

South Australia

**Statutes Amendment (Evidence and Procedure)  
Bill 2007**

A BILL FOR

An Act to amend various Acts to make provision for miscellaneous evidentiary and other procedural matters.

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**The Parliament of South Australia enacts as follows:****Part 1—Preliminary****1—Short title**

This Act may be cited as the *Statutes Amendment (Evidence and Procedure) Act 2007*.

**2—Commencement**

- 5 This Act will come into operation on a day to be fixed by proclamation.

**3—Amendment provisions**

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

**Part 2—Amendment of *Criminal Law (Legal Representation) Act 2001***

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**4—Amendment of section 4—Interpretation**

- (1) Section 4(1), definition of *assisted person*—delete the definition and substitute:

*assisted person* means a person for whom legal assistance is, or has been, provided in connection with—

15

- (a) the trial of a serious offence (whether or not the case actually proceeds to trial); or  
 (b) the cross-examination of a section 13B witness;

- (2) Section 4(1)—after the definition of *relevant offence* insert:

*section 13B witness* means a witness who is the alleged victim of an offence to which section 13B of the *Evidence Act 1929* applies;

20

## 5—Amendment of section 6—Entitlement to legal assistance

(1) Section 6(1)(a)—after "trial" insert:

of the offence

(2) Section 6—after subsection (1) insert:

5 (1a) If a defendant who is not legally represented in a trial applies to the Commission for legal assistance for the cross-examination of a section 13B witness in the trial, the Commission must (subject to the qualifications that appear below) grant such legal assistance.

(3) Section 6(4)(a)(i)—delete "or an associated proceeding" and substitute:

10 , an associated proceeding or the cross-examination of a section 13B witness (as the case may be)

(4) Section 6(4)(a)(ii)—delete "at the trial"

## 6—Amendment of section 9—Representation of certain defendants

Section 9—after subsection (1) insert:

15 (1a) This section does not apply to a defendant in a trial who is only represented by a lawyer for the purposes of the cross-examination of a section 13B witness in the trial.

## 7—Amendment of section 10—Certain costs may be awarded against defendant personally

20 Section 10—after its present contents (now to be designated as subsection (1)) insert:

(2) However, the court may not make such an order if the adjournment is to allow a defendant who is not legally represented in a trial to obtain legal representation for the purposes of the cross-examination of a section 13B witness in the trial.

## 25 Part 3—Amendment of *District Court Act 1991*

### 8—Insertion of section 50B

After section 50A insert:

#### 50B—Trials of sexual offences involving children to be given priority

30 (1) The Court will give the necessary directions to ensure that a trial of a sexual offence where the victim of the offence is a child is given priority over any less urgent criminal trial and is dealt with as expeditiously as the proper administration of justice allows.

(2) In this section—

35 *sexual offence* means—

(a) rape; or

(b) indecent assault; or

- (c) any offence involving unlawful sexual intercourse or an act of gross indecency; or
- (d) incest; or
- (e) any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest; or
- (f) any attempt to commit, or assault with intent to commit, any of the offences referred to in a preceding paragraph.

### 9—Amendment of section 54—Accessibility of evidence etc

- (1) Section 54(2)—after paragraph (b) insert:

(ba) sensitive material in the custody of the Court;

- (2) Section 54(3)—delete subsection (3) and substitute:

(3) The Court may permit inspection or copying of material referred to in subsection (2) subject to any of the following conditions:

- (a) a condition that material that is sensitive material will be available for examination under the supervision of the Court at a place specified in the notice and at a time to be arranged;
- (b) a condition limiting the publication or use of the material;
- (c) any other condition that the Court considers appropriate.

- (3) Section 54—after subsection (5) insert:

(6) In this section—

*sensitive material*—see section 67H of the *Evidence Act 1929*.

## Part 4—Amendment of *Evidence Act 1929*

### 10—Amendment of section 4—Interpretation

- (1) Section 4—after the definition of *court* insert:

*domestic partner* means a person who is a domestic partner within the meaning of the *Family Relationships Act 1975*, whether declared as such under that Act or not;

- (2) Section 4—after the definition of *legal proceeding* insert:

*mental disability* includes an intellectual disability;

*serious offence against the person* means—

- (a) attempted murder; or
- (b) attempted manslaughter; or
- (c) a sexual offence; or
- (d) —

- (i) an offence of stalking under section 19AA of the *Criminal Law Consolidation Act 1935*; or
- (ii) an offence of causing serious harm under section 23 of the *Criminal Law Consolidation Act 1935*; or
- 5 (iii) an offence involving an unlawful threat to kill or endanger life; or
- (iv) an offence involving abduction; or
- (v) an offence involving blackmail; or
- 10 (vi) an attempt to commit, or assault with intent to commit, any of the offences in the preceding subparagraphs;

