeding unless the court gives leave.

**79E Application for leave to disclose protected confidence**

- (1) An application for leave must—
  - (a) be in writing; and
  - (b) set out the leave sought; and
  - (c) set out the applicant’s arguments in support of the application (including the matters mentioned in section 79F (2)).
- (2) The application must also—
  - (a) set out briefly the nature of the protected confidence evidence (if known); and
  - (b) set out, or be accompanied by a copy of, any relevant documents.

**79F Threshold test—legitimate forensic purpose**

- (1) The court must refuse the leave sought under section 79E if not satisfied that the applicant has established a legitimate forensic purpose for seeking the leave.
- (2) To establish a legitimate forensic purpose, the applicant must—
  - (a) identify a legitimate forensic purpose for seeking the leave; and
  - (b) satisfy the court that there is an arguable case that the evidence in relation to which the leave is sought would materially assist the applicant’s case in the proceeding.



- (3) The court must decide whether or not to refuse the application under this section before it conducts a preliminary examination of the protected confidence evidence under section 79G.

**79G Preliminary examination of protected confidence evidence**

- (1) If the court is satisfied that the applicant has established a legitimate forensic purpose for seeking the leave, the court must then conduct a preliminary examination of the protected confidence evidence to decide whether leave should be given.
- (2) For the preliminary examination, the court may—
- (a) require anyone who has custody or control of a document recording a protected confidence to produce the document to the court for inspection; or
  - (b) require the counsellor or, if the counsellor provides counselling on behalf of an entity, the principal or another representative of the entity—
    - (i) to give the court written answers to any questions; or
    - (ii) to attend the court for oral examination.
- (3) The court must not order a person to attend for oral examination under subsection (2) (b) (ii) unless the oral examination of the person is necessary for the effective conduct of the preliminary examination.
- (4) Only a person mentioned in subsection (2) may be ordered to answer questions or be examined under this section.
- (5) The preliminary examination must be conducted—
- (a) in the absence of the public and the jury (if any); and
  - (b) in the absence of the parties to the proceeding and their lawyers, except to the extent otherwise decided by the court.

- (6) Evidence taken at the preliminary examination must not be disclosed to the parties or their lawyers, except to the extent otherwise decided by the court or an appellate court under section 79H (6).
- (7) A record of the preliminary examination must be made, but must not be made available for public access.

### **79H Giving of leave to disclose protected confidence**

- (1) After conducting the preliminary examination of the protected confidence evidence, the court may give leave for the disclosure of the protected confidence only if satisfied that—
  - (a) for a civil proceeding—the public interest in ensuring the proceeding is conducted fairly outweighs the public interest in preserving the confidentiality of the protected confidence; or
  - (b) for a criminal proceeding—the public interest in ensuring an accused person in the proceeding is given a fair trial outweighs the public interest in preserving the confidentiality of the protected confidence.
- (2) To remove any doubt, if the court is satisfied under subsection (1) about part of a document only, it may give leave in relation to that part and refuse leave for the rest of the document.
- (3) In making a decision under subsection (1), the court must have regard to—
  - (a) for a criminal proceeding—the extent to which disclosure of the protected confidence is necessary for an accused person to make a full defence; and
  - (b) the public interest in ensuring that victims of sexual offences receive effective counselling or other treatment; and

- (c) the extent to which disclosure of protected confidences may dissuade victims of sexual offences from seeking counselling or other treatment or diminish the value of counselling or other treatment; and
  - (d) whether the evidence will have a substantial probative value to a fact in issue and whether other evidence of similar or greater probative value is available about the matters to which the evidence relates; and
  - (e) the likelihood that disclosure of the protected confidence will affect the outcome of the case; and
  - (f) whether disclosure of the protected confidence is sought on the basis of a discriminatory belief or bias; and
  - (g) whether the person to or by whom the protected confidence was made objects to the disclosure of the protected confidence; and
  - (h) the nature and extent of the reasonable expectation of confidentiality for the protected confidence and the potential prejudice to the privacy of anyone, including to the extent to which any interest in confidentiality or privacy has been lessened by the passage of time or the happening of any event since the protected confidence was made.
- (4) Subsection (3) does not limit the matters to which the court may have regard.
- (5) Leave under this section may be given subject to conditions.
- (6) If the court refuses to give leave, and an appeal is made against the refusal, or a ground of an appeal is the refusal, the appellate court may examine the evidence taken at the preliminary examination under section 79G, and may make the orders about the disclosure of the evidence it considers appropriate.

