

Legislative Council—No 39A

As reported with amendments, report adopted, Standing Orders suspended and passed remaining stages, 2 July 2015

South Australia

**Statutes Amendment (Vulnerable Witnesses)
Bill 2015**

A BILL FOR

An Act to amend various Acts to make provision for special arrangements relating to vulnerable persons and the justice system.

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1 Transitional provision

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (Vulnerable Witnesses) Act 2015*.

5 **2—Commencement**

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.

10 **Part 2—Amendment of *District Court Act 1991***

4—Amendment of section 50B—Certain trials of sexual offences to be given priority

(1) Section 50B(1)—delete "child" and substitute:

person to whom this section applies

15 (2) Section 50B(2)—before the definition of *sexual offence* insert:

person to whom this section applies means—

(a) a child; or

(b) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions;

20

(3) Section 50B(2), definition of *sexual offence*—after paragraph (e) insert:

- (ea) an offence of sexual exploitation of a person with a cognitive impairment under section 51 of the *Criminal Law Consolidation Act 1935*; or

5 **Part 3—Amendment of *Evidence Act 1929***

5—Amendment of section 4—Interpretation

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

cognitive impairment includes the following:

- (a) a developmental disability (including, for example, an intellectual disability, Down syndrome, cerebral palsy or an autistic spectrum disorder);
- (b) an acquired disability as a result of illness or injury (including, for example, dementia, a traumatic brain injury or a neurological disorder);
- (c) a mental illness;

communication partner means a person, or a person of a class, approved by the Minister for the purposes of providing assistance in proceedings to a witness with complex communication needs;

(2) Section 4, definition of *mental disability*—delete the definition

(2a) Section 4, definition of *sexual offence*—after paragraph (da) insert:

- (db) an offence of sexual exploitation of a person with a cognitive impairment under section 51 of the *Criminal Law Consolidation Act 1935*; or

(3) Section 4, definition of *vulnerable witness*, (b)—delete paragraph (b) and substitute:

- (b) a witness who is cognitively impaired; or

(4) Section 4, definition of *young child*—delete "12 years" and substitute:

14 years

6—Amendment of section 9—Unsworn evidence

Section 9—after subsection (5) insert:

- (6) Subject to this Act, this section does not apply to a statement made outside of a court admitted as evidence in any proceedings under an exception to the rule against hearsay at common law or under this Act.

7—Insertion of section 12AB

After section 12A insert:

12AB—Pre-trial special hearings

(1) Subject to this section, if—

- 5 (a) the evidence of a witness to whom this section applies is necessary for the purposes of the trial of a charge of an offence to which this section applies; and
- 10 (b) the facilities necessary to take the evidence of the witness are readily available to the court and it is otherwise practicable to make arrangements for a special hearing to be convened as a proceeding preliminary to the trial (a *pre-trial special hearing*); and
- 15 (c) the arrangements can be made without prejudice to any party to the proceedings,

the court should, on application under this section, order that arrangements be made relating to the giving of evidence by the witness at a pre-trial special hearing.

(2) An order for a pre-trial special hearing—

(a) must make provision for each of the following matters:

- 20 (i) that a hearing be convened as a proceeding preliminary to the trial of the charge of the offence for the purpose of taking the evidence of the witness in any setting that the court thinks fit in the circumstances (including an informal setting);
- 25 (ii) if the witness has a physical disability or cognitive impairment—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 (including, if the witness has complex communication needs, with such communication assistance as may be specified by the court);

Note—

35 Communication assistance for a witness may be provided, for example, by a communication partner or by using a device (such as a speak-and-spell communication device).

- 40 (iii) that an audio visual record of the evidence be made;
- (iv) that the taking of evidence at the hearing be transmitted to the defendant by means of closed circuit television;

(v) if the defendant attends the hearing in person—that appropriate measures be taken to prevent the witness and the defendant from directly seeing or hearing each other before, during or after the hearing; and

(b) may make provision for the witness to be accompanied at the hearing by a relative, friend or other person for the purpose of providing emotional support; and

(c) may specify that the hearing is convened for any (or all) of the following purposes:

(i) examination of the witness;

(ii) cross-examination of the witness;

(iii) re-examination of the witness; and

(d) may make provision for any other matter that the court thinks fit.

(3) An order for a pre-trial special hearing must not be made if the effect of the order would be—

(a) to relieve a witness from the obligation to give evidence; or

(b) to relieve a witness from the obligation to submit to cross-examination; or

(c) to prevent the judge 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

(d) to prevent the defendant from instructing counsel while the witness is giving evidence.