(3) Section 4—after the definition of *sexual offence* insert:

*spouse* —a person is the spouse of another if they are legally married;

(4) Section 4—after the definition of *telegraph station* insert:

*vulnerable witness* means—

- 15 (a) a witness who is under 16 years of age; or
- (b) a witness who suffers from a mental disability; or
- (c) a witness who is the alleged victim of an offence to which the proceedings relate—
  - (i) where the offence is a serious offence against the person; or
  - 20 (ii) in any other case—where, because of the circumstances of the witness or the circumstances of the case, the witness would, in the opinion of the court, be specially disadvantaged if not treated as a vulnerable witness; or
- (d) a witness who—
  - 25 (i) has been subjected to threats of violence or retribution in connection with the proceedings; or
  - (ii) has reasonable grounds to fear violence or retribution in connection with the proceedings;

### 11—Amendment of section 9—Unsworn evidence

30 Section 9(4)—delete "trial by jury" and substitute:

criminal trial

## 12—Substitution of sections 12A and 13

Sections 12A and 13—delete the sections and substitute:

### 12A—Warning relating to uncorroborated evidence of child in criminal proceedings

- 5 (1) If, in a criminal trial, a child gives sworn evidence that is not corroborated, the judge must not warn the jury that it is unsafe to convict on the child's uncorroborated evidence unless—
- 10 (a) the warning is warranted because there are, in the circumstances of the particular case, cogent reasons, apart from the fact that the witness is a child, to doubt the reliability of the child's evidence; and
- (b) a party asks that the warning be given.
- 15 (2) In giving any such warning, the judge is not to make any suggestion that the evidence of children is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults.

### 13—Special arrangements for protecting witnesses from embarrassment, distress, etc when giving evidence

- 20 (1) Subject to this section, if—
- (a) it is desirable to make special arrangements for taking evidence from a witness in a trial in order to protect the witness from embarrassment or distress, to protect the witness from being intimidated by the atmosphere of the courtroom or for any other proper reason; and
- 25 (b) the facilities necessary for the special arrangements are readily available to the court and it is otherwise practicable to make the special arrangements; and
- (c) the special arrangements can be made without prejudice to any party to the proceedings,
- 30 the court should, on its own initiative, order that special arrangements be made for taking the evidence of the witness.
- (2) Without limiting the kind of order that may be made under this section, the court may make 1 or more of the following orders:
- 35 (a) an order that the evidence be given outside the trial court and transmitted to the trial court by means of closed circuit television;
- (b) an order that the evidence be taken outside the trial court, and that an audio visual record of the evidence be made and replayed in the trial court;
- 40 (c) an order that a screen, partition or one-way glass be placed to obscure the view of a party to whom the evidence relates or some other person;

- 5
- (d) an order that a defendant be excluded from the place where the evidence is taken, or otherwise be prevented from directly seeing and hearing the witness while giving evidence;
- (e) an order that the witness be accompanied by a relative or friend for the purpose of providing emotional support;
- 10
- (f) if the witness suffers from a physical or mental disability— an order that the evidence be taken in a particular way (to be specified by the court) that will, in the court's opinion, facilitate the taking of evidence from the witness or minimise the witness's embarrassment or distress.
- 15
- (3) The court may, if of the opinion that expert evidence would assist the court to determine the special arrangements that should be made for taking the evidence of the witness, receive such evidence and, if the native language of the witness is not English and the witness is not reasonably fluent in English, evidence about any additional difficulty that may be caused by the witness giving evidence through an interpreter.
- 20
- (4) Special arrangements made under this section may relate to the witness's evidence as a whole or to particular aspects of the witness's evidence, such as cross-examination and re-examination.
- 25
- (5) An order must not be made under this section if the effect of the order would be—
- (a) to relieve a witness from the obligation to give sworn evidence; or
- (b) to relieve a witness from the obligation to submit to cross-examination; or
- 30
- (c) to prevent the judge, jury or defendant from observing the witness's demeanour in giving evidence (but the observation may be direct or by live transmission of the witness's voice and image or by replay of a recording of the witness's voice and image); or
- (d) to prevent the defendant from instructing counsel while the witness is giving evidence.
- 35
- (6) If a witness is accompanied by a relative or friend for the purpose of providing emotional support, that person must be visible to the judge and jury (if any) while the witness is giving evidence and, if, in consequence of an order under this section, a party is prevented from seeing that person directly while the witness gives evidence, the court must ensure that the party is able to observe that person either—
- 40
- (a) by direct transmission of images of the witness together with that person while the witness is giving evidence; or



(b) by the later replay of a recording of images of the witness together with that person made while the witness was giving evidence.