**79I Ancillary orders for protection of person who made protected confidence**

- (1) The court may make any order it considers appropriate to limit possible harm, or the extent of possible harm, to a person who made a protected confidence by the disclosure of protected confidence evidence.
- (2) Without limiting subsection (1), the court may—
  - (a) order that the court be closed to the public while all or part of the protected confidence evidence is presented; or
  - (b) for a document recording a protected confidence—order that a document be edited as directed by the court or that a copy of a document (or part of a document) be disclosed instead of the original; or
  - (c) make orders in relation to the suppression or publication of all or any part of the protected confidence evidence; or
  - (d) for a document recording a protected confidence—make orders about the production or inspection of the document; or
  - (e) make orders in relation to the disclosure of—
    - (i) protected identity information about the person who made the protected confidence; or
    - (ii) information that discloses the identity of the person who made the protected confidence; or
    - (iii) information from which the identity of the person who made the protected confidence might reasonably be inferred.
- (3) This section is in addition to section 74 (Prohibition of publication of complainant's identity).

(4) In this section:

*protected identity information* means information about, or allowing someone to find out, the private, business or official address, email address or telephone number of a person.

**79J No waiver of protected confidence immunity**

This division applies whether or not a person who has made a protected confidence consents or does not object to the disclosure of the protected confidence.

**79K No protected confidence immunity for medical information**

This division does not apply in relation to—

- (a) information obtained by a doctor because of a physical examination of a person against whom a sexual offence was, or is alleged to have been, committed; or
- (b) any communication made in the course, or because, of the examination.

**79L No protected confidence immunity for communications for criminal investigations and proceedings**

This division does not apply to a communication made for the purpose of—

- (a) an investigation by a law enforcement entity into the commission or alleged commission of a sexual offence; or
- (b) a preliminary criminal proceeding or criminal proceeding arising from the commission or alleged commission of a sexual offence.

**79M No protected confidence immunity in case of misconduct**

- (1) This division does not apply in relation to a communication made, or a document prepared, in the furtherance of the commission of an offence, a fraud or an act that makes a person liable to a civil penalty.
- (2) A court may find that a communication was made, or a document was prepared, in the furtherance of the commission of an offence, a fraud or an act if there are reasonable grounds for finding that—
  - (a) the offence, fraud or act was committed; and
  - (b) the communication was made, or document prepared, in the furtherance of the offence, fraud or act.

**Division 4.4.4 Sexual offence proceedings—  
directions and warnings to juries**

*Note* The *Supreme Court Act 1933*, s 68C (3) provides that in a criminal proceeding tried by a judge alone, if a territory law requires a warning or direction to be given, or a comment to be made, to a jury in the proceeding, the judge must take the warning, direction or comment into account in considering his or her verdict.

**80 Comments on complainants' evidence**

If evidence is given by a complainant in a sexual offence proceeding, the judge must not give the jury any warning or suggestion to the effect that the law regards complainants to be an unreliable class of witnesses.

**80A Comments on children's evidence**

If evidence is given by a child in a sexual offence proceeding, the judge must not give the jury any warning or suggestion to the effect that the law regards children to be an unreliable class of witnesses.

**80B Comments about lack of, or delays in making, complaint**

- (1) This section applies if, in a sexual offence proceeding, evidence is given, or a question is asked of a witness, that tends to suggest that—
  - (a) the complainant made no complaint about the alleged offence; or
  - (b) there was a delay in making a complaint.
- (2) The judge must—
  - (a) give the jury a warning to the effect that the absence of, or the delay in making, the complaint does not necessarily indicate that the allegation that the offence was committed is false; and
  - (b) tell the jury that there may be good reasons why a victim of a sexual offence may not make, or may hesitate in making, a complaint about the offence.

**80C Directions about implied consent**

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that a person is not to be regarded as having consented to a sexual act just because—

- (a) the person did not say or do anything to indicate that the person did not consent; or
- (b) the person did not protest or physically resist; or
- (c) the person did not sustain a physical injury; or
- (d) on that or an earlier occasion, the person had consented to engage in a sexual act (whether or not of the same kind) with the accused person or someone else.

**80D Directions about mistaken belief about consent**

In a sexual offence proceeding, the judge must, in a relevant case, direct the jury that, in deciding whether the accused person was under a mistaken belief that a person consented to a sexual act, the jury may consider whether the belief was reasonable in the circumstances.