(4) If a witness to whom this section applies is accompanied by a person for the purpose of providing emotional support or communication assistance—

(a) the accompanying person must be visible to the judge while the witness is giving evidence; and

(b) if the defendant is prevented from seeing the accompanying person directly while the witness is giving evidence—the court must ensure that the defendant is able to observe that person by direct transmission of images of the witness together with that person while the witness is giving evidence; and

(c) the audio visual record of the evidence must show the accompanying person throughout the taking of the evidence.

(5) A person may only provide communication assistance—

(a) if the person—

- 5
- (i) is a communication partner or has been approved by the court to provide such assistance to the witness; and
- (ii) takes an oath or makes an affirmation that he or she will communicate accurately with both the witness and the court; and
- 10
- (b) in a case where a party to the proceedings disputes the person's ability or impartiality in providing communication assistance—if the judge is satisfied as to the person's ability and impartiality.
- (6) The fact that a person has provided communication assistance to a witness in a pre-trial special hearing under this section does not of itself prevent that person also from being called as a witness in the trial of the charge of the offence or in any other relevant proceedings.
- 15
- (7) An application for a pre-trial special hearing order must—
- (a) be made in writing by the party calling the witness to whom this section applies to give evidence; and
- (b) be filed in the court as a proceeding preliminary to the commencement of the trial; and
- 20
- (c) within 14 days of being filed in the court—be served on the other party to the proceedings (the *respondent*); and
- (d) specify why the witness is a witness to whom this section applies and the reasons why the special hearing is sought; and
- 25
- (e) otherwise be made in accordance with the rules of court.
- (8) The respondent may, if of the opinion that the witness on whose behalf the application has been made is not in fact a witness to whom this section applies, 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.
- 30
- (9) 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
- 35
- (b) by conducting a hearing in a room closed to the public.
- (10) If no objection to the application is filed within the prescribed period, the court must, subject to subsection (1)(b) and (c), make a pre-trial special hearing order pursuant to this section.
- 40
- (11) A pre-trial special hearing order may be made, varied or revoked on the court's own initiative, or on the application of a party to the proceedings.

5 (12) A determination or order made by a judge under this section is binding on the judge presiding at the trial of the defendant, whether the trial is the first or a new trial following a stay of the proceedings, discontinuance of an earlier trial or an appeal, unless the trial judge considers that it would not be in the interests of justice for the determination or order to be binding or the determination or order is inconsistent with an order made on such an appeal.

10 (13) Subject to section 13BA, an audio visual record of the evidence of a witness made at a pre-trial special hearing is admissible as evidence of the witness in the trial of a charge of an offence to which this section applies.

(14) In this section—

trial of a charge of an offence to which this section applies means—

- 15 (a) the trial of a charge of a serious offence against the person; or
- (b) the trial of a charge of an offence of contravening or failing to comply with an intervention order under the *Intervention Orders (Prevention of Abuse) Act 2009*; or
- 20 (c) the trial of a charge of an offence of contravening or failing to comply with a restraining order under the *Summary Procedure Act 1921*;

witness to whom this section applies means—

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

8—Amendment of section 13—Special arrangements for protecting witnesses from embarrassment, distress etc when giving evidence

30 Section 13(2)(f)—delete "suffers from a physical or mental disability" and substitute:
has a physical disability or cognitive impairment

9—Amendment of section 13A—Special arrangements for protecting vulnerable witnesses when giving evidence in criminal proceedings

(1) Section 13A(2)(e) and (f)—delete paragraphs (e) and (f) and substitute:

- 35 (e) 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 vulnerable witness or minimise the witness's embarrassment or distress, including (for example)—
- 40 (i) that the witness be accompanied by a relative, friend or other person for the purpose of providing emotional support; and

- 5
- (ii) if the witness has a physical disability or cognitive impairment—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 (including, if the witness has complex communication needs, with such communication assistance as may be specified by the court); and

10 **Note—**

Communication assistance for a vulnerable witness with complex communication needs may be provided, for example, by a communication partner or by using a device (such as a speak-and-spell communication device).

- 15
- (iii) that extra allowance be made for breaks during, and time to be given for, the taking of evidence; and
 - (iv) that, while the evidence is being taken, the judge and any lawyer present in the court not wear a wig or gown (or both).

- 20 (2) Section 13A(5)—delete "relative or friend for the purpose of providing emotional support" and substitute:

person for the purpose of providing emotional support or communication assistance

- (3) Section 13A—after subsection (5) insert:

(5A) A person may only provide communication assistance to a witness—

- 25 (a) if the person—

(i) is a communication partner or has been approved by the court to provide such assistance to the witness; and

30 (ii) takes an oath or makes an affirmation that he or she will communicate accurately with both the witness and the court; and

- 35 (b) in a case where a party to the proceedings disputes the person's ability or impartiality in providing communication assistance—if the judge is satisfied as to the person's ability and impartiality.