5 (7) If, in a criminal trial, a court makes special arrangements for taking the evidence of a witness, the judge must warn the jury not to draw from that fact any inference adverse to the defendant, and not to allow the special arrangements to influence the weight to be given to the evidence.

10 (8) An order under this section may be made, varied or revoked on the court's own initiative, or on the application of a party or witness.

### **13A—Special arrangements for protecting vulnerable witnesses when giving evidence in criminal proceedings**

(1) Subject to this section, if—

15 (a) a vulnerable witness is to give evidence in criminal proceedings; and

(b) the facilities necessary for the special arrangements are readily available to the court and it is otherwise practicable to make the special arrangements; and

20 (c) the special arrangements can be made without prejudice to any party to the proceedings,

the court must, on application under this section, order that special arrangements be made for taking the evidence of the witness.

(2) Without limiting the kind of order that may be made under this section, the court may make 1 or more of the following orders:

25 (a) an order that the evidence be given outside the trial court and transmitted to the trial court by means of closed circuit television;

30 (b) an order that the evidence be taken outside the trial court, and that an audio visual record of the evidence be made and replayed in the trial court;

(c) an order that a screen, partition or one-way glass be placed to obscure the view of a party to whom the evidence relates or some other person;

35 (d) an order that a defendant be excluded from the place where the evidence is taken, or otherwise be prevented from directly seeing and hearing the vulnerable witness while giving evidence;

40 (e) an order that the vulnerable witness be accompanied by a relative or friend for the purpose of providing emotional support;

- 5 (f) if the vulnerable witness suffers from a physical or mental disability—an order that the evidence be taken in a particular way (to be specified by the court) that will, in the court's opinion, facilitate the taking of evidence from the witness or minimise the witness's embarrassment or distress.
- (3) Special arrangements made under this section may relate to the vulnerable witness's evidence as a whole or to particular aspects of the witness's evidence, such as cross-examination and re-examination.
- 10 (4) An order must not be made under this section if the effect of the order would be—
- (a) to relieve a vulnerable witness from the obligation to give sworn evidence; or
- 15 (b) to relieve a vulnerable witness from the obligation to submit to cross-examination; or
- (c) to prevent the judge, jury or defendant from observing the vulnerable witness's demeanour in giving evidence (but the observation may be direct or by live transmission of the witness's voice and image or by replay of a recording of the witness's voice and image); or
- 20 (d) to prevent the defendant from instructing counsel while the vulnerable witness is giving evidence.
- (5) If a vulnerable witness is accompanied by a relative or friend for the purpose of providing emotional support, that person must be visible to the judge and jury (if any) while the witness is giving evidence and, if, in consequence of an order under this section, a party is prevented from seeing that person directly while the witness gives evidence, the court must ensure that the party is able to observe that person either—
- 25 (a) by direct transmission of images of the witness together with that person while the witness is giving evidence; or
- (b) by the later replay of a recording of images of the witness together with that person made while the witness was giving evidence.
- 30 (6) An application for an order under this section must—
- (a) be made in writing by the party calling the vulnerable witness to give evidence; and
- (b) be filed in the court before the commencement of the trial; and
- 35 (c) within 14 days of being filed in the court—be served on the other party to the proceedings (the *respondent*); and
- 40 (d) specify the nature of the vulnerability of the witness, the special arrangements sought and the reasons for the arrangements; and

- (e) otherwise be made in accordance with the rules of court.
- (7) The respondent may, if of the opinion that the witness on whose behalf the application has been made is not in fact a vulnerable witness, within 14 days of being served with the application (the *prescribed period*), file an answering document in the court objecting to the application on that ground.
- (8) If an objection to the application is filed within the prescribed period, the court must determine the application before the commencement of the trial—
- (a) in the absence of the applicant and respondent; or
- (b) by conducting a hearing in a room closed to the public.
- (9) The court may, if of the opinion that expert evidence would assist the court to determine the special arrangements that should be made for taking the evidence of the vulnerable witness, receive such evidence and, if the native language of the witness is not English and the witness is not reasonably fluent in English, evidence about any additional difficulty that may be caused by the witness giving evidence through an interpreter.
- (10) If no objection to the application is filed within the prescribed period, the court may order that appropriate special arrangements be made for taking the evidence of the vulnerable witness at the trial.
- (11) The court—
- (a) may dispense with special arrangements for taking the evidence of a vulnerable witness in criminal proceedings if—
- (i) the witness is an adult; and
- (ii) the court is satisfied that—
- (A) the facilities necessary for the special arrangements are not readily available to the court; and
- (B) taking into account the following matters, it is not reasonably practicable to make the facilities available:
- the cost, inconvenience and delay involved in procuring the necessary facilities or in adjourning to some other place where the necessary facilities are available;
  - the urgency of the proceedings; and
- (b) must give reasons for its decision.