**Part 4.5 Special requirements—family violence offence proceedings****Division 4.5.1 Preliminary—pt 4.5****81 Meaning of *recorded statement*—pt 4.5**

In this part:

*recorded statement* means—

- (a) an audiovisual recording—
  - (i) of a complainant answering questions from a police officer in relation to the investigation of a family violence offence; and
  - (ii) made by a police officer; or
- (b) an audio recording that complies with paragraph (a)—
  - (i) if the complainant does not consent to an audiovisual recording; or
  - (ii) in exceptional circumstances.

**Example—exceptional circumstances**

technical difficulties with the visual aspect of the recording identified following the making of the recording



## **Division 4.5.2      Family violence offence proceedings—recorded statement of police interview**

### **81A      Recorded statement—requirements**

- (1) A police officer must, before making a recorded statement, tell the complainant that—
  - (a) the recorded statement may be used in evidence at a hearing; and
  - (b) if the recorded statement is used in evidence at a hearing, the complainant may be called to give evidence under cross-examination in person at the hearing; and
  - (c) the complainant does not have to consent to the recording.
- (2) A recorded statement must be made—
  - (a) as soon as practicable after the events mentioned in the statement happened; and
  - (b) in the form of questions and answers.

*Note*      If the recorded statement is to be admitted as evidence in a proceeding, the rules of evidence apply to the content of the statement.
- (3) A recorded statement of a complainant must include the following:
  - (a) the name of each person present during any part of the recording;
  - (b) a statement by the complainant—
    - (i) of the complainant's name, age and whether the complainant lives in the ACT; and
    - (ii) about the truth of the representations made by the complainant in the recorded statement;
  - (c) any other matter prescribed by regulation.

- (4) As far as is practicable, a recorded statement must not contain an image of—
- (a) a child; or
  - (b) a person who is intellectually impaired.
- (5) If any part of a recorded statement is in a language other than English—
- (a) the recorded statement must contain an English translation of the part; or
  - (b) a separate written English translation of the part must accompany the recorded statement.
- (6) A recorded statement must not be edited or changed unless—
- (a) both parties consent to the edits or changes; or
  - (b) the court hearing the proceeding in which the recorded statement is tendered otherwise orders.

**Example—court ordering change**

editing the recorded statement to omit inadmissible material

- (7) In this section:

**hearing** includes a pre-trial hearing.

**intellectually impaired**—see section 42.

**police officer** includes a person who is a member of the police force of a State or another Territory if—

- (a) provisions of the law of that State or Territory correspond (or substantially correspond) to this part; and
- (b) the person is trained in the taking of evidence under those provisions.

**81B Recorded statement—may be admitted as evidence**

- (1) A recorded statement may—
  - (a) be played at the hearing of a family violence offence proceeding for the offence to which it relates; and
  - (b) if the recorded statement is played at the hearing—be admitted as all or part of the complainant’s evidence in chief in the proceeding as if the complainant gave the evidence at the hearing in person.
- (2) However, the court may refuse to admit all or any part of the recorded statement if the court considers it is in the interests of justice to do so.
- (3) The complainant may choose not to be present in the courtroom while the court is viewing or listening to the recorded statement.
- (4) If the complainant is giving evidence by audiovisual link from an external place under division 4.3.5, the complainant must not be visible or audible to anyone in the courtroom by closed-circuit television or by means of similar technology while the court is viewing or listening to the recorded statement.
- (5) To remove any doubt, if a recorded statement is admitted as part of a complainant’s evidence in chief in a proceeding, the complainant may give further evidence in chief.
- (6) This section is subject to section 81G (Recorded statement—admissibility).
- (7) In this section:  
*hearing* includes a pre-trial hearing.

**81C Recorded statement—hearsay rule and opinion rule**

- (1) The hearsay rule and the opinion rule do not prevent the admission or use of evidence of a representation in the form of a recorded statement only because it is in that form.

*Note* The hearsay rule and opinion rule will apply to the content of the recorded statement to be admitted as evidence.

- (2) In this section:

*hearsay rule*—see the *Evidence Act 2011*, section 59 (1).

*opinion rule*—see the *Evidence Act 2011*, section 76.