(5B) The fact that a person has provided communication assistance to a witness in proceedings under this section does not of itself prevent that person also from being called as a witness to give evidence in the proceedings or in any other relevant proceedings.

10—Insertion of section 13BA

After section 13B insert:

13BA—Admissibility of recorded evidence by certain witnesses in certain criminal proceedings

- 5
- (1) Subject to this section, the court may, in the trial of a charge of an offence order that the evidence of a witness be admitted in the form of an audio visual record.
- (2) An application for an order under subsection (1) must—
- 10
- (a) be made in writing by the party wishing to have the audio visual record of the evidence admitted in the trial; and
- (b) be filed in the court; and
- (c) within 14 days of being filed in the court—be served on the other party to the proceedings (the *respondent*); and
- (d) otherwise be made in accordance with the rules of court.
- 15
- (3) An audio visual record of the evidence of a witness may be admitted under this section if—
- (a) the recording has been made pursuant to—
- (i) section 12AB; or
- (ii) Part 17 Division 3 of the *Summary Offences Act 1953*; and
- 20
- (b) the court is satisfied as to the witness's capacity to give sworn or unsworn evidence at the time the recording was made; and
- (c) the court is satisfied that the respondent has been given a reasonable opportunity to view the recording; and
- 25
- (d) during the course of the trial, the witness is available, if required, for further examination, cross-examination or re-examination.
- (4) The court's discretion to exclude evidence is not affected by subsection (3) and the court may—
- 30
- (a) rule as inadmissible the whole or any part of the recording; or
- (b) before admitting the recording, order that it be edited so as to exclude evidence that is inadmissible for any reason.

(5) Despite subsection (3)(d), the witness cannot be further examined, cross-examined or re-examined on the evidence admitted in the trial without the permission of the court which may only be given, on application by a party to the proceedings—

5 (a) if the court is satisfied that a party to the proceedings has, since the making of the audio visual record, become aware of a matter of which the party could not reasonably have been aware at the time the record was made; or

10 (b) if the witness gives evidence in the trial apart from or in addition to evidence admitted under this section in the form of an audio visual record and the court is satisfied that it is in the interests of justice that the witness be further examined, cross-examined or re-examined; or

15 (c) if the court is satisfied that it is otherwise in the interests of justice to permit the witness to be further examined, cross-examined or re-examined.

(6) If a court admits evidence in the form of an audio visual record under this section, the judge must—

20 (a) explain to the jury that the law allows the court to admit evidence in this form; and

(b) warn the jury—

(i) not to draw from the admission of evidence in that form any inference adverse to the defendant; and

25 (ii) not to allow the admission of evidence in that form to influence the weight to be given to the evidence.

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

(1) Section 13C(1)(a)—before "13A(2)(b)" insert:

12AB(2)(a) or

30 (2) Section 13C(2)—delete "or section 13A(2)(b)" and substitute:

, section 12AB(2)(a) or 13A(2)(b)

12—Insertion of section 14A

After section 14 insert:

14A—Entitlement of witness to be given communication assistance in certain circumstances

35 (1) Subject to this section, if—

(a) a witness in proceedings is a person with complex communication needs; and

- (b) assistance of a kind to meet the needs of the witness with understanding and communicating with the court during proceedings is readily available and it is otherwise practicable to make the assistance available,

5 the court may, on application under this section or on its own initiative, order that the evidence be given by the witness using assistance of a kind specified in the order (*communication assistance*).

- 10 (2) An order under this section need not be made in respect of a witness if the court is satisfied that the witness is able to understand and communicate with the court during the proceedings, including the ability to answer questions put orally and respond to them.
- (3) Without limiting the kind of order that may be made under this section, the court may make 1 or more of the following orders:
- 15 (a) an order that the witness be accompanied by a communication partner;
- (b) an order that the witness use a device or device of a kind, approved by the court, for the purpose of facilitating the taking of evidence from the witness;
- 20 (c) an order that the evidence be taken in some other particular way (to be specified by the court) that will, in the court's opinion, facilitate the taking of evidence from the witness.
- (4) A person may only provide communication assistance to a witness—
- (a) if the person—
- 25 (i) is a communication partner or has been approved by the court to provide such assistance to the witness; and
- (ii) takes an oath or makes an affirmation that he or she will communicate accurately with both the witness and the court; and
- 30 (b) in a case where a party to the proceeding disputes the person's ability or impartiality in providing communication assistance—if the judge is satisfied as to the person's ability and impartiality.