5 (12) If, in a criminal trial, a court makes special arrangements for taking the evidence of a vulnerable witness, the judge must warn the jury not to draw from that fact any inference adverse to the defendant, and not to allow the special arrangements to influence the weight to be given to the evidence.

(13) An order under this section may be made, varied or revoked on the court's own initiative, or on the application of a party to the proceedings.

### 13B—Cross-examination of victims of certain offences

10 (1) A defendant is not to be permitted to cross-examine a witness who is the alleged victim of an offence to which this section applies—

(a) in a criminal trial unless the cross-examination is by counsel;

(b) in civil proceedings relating to the offence unless—

15 (i) the cross-examination is by counsel; or

(ii) if the defendant is not legally represented in the proceedings—the cross-examination is conducted in accordance with subsection (2).

(2) For the purposes of subsection (1)(b)(ii)—

20 (a) the defendant must submit to the judge in writing the questions the defendant intends to ask the witness in cross-examination; and

(b) the judge (or the judge's delegate) will ask the witness those of the questions submitted that are determined by the judge to be allowable in cross-examination.

25 (3) If a defendant is not legally represented in a criminal trial that will involve the taking of evidence from any such witness, the court must ensure that the defendant—

30 (a) has been warned of the limitation on the right of cross-examination imposed by this section; and

(b) has been informed—

(i) that he or she may be entitled to legal assistance under the *Legal Services Commission Act 1977*;

35 (ii) in any case—of his or her rights under the *Criminal Law (Legal Representation) Act 2001* to obtain the assistance of counsel for the purpose of cross-examining the witness; and

(c) has had a reasonable opportunity to obtain the assistance of counsel before the evidence is taken.

- (4) If, in a criminal trial, an unrepresented defendant obtains the assistance of counsel for the purpose of cross-examining such a witness, the judge must—
- 5 (a) explain to the jury the limitation imposed by this section on the defendant's right to personally cross-examine the witness; and
- (b) warn the jury that no adverse inference may be drawn against the defendant from the requirement for the unrepresented defendant to obtain the assistance of counsel to cross-examine the witness.
- 10 (5) In this section—
- offence to which this section applies* means—
- (a) a serious offence against the person; or
- 15 (b) an offence of contravening or failing to comply with a domestic violence restraining order under the *Domestic Violence Act 1994*; or
- (c) an offence of contravening or failing to comply with a restraining order under the *Summary Procedure Act 1921*.

**13C—Court's power to make audio visual record of evidence of vulnerable witnesses in criminal proceedings**

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- (1) If a vulnerable witness is to give evidence in criminal proceedings, the following provisions apply:
- 25 (a) in the case of a vulnerable witness who is a child of or under the age of 16 years and who is the alleged victim of a sexual offence—the court must order that an audio visual record be made of the witness's evidence before the court (unless an order has already been made in respect of the witness's evidence under section 13A(2)(b));
- 30 (b) in the case of any other vulnerable witness—the court may, on application by the prosecution, order that an audio visual record be made of the witness's evidence before the court if—
- 35 (i) the facilities necessary for making an audio visual record of the evidence are readily available to the court; and
- (ii) it is otherwise practicable to make such a record.
- (2) Subject to subsection (3), an audio visual record of evidence (whether made by order under this section or section 13A(2)(b)) is to be kept in the custody of the court and access to the record is to be restricted to court officials who are responsible for its custody.
- 40

- 5
- (3) The court (or a superior court) may authorise a person to take custody of the audio visual record of evidence, or to have some other form of access to it, if satisfied that the custody or access is reasonably necessary for the purposes of related proceedings that have been commenced or are in contemplation.
- (4) Despite any other law, access to an audio visual record of evidence is not to be allowed except as provided by this section.

### 13D—Court's power to admit evidence taken in earlier proceedings

- 10
- (1) If, on application by a party to civil or criminal proceedings before a court, the court is satisfied that—
- 15
- (a) evidence given by a witness in earlier criminal proceedings is relevant to the proceedings before the court; and
- (b) the witness—
- 20
- (i) has died; or
- (ii) has become too ill or infirm to give evidence; or
- (iii) has not, after diligent search, been found; or
- (iv) is a vulnerable witness,
- the court in the later proceedings has a discretion to admit an official record of the evidence.
- 25
- (2) An *official record* of evidence is a record made at the direction or with the approval of the court before which the evidence was taken and, if an audio or audio visual record of the evidence was taken at the direction or with the approval of the court, in addition to a written transcript, the official record of evidence includes the audio or audio visual record.
- 30
- (3) Before the court admits an official record into evidence in proceedings under this section, the record must be edited—
- (a) as agreed between the parties to those proceedings so as to exclude material that is not relevant to those proceedings; and
- (b) so as to exclude evidence that is inadmissible in those proceedings for any other reason.
- 35
- (4) If the court admits an official record into evidence under this section, it may relieve the witness, wholly or in part, from an obligation to give evidence in the later proceedings.