**81D Validity of proceeding not affected**

- (1) The failure of a police officer to record a representation in the form of a recorded statement in accordance with the requirements of this division or any regulation does not affect the validity of a proceeding in which evidence of the representation is given.
- (2) The failure of a complainant to give evidence in accordance with this part does not affect the validity of a proceeding or any decision made in connection with the proceeding.

**81E Recorded statement—represented accused person to be given copy**

- (1) This section applies if—
  - (a) a recorded statement has been made in relation to a family violence offence proceeding; and
  - (b) the accused person is represented by a lawyer in the proceeding.
- (2) The lawyer representing the accused person must be given a copy of the recorded statement as soon as practicable after the proceeding is commenced.

- (3) The lawyer representing the accused person must return the copy of the recorded statement by giving it to the prosecutor not later than 16 weeks after the proceeding is finalised.
- (4) The accused person must not be given, or take a copy of, the recorded statement.

**81F Recorded statement—unrepresented accused person to be given access**

- (1) This section applies if—
  - (a) a recorded statement has been made in relation to a family violence offence that is the subject of a proceeding; and
  - (b) the accused person is not represented by a lawyer in the proceeding.
- (2) The accused person must be given an audio copy of the recorded statement as soon as practicable after the proceeding is commenced.
- (3) Also, if it is reasonably practicable, the accused person must be given an opportunity to view a recorded statement that is in the form of a video recording at a police station on at least 1 of the following occasions:
  - (a) when the accused person is being questioned in relation to the alleged family violence offence;
  - (b) at the request of the accused person, on a day arranged with the accused person;
  - (c) on another day stated in a written notice given to the accused person before committal proceedings or the trial commences.
- (4) If compliance with subsection (3) is not reasonably practicable, the accused person must be given the opportunity to view the recorded statement on a day on which proceedings relating to the offence are being held.

**81G Recorded statement—admissibility**

Evidence of a representation of a complainant given in the form of a recorded statement is not to be admitted if section 81E or section 81F have not been complied with, unless the court is satisfied that—

- (a) the parties consent to the recorded statement being admitted; or
- (b) the accused person or the accused person's lawyer (if any) have been given a reasonable opportunity to listen to or view the recorded statement and it would be in the interests of justice to admit the recorded statement.

**81H Recorded statement—accused person to be given audio copy**

- (1) This section applies if—
  - (a) the prosecutor in a family violence offence proceeding intends to tender a recorded statement as evidence; and
  - (b) the court accepts a plea of not guilty from the accused person; and
  - (c) the accused person has not already been given an audio copy of the recorded statement under section 81F.
- (2) The accused person must be given an audio copy of the recorded statement.

**81I Recorded statement—jury trial**

- (1) This section applies if—
  - (a) a family violence offence proceeding is a trial by jury; and
  - (b) a recorded statement is admitted in evidence in the proceeding.
- (2) The court must tell the jury that—
  - (a) admission of a recorded statement 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 recorded statement 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.

### **81J Recorded statement—offence to publish**

- (1) A person commits an offence if the person—
  - (a) publishes a recorded statement; and
  - (b) does not have authority to publish the recorded statement.

Maximum penalty: 50 penalty units, imprisonment for 6 months or both.
- (2) For this section, a person has *authority* to publish a recorded statement only if the person publishes the recorded statement in connection with—
  - (a) the investigation of, or a proceeding for, an offence in relation to which the recorded statement is prepared; or
  - (b) a re-hearing, re-trial or appeal in relation to the proceeding; or
  - (c) a proceeding for an application for a protection order under the *Family Violence Act 2016* if—
    - (i) the affected person in relation to the application for the protection order is the complainant in relation to the recorded statement; and
    - (ii) the respondent to the application for the protection order is the person against whom the family violence offence, the subject of the recorded statement, is alleged.

- (3) In this section:

*person* includes the complainant in relation to the recorded statement.

*publish* means communicate or disseminate information in a way or to an extent that makes it available to, or likely to come to the notice of, the public or a section of the public or anyone else not lawfully entitled to the information.

### **Division 4.5.3      Recorded statement of police interview admissible as evidence— application for protection order**

#### **81K      Recorded statement—may be admitted as evidence in application for family violence protection order**

- (1) This section applies if a recorded statement is made in relation to an alleged family violence offence.
- (2) The recorded statement may be admitted by the Magistrates Court in a proceeding for an application for a protection order under the *Family Violence Act 2016* if—
  - (a) the affected person in relation to the application for the protection order is the complainant in relation to the recorded statement; and
  - (b) the respondent to the application for the protection order is the person against whom the family violence offence is alleged.