### 13—Amendment of section 21—Competence and compellability of witnesses

Section 21(7), definitions of *domestic partner* and *spouse*—delete the definitions

## 14—Substitution of section 25

Section 25—delete the section and substitute:

### 25—Disallowance of improper questions

- 5
- (1) A question is an *improper question* if—
- (a) the question is misleading or confusing; or
  - (b) the question is apparently based on a stereotype, including a sexual, racial, ethnic or cultural stereotype or a stereotype based on age or physical or mental disability; or
  - 10 (c) the question is unnecessarily repetitive, offensive or oppressive, or is 1 of a series of questions that is unnecessarily repetitive, offensive or oppressive; or
  - (d) the question is put in a humiliating, insulting or otherwise inappropriate manner or tone.
- (2) A question is not, however, improper only because—
- 15 (a) it challenges the truthfulness of the witness, or the consistency or accuracy of statements made by the witness; or
  - (b) it deals with matters the witness would find distasteful or intrudes on the witness's privacy.
- (3) If an improper question is put to a witness in cross-examination, the court must—
- 20 (a) disallow the question; and
  - (b) inform the witness that the question need not be answered.
- (4) In determining whether a question is improper, the court may take into account—
- 25 (a) the age, personality and educational level of the witness; and
  - (b) any mental or physical disabilities to which the witness is subject; and
  - (c) the witness's ethnic and cultural background; and
  - 30 (d) any other characteristics of the witness that may be relevant; and
  - (e) the context in which the question is put, including—
    - 35 (i) the nature of the proceedings and, if the proceedings are criminal proceedings, the nature of the offence to which they relate; and
    - (ii) the relationship (if any) between the witness and a party to the proceedings; and
  - (f) any other relevant factor.

- (5) The failure to exercise the discretion in relation to a question does not affect the admissibility of any answer given in response to the question.

**15—Insertion of heading to Part 3 Division 1**

5 Before section 30 insert:

**Division 1—Miscellaneous rules of evidence in general cases**

**16—Substitution of section 34CA**

Section 34CA—delete the section and substitute:

**34CA—Statement of protected witness**

- 10 (1) A court may admit hearsay evidence of the nature and contents of a statement made outside the court by a protected witness from the person to whom the statement was made if—
  - 15 (a) the court, having regard to the circumstances in which the statement was made, is satisfied that the statement has sufficient probative value to justify its admission; and
  - (b) —
    - 20 (i) the protected witness has been called, or is available to be called, as a witness in the proceedings; and
    - (ii) the court gives permission for the protected witness to be cross-examined on matters arising from the hearsay evidence.
- 25 (2) A court may only give permission to allow a protected witness to be cross-examined on such matters if satisfied that the cross-examination is likely to elicit material of substantial probative value or material that would substantially reduce the credibility of the hearsay evidence.
- 30 (3) In a criminal trial, the judge must, if hearsay evidence of the nature and contents of a statement made outside the court by a protected witness has been admitted but the protected person has not, for some reason, been cross-examined on matters arising from the hearsay evidence, warn the jury that the hearsay evidence should be scrutinised with particular care because it has not been tested in the usual way.
- 35 (4) In this section—

*protected witness* means—

  - (a) a young child; or
  - (b) a person who suffers from a mental disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to
- 40 questions.



### **34CB—Direction relating to delay where defendant forensically disadvantaged**

- 5 (1) A rule of law or practice obliging a judge in a trial of a charge of an offence to give a warning of a kind known as a *Longman* warning is abolished.

**Note—**

See *Longman v The Queen* (1989) 168 CLR 79

- 10 (2) If, in a trial of a charge of an offence, the court is of the opinion that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage to the defendant, the judge must—

- 15 (a) explain to the jury the nature of the forensic disadvantage;  
and  
(b) direct that the jury must take the forensic disadvantage into account when scrutinising the evidence.

- (3) An explanation or direction under subsection (2) may not take the form of a warning and—

- 20 (a) must be specific to the circumstances of the particular case;  
and  
(b) must not include the phrase "dangerous or unsafe to convict" or similar words or phrases.

### **17—Repeal of section 34I**

Section 34I—Delete the section

### **18—Insertion of Part 3 Division 2**

25 After section 34K insert:

### **Division 2—Miscellaneous rules of evidence in sexual cases**

#### **34L—Evidence in sexual cases generally**

- 30 (1) In proceedings in which a person is charged with a sexual offence, no question may be asked or evidence admitted—

- 35 (a) as to the sexual reputation of the alleged victim of the offence; or  
(b) except with the permission of the judge—as to the alleged victim's sexual activities before or after the events of and surrounding the alleged offence (other than recent sexual activities with the accused).