#### **16      Witness with vulnerability may give evidence in closed court Section 102 (4), note**

*substitute*

*Note*      Publishing certain information in relation to sexual offence proceedings is an offence (see s 74).



**17 Section 102 (5)**

*omit*

division 4.2.2A (Sexual and violent offence proceedings—audiovisual recording of police interview admissible as evidence) or division 4.2.2B (Sexual offence proceedings—giving evidence at pre-trial hearing)

*substitute*

division 4.3.3 (Special requirements—audiovisual recording of police interview) or division 4.3.4 (Giving evidence at pre-trial hearing)

**18 Dictionary, definition of *audiovisual recording***

*substitute*

***audiovisual recording***, for division 4.3.3 (Special requirements—audiovisual recording of police interview)—see section 51.

**19 Dictionary, new definition of *child***

*insert*

***child***, in a proceeding, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

**20 Dictionary, definition of *civil proceeding***

*substitute*

***civil proceeding***, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**21 Dictionary, definition of *complainant***

*substitute*

***complainant***, in relation to a proceeding for an offence, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

**22 Dictionary, new definition of *counselling***

*insert*

***counselling***, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**23 Dictionary, definition of *counsellor***

*substitute*

***counsellor***, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**24 Dictionary, definition of *court***

*substitute*

***court***, for part 2.2 (Evidence of children—audiovisual links)—see section 5.

**25 Dictionary, definition of *criminal proceeding*, paragraph (b)**

*substitute*

(b) for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**26 Dictionary, definition of *document recording a protected confidence***

*substitute*

*document recording a protected confidence*, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**27 Dictionary, new definition of *family member***

*insert*

*family member*, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

**28 Dictionary, definition of *family violence offence***

*omit*

**29 Dictionary, definition of *family violence offence proceeding***

*substitute*

*family violence offence proceeding*, for chapter 4 (Sexual, violent and family violence offence proceedings)—see section 38.

**30 Dictionary, new definition of *give evidence***

*insert*

*give evidence*, in a proceeding by audiovisual link—

- (a) for part 2.2 (Evidence of children—audiovisual links)—see section 6; and
- (b) for division 4.3.5 (Giving evidence by audiovisual link)—see section 67.

**31 Dictionary, definition of *give evidence in a proceeding by audiovisual link***

*omit*

**32 Dictionary, definitions of *harm* and *intellectually impaired***

*substitute*

*harm*, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

*intellectually impaired*, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

**33 Dictionary, definition of *less serious violent offence***

*omit*

**34 Dictionary, new definition of *less serious violent offence proceeding***

*insert*

*less serious violent offence proceeding*, for chapter 4 (Sexual, violent and family violence offence proceedings)—see section 39.

**35 Dictionary, definition of *Magistrates Court***

*substitute*

*Magistrates Court*, for part 2.2 (Evidence of children—audiovisual links)—see section 5.

**36 Dictionary, definition of *preliminary criminal proceeding***

*substitute*

*preliminary criminal proceeding*, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**37 Dictionary, definition of *proceeding*, paragraphs (b), (c) and (d)**

*substitute*

- (b) for part 2.2 (Evidence of children—audiovisual links)—see section 5; and
- (c) for part 4.1 (Kinds of proceedings)—see section 37; and
- (d) for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**38 Dictionary, definitions of *protected confidence* and *protected confidence evidence***

*substitute*

*protected confidence*, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79A.

*protected confidence evidence*, for division 4.4.3 (Sexual offence proceedings—protection of counselling communications)—see section 79.

**39 Dictionary, definition of *recorded statement***

*substitute*

*recorded statement*, for part 4.5 (Special requirements—evidence in family violence offence proceedings)—see section 81.

**40 Dictionary, definitions of *relative* and *relevant person***

*omit*

**41 Dictionary, new definition of *relevant proceeding***

*insert*

***relevant proceeding***, for part 4.3 (Special requirements—general)—see section 46.

**42 Dictionary, definition of *serious violent offence***

*omit*

**43 Dictionary, new definition of *serious violent offence proceeding***

*insert*

***serious violent offence proceeding***, for chapter 4 (Sexual, violent and family violence offence proceedings)—see section 40.