5 (2) In deciding whether permission should be granted under subsection (1)(b), the judge must give effect to the principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment through the asking of questions or admission of evidence of the kind referred to in that subsection, and must not grant permission unless satisfied that the evidence in respect of which permission is sought—

(a) is of substantial probative value; or

10 (b) would, in the circumstances, be likely materially to impair confidence in the reliability of the evidence of the alleged victim,

and that its admission is required in the interests of justice.

15 (3) Permission must not be granted under subsection (1)(b) authorising the asking of questions or the admission of evidence the purpose of which is only to raise inferences from some general disposition of the alleged victim.

(4) An application for permission under subsection (1)(b) must be heard and determined in the absence of the jury (if any).

20 (5) In a trial of a charge of a sexual offence, the judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.

25 (6) Subsection (5) does not affect the operation of any provision of this or any other Act requiring that the evidence of a witness be corroborated.

(7) In this section—

*evidence* includes an allegation or statement made by way of an unsworn statement;

30 *sexual activities* includes sexual experience or lack of sexual experience.

### 34M—Evidence relating to complaint in sexual cases

(1) This section abolishes the common law relating to recent complaint in sexual cases.

**Note—**

35 *See Kilby v The Queen* (1973) 129 CLR 460; *Crofts v The Queen* (1996) 186 CLR 427

40 (2) In a trial of a charge of a sexual offence, no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

(3) Despite any other rule of law or practice, evidence related to the making of an initial complaint of an alleged sexual offence is admissible in a trial of a charge of the sexual offence.

**Examples—**

Evidence may be given by any person about—

- when the complaint was made and to whom;
- the content of the complaint;
- how the complaint was solicited;
- why the complaint was made to a particular person at a particular time;
- why the alleged victim did not make the complaint at an earlier time.

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(4) However, if evidence referred to in subsection (3) is admitted in a trial, the judge must direct the jury as follows:

- (a) the evidence is hearsay evidence;
- (b) the evidence is not to be used as evidence of the truth of what was alleged;
- (c) the evidence is admitted to inform the jury as to how the allegation first came to light;
- (d) there may be varied reasons why the alleged victim of a sexual offence has made a complaint of the offence at a particular time or to a particular person;
- (e) it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.

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(5) It is not necessary that a particular form of words be used in giving the direction under subsection (4).

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(6) In this section—

***complaint***, in relation to a sexual offence, includes a report or any other disclosure (whether to a police officer or otherwise);

***initial complaint***, in relation to a sexual offence, includes information provided by way of elaboration of the initial complaint (whether provided at the time of the initial complaint or at a later time).

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**34N—Directions relating to consent in certain sexual cases**

(1) In a trial of a charge of a sexual offence where a lack of consent of a person in relation to a particular sexual activity is in issue, the judge must direct the jury that the person is not to be regarded as having consented to the sexual activity the subject of the charge merely because—

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- (a) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or
- (b) the person did not protest to or physically resist the sexual activity; or

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(c) the person was not physically injured in the course of, or in connection with, the sexual activity; or

(d) 1 or more of the following circumstances apply:

(i) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;

(ii) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;

(iii) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person.

(2) The judge must, in a trial referred to in subsection (1), give each of the directions referred to in that subsection as may be applicable in the circumstances of the particular case.

(3) In this section—

*consent*, in relation to a sexual activity, has the same meaning as in the *Criminal Law Consolidation Act 1935*;

*sexual activity* includes sexual intercourse (within the meaning of the *Criminal Law Consolidation Act 1935*).

## 19—Amendment of section 59IQ—Appearance etc by audio visual link or audio link

Section 59IQ(8), definition of *immediate family*, (a)—delete paragraph (a) and substitute:

(a) a spouse or domestic partner; or

## 20—Insertion of Part 7 Division 10

After section 67F insert:

### Division 10—Sensitive material

#### 67G—Interpretation and application

(1) In this Division—

*access*—a person gives another person access to sensitive material if the person—

(a) allows the other to view the material; or

(b) gives the other a copy of the material; or

(c) gives the other a tape, disk or device from which the material may be produced or reproduced; or

(d) transmits the material, or a copy of the material, to the other in the form of computer data;

*conditions of access*—see section 67I(4);

*criminal investigation* means the investigation of an offence, or alleged offence;

*criminal proceedings* means proceedings against a person for an offence (whether summary or indictable), including the following:

- (a) proceedings for the preliminary examination of an indictable offence;
- (b) proceedings relating to bail;
- (c) proceedings for the trial of an offence;
- (d) proceedings relating to sentencing;
- (e) proceedings on an appeal against conviction or sentence;

*private act* means—

- (a) a sexual act; or
- (b) an act involving an intimate bodily function such as using a toilet; or
- (c) an activity involving nudity or exposure or partial exposure of sexual organs, pubic area, buttocks or female breasts;

*prosecuting authority* means—

- (a) in relation to criminal proceedings—the Director of Public Prosecutions, a delegate of the Director of Public Prosecutions, a police officer, or any other person acting in a public official capacity, who is responsible for commencing or conducting a prosecution; and
- (b) in relation to a criminal investigation—a police officer or any other person acting in a public official capacity who is responsible for conducting a criminal investigation;

*public official* means—

- (a) a police officer; or
- (b) a person who holds an office or position in the employment of the State or an instrumentality or agency of the State; or
- (c) any person classified by regulation as a public official;

*restricted access* to sensitive material means access subject to conditions imposed under this Division;

*sensitive material* has the meaning given by section 67H;

*sensitive material notice*—see section 67I;

*unrestricted access* to sensitive material means access that is not subject to conditions imposed under this Division.

- (2) In this Division, a reference to a *prosecuting authority* includes a reference to a legal practitioner representing the prosecuting authority.

### **67H—Meaning of sensitive material**

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- (1) For the purposes of this Division, anything that contains or displays an image of a person is *sensitive material* if—
- (a) the image is of the person engaged or apparently engaged in a private act; or
- (b) the image is of the victim, or alleged victim, of a sexual offence or an offence of stalking under section 19AA of the *Criminal Law Consolidation Act 1935*; or
- 10 (c) the image is of the person taken or made after the person's death.
- (2) A reference to *sensitive material* extends to anything in a prosecuting authority's possession that the prosecuting authority reasonably considers to be sensitive material.

### **67I—Procedures for giving restricted access to sensitive material**

- 15 (1) If, but for this Division, a prosecuting authority would be required to give unrestricted access to sensitive material, the prosecuting authority has a discretion to give either unrestricted or restricted access to the sensitive material.
- 20 (2) A prosecuting authority cannot, however, exercise its powers under this Division to restrict access to sensitive material by—
- (a) a court; or
- (b) a public official who reasonably requires access to the sensitive material for purposes connected with his or her official functions.
- 25 (3) If the prosecuting authority decides to give restricted access, the authority must give the person entitled to access a notice (a *sensitive material notice*) that complies with this section.
- (4) The sensitive material notice must—
- (a) describe the sensitive material; and
- 30 (b) indicate that the prosecuting authority has decided to exercise its powers under this section to restrict the person's access to the sensitive material; and
- (c) state that the restricted access to the sensitive material is subject to the following conditions:
- 35 (i) the condition that the material will be available for examination by the person under the supervision of the prosecuting authority at a place specified in the notice and at a time to be arranged at the request of the person;

(ii) any other condition the prosecuting authority considers necessary or desirable to protect the integrity of the material and to prevent unauthorised reproduction or dissemination; and

5 (d) set out the name and contact details of the person who is responsible for arranging restricted access to the material on behalf of the prosecuting authority.

10 (5) After receiving a sensitive material notice, the person entitled to restricted access may ask the prosecuting authority to give the person access to the sensitive material.

15 (6) The prosecuting authority must, as soon as practicable after receiving such a request, give the person entitled to restricted access such opportunity or opportunities as may be reasonable in the circumstances to access the sensitive material under the conditions of access.

(7) A decision by a prosecuting authority under this section to restrict access to sensitive material is administrative and final and not subject to any form of review.

20 (8) A person who is given restricted access to sensitive material by a prosecuting authority under this section must not contravene a condition of access.

Maximum penalty: \$8 000 or imprisonment for 2 years or both.

### **67J—Improper dissemination of sensitive material**

25 (1) A person who creates sensitive material for a prosecuting authority, or who obtains possession of sensitive material on behalf of or from a prosecuting authority, in connection with a criminal investigation, or criminal or civil proceedings, must not allow access to the material except—

30 (a) for the legitimate purposes of the investigation or proceedings; or

(b) as may be authorised by the prosecuting authority.

Maximum penalty: \$8 000 or imprisonment for 2 years or both.

35 (2) A public official who creates, or obtains possession of, sensitive material in connection with official functions must not allow access to the material except as reasonably required for purposes connected with his or her official functions (which may include functions relating to education or training).

Maximum penalty: \$8 000 or imprisonment for 2 years or both.

40 (3) In proceedings for an offence against subsection (1) or (2), it is a defence to prove that the act or omission constituting the offence was attributable to an honest and reasonable mistake on the defendant's part.