**44 Dictionary, definition of *sexual offence***

*omit*

**45 Dictionary, definition of *sexual offence proceeding***

*substitute*

***sexual offence proceeding***, for chapter 4 (Sexual, violent and family violence offence proceedings)—see section 41.

**46 Dictionary, definitions of *sexual or violent offence* and *sexual or violent offence proceeding***

*omit*

**47 Dictionary, definition of *similar act witness***

*substitute*

***similar act witness***, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

**48 Dictionary, new definition of *special relationship witness***

*insert*

*special relationship witness*, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

**49 Dictionary, definitions of *violent offence* and *violent offence proceeding***

*omit*

**50 Dictionary, new definition of *vulnerable adult***

*insert*

*vulnerable adult*, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

**51 Dictionary, definition of *witness***

*substitute*

*witness*, for part 4.3 (Special requirements—general)—see section 46.

**52 Dictionary, definition of *witness with a disability***

*omit*

**53 Dictionary, new definition of *witness with disability***

*insert*

*witness with disability*, for part 4.2 (What special requirements apply to particular proceedings)—see section 42.

## Part 5 Evidence (Miscellaneous Provisions) Regulation 2009

### 54 Sections 4 and 5

*substitute*

#### 4 Prescribed person—Act, s 51 (1) and (3)

- (1) For the [Act](#), section 51 (1) and (3), a prescribed person is—
  - (a) a police officer who has completed training in the making of audiovisual recordings of witnesses answering questions in relation to the investigation of sexual or violent offences; or
  - (b) for an audiovisual recording of a witness in a proceeding mentioned in the [Act](#), section 41 (b) and (c)—a police officer.
- (2) The training mentioned in subsection (1) (a) may be completed—
  - (a) in the ACT or elsewhere; and
  - (b) before or after the commencement of this section.
- (3) In this section:

*police officer* includes a person who is a member of the police force of a State or another Territory if—

- (a) provisions of the law of that State or Territory correspond (or substantially correspond) to the [Act](#), division 4.3.3 (Special requirements—audiovisual recording of police interview); and
- (b) the person is trained in the taking of evidence under those provisions.

#### 5 Responsible person—Act, s 53 (4) (b)

For the [Act](#), section 53 (4) (b), a prescribed position is the Superintendent of Prosecution and Judicial Support.



## **Schedule 1      Consequential amendments**

(see s 3)

### **Part 1.1              Children and Young People Act 2008**

#### **[1.1]      Section 246, definition of *privileged*, paragraph (b)**

*substitute*

- (b) it includes a protected confidence under the *Evidence (Miscellaneous Provisions) Act 1991*, division 4.4.3 (Sexual offence proceedings—protection of counselling communications).

### **Part 1.2              Court Procedures Act 2004**

#### **[1.2]      Section 41 (2) (d) (ii) to (vii)**

*substitute*

- (ii) section 50 (Evidence to be given in closed court);
- (iii) section 70 (Consequential orders—div 4.3.5);
- (iv) section 73 (Certain evidence to be given in closed court);
- (v) section 77 (c) (Application for leave under s 76);
- (vi) section 79G (5) (Preliminary examination of protected confidence evidence);
- (vii) section 79I (2) (a) (Ancillary orders for protection of person who made protected confidence);

## Part 1.3 Crimes (Sentencing) Act 2005

### [1.3] Section 52 (4) (b)

*substitute*

- (b) chapter 4 (Sexual, violent and family violence offence proceedings).

## Part 1.4 Evidence Act 2011

### [1.4] Section 126F (3), except note

*substitute*

- (3) This division does not apply in relation to a protected confidence within the meaning of the *Evidence (Miscellaneous Provisions) Act 1991*, division 4.4.3 (Sexual offence proceedings—protection of counselling communications).

## Part 1.5 Supreme Court Act 1933

### [1.5] Section 9 (2)

*substitute*

- (2) However, the associate judge may exercise the jurisdiction of the court in presiding at a pre-trial hearing under the *Evidence (Miscellaneous Provisions) Act 1991*, division 4.3.4 (Giving evidence at pre-trial hearing).

---

## Endnotes

**1 Presentation speech**

Presentation speech made in the Legislative Assembly on 25 October 2018.

**2 Notification**

Notified under the [Legislation Act](#) on 4 December 2018.

**3 Republications of amended laws**

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

---

I certify that the above is a true copy of the Royal Commission Criminal Justice Legislation Amendment Bill 2018, which was passed by the Legislative Assembly on 27 November 2018.

Clerk of the Legislative Assembly

© Australian Capital Territory 2018