## 21—Amendment of section 71B—Publishers required to report result of certain proceedings

(1) Section 71B(1)—at the foot of subsection (1) insert:

Maximum penalty:

- (a) in the case of a natural person—\$10 000;
- (b) in the case of a body corporate—\$120 000.

(2) Section 71B(2), penalty provision—delete the penalty provision

## 22—Transitional provision

The amendments made by Part 4 of this Act to the *Evidence Act 1929* apply to proceedings commenced after the commencement of that Part.

## Part 5—Amendment of *Magistrates Court Act 1991*

### 23—Insertion of section 48B

After section 48A insert:

#### 48B—Trials of sexual offences involving children to be given priority

- (1) The Court will give the necessary directions to ensure that a trial of a sexual offence where the victim of the offence is a child is given priority over any less urgent criminal trial and is dealt with as expeditiously as the proper administration of justice allows.
- (2) In this section—  
*sexual offence* means—
  - (a) rape; or
  - (b) indecent assault; or
  - (c) any offence involving unlawful sexual intercourse or an act of gross indecency; or
  - (d) incest; or
  - (e) any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest; or
  - (f) any attempt to commit, or assault with intent to commit, any of the offences referred to in a preceding paragraph.

### 24—Amendment of section 51—Accessibility of evidence etc

(1) Section 51(2)—after paragraph (b) insert:

- (ba) sensitive material in the custody of the Court;



(2) Section 51(3)—delete subsection (3) and substitute:

(3) The Court may permit inspection or copying of material referred to in subsection (2) subject to any of the following conditions:

- (a) a condition that material that is sensitive material will be available for examination under the supervision of the Court at a place specified in the notice and at a time to be arranged;
- (b) a condition limiting the publication or use of the material;
- (c) any other condition that the Court considers appropriate.

(3) Section 51—after subsection (5) insert:

(6) In this section—

*sensitive material*—see section 67H of the *Evidence Act 1929*.

## **Part 6—Amendment of *Summary Procedure Act 1921***

### **25—Amendment of section 4—Interpretation**

Section 4(1)—after the definition of *rules* insert:

*sensitive material*—see section 67H of the *Evidence Act 1929*;

*sensitive material notice*—see section 67I of the *Evidence Act 1929*;

### **26—Amendment of section 104—Preliminary examination of charges of indictable offences**

(1) Section 104(1)(a)(ii) and (iii)—delete subparagraphs (ii) and (iii) and substitute:

(ii) copies of any documents on which the prosecutor relies as tending to establish the guilt of the defendant (other than sensitive material or documents that are of only peripheral relevance to the subject matter of the charge); and

(iii) a document describing any other evidentiary material (including sensitive material and documents that are of only peripheral relevance to the subject matter of the charge) on which the prosecutor relies as tending to establish the guilt of the defendant together with a statement of the significance the material is alleged to have; and

(2) Section 104(5)—delete subsection (5) and substitute:

(5) If the prosecutor relies on evidence that is sensitive material as tending to establish the guilt of the defendant, the prosecutor must, at least 14 days before the date appointed for the defendant's appearance to answer the charge—

- (a) give the defendant copies of the sensitive material; or
- (b) give the defendant a sensitive material notice in relation to the material.

## Part 7—Amendment of *Supreme Court Act 1935*

### 27—Insertion of section 126A

After section 126 insert:

#### 126A—Trials of sexual offences involving children to be given priority

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- (1) The court will give the necessary directions to ensure that a trial of a sexual offence where the victim of the offence is a child is given priority over any less urgent criminal trial and is dealt with as expeditiously as the proper administration of justice allows.
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- (2) In this section—
- sexual offence* means—
- (a) rape; or
- (b) indecent assault; or
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- (c) any offence involving unlawful sexual intercourse or an act of gross indecency; or
- (d) incest; or
- (e) any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest; or
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- (f) any attempt to commit, or assault with intent to commit, any of the offences referred to in a preceding paragraph.

### 28—Amendment of section 131—Accessibility of evidence etc

- (1) Section 131(2)—after paragraph (b) insert:
- (ba) sensitive material in the custody of the court;
- 25
- (2) Section 131(3)—delete subsection (3) and substitute:
- (3) The court may permit inspection or copying of material referred to in subsection (2) subject to any of the following conditions:
- (a) a condition that material that is sensitive material will be available for examination under the supervision of the court at a place specified in the notice and at a time to be arranged;
- 30
- (b) a condition limiting the publication or use of the material;
- (c) any other condition that the court considers appropriate.
- (3) Section 131—after subsection (5) insert:
- 35
- (6) In this section—
- sensitive material*—see section 67H of the *Evidence Act 1929*.