35 **13—Substitution of section 21**

Section 21—delete the section and substitute:

21—Competence and compellability of witnesses

- 40 (1) A close relative of a person charged with an offence is competent and compellable to give evidence for the defence and, subject to this section, is competent and compellable to give evidence for the prosecution.

- 5 (2) If a person is charged with an offence and a close relative of the accused is required by law (whether by subpoena or other process) to give evidence against the accused in any proceedings related to the charge (including proceedings for the grant, variation or revocation of bail, or an appeal at which fresh evidence is to be taken), the prospective witness may apply to the court for an exemption from the requirement to give evidence against the accused in the proceedings.
- 10 (3) If, on an application under subsection (2), the court considers that—
- (a) if the prospective witness were to give evidence, or evidence of a particular kind, against the accused, there would be a substantial risk of—
- 15 (i) serious harm to the relationship between the prospective witness and the accused; or
- (ii) serious harm of a material, emotional or psychological nature to the prospective witness; and
- (b) having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give, there is insufficient justification for exposing the prospective witness to that risk,
- 20 the court may exempt the prospective witness (wholly or in part) from the requirement to give evidence against the accused in the proceedings before the court.
- 25 (4) A court may, on its own initiative, grant an exemption under subsection (3) where no application has been made under subsection (2) if—
- (a) the prospective witness who is required by law to give evidence against the accused is a young child or is cognitively impaired; and
- 30 (b) the court is of the opinion that such an exemption should be granted.
- (5) Despite subsection (4), in proceedings in which a close relative of an accused person is called as a witness against the accused, the court is not required to make any inquiry about whether the prospective witness—
- 35 (a) is aware of his or her right to apply for an exemption under this section; or
- (b) is incapable (whether by reason of age or some other reason) of understanding his or her right to apply for an exemption under this section.
- 40

- (6) If a court is constituted of a judge and jury—
- (a) an application for an exemption under this section must be heard and determined by the judge in the absence of the jury; and
 - (b) the following matters may not be made the subject of a question put to a witness in the presence of the jury or of any comment to the jury by counsel or the judge:
 - (i) whether or not a person applied for an exemption under this section;
 - (ii) whether or not the court considered granting an exemption under this section;
 - (iii) whether a person has been granted or refused an exemption under this section.
- (7) A decision or order of a court made under this section, or the failure of a court to make an inquiry under subsection (5), does not give rise to a ground of appeal under section 352(1)(a)(i) or (ii) of the *Criminal Law Consolidation Act 1935*.
- (8) This section does not operate to make a person who has been charged with an offence compellable to give evidence in proceedings related to that charge.
- (9) In this section—
- close relative* of an accused person means a spouse, domestic partner, parent or child.

14—Amendment of section 25—Disallowance of inappropriate questions

- (1) Section 25(1)—delete "*improper question*" and substitute:
- inappropriate question*
- (2) Section 25(1)—after paragraph (a) insert:
- (ab) the question is expressed in language that is unnecessarily complicated; or
- (3) Section 25(2)—delete "improper" and substitute:
- inappropriate
- (4) Section 25(3)—delete "improper" and substitute:
- inappropriate
- (5) Section 25(4)—delete "improper" and substitute:
- inappropriate
- (6) Section 25(4)(b)—delete paragraph (b) and substitute:
- (b) any physical disability or cognitive impairment of the witness; and

15—Repeal of section 34CA

Section 34CA—delete the section

16—Insertion of section 34LA

After section 34L insert:

34LA—Admissibility of evidence of out of court statements by certain alleged victims of sexual offences

- 5 (1) In proceedings in which a person is charged with a sexual offence, a statement not made in oral evidence in the proceedings (an *out of court statement*) is admissible as evidence of any matter stated if—
- 10 (a) oral evidence given in the proceedings by the person who made the out of court statement would be admissible as evidence of that matter; and
- (b) the person who made the out of court statement is identified to the court's satisfaction; and
- (c) each of the conditions specified in subsection (2) is satisfied.
- (2) The conditions are as follows:
- 15 (a) the person who made the out of court statement is the alleged victim of the sexual offence;
- (b) the person will not be called as a witness in the proceedings because the judge is satisfied that, at the time the person made the out of court statement, the person was—
- 20 (i) a young child; or
- (ii) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions;
- 25 (c) the out of court statement was not made by the person to an investigating or other authority as part of a formal interview process conducted in relation to the alleged offence;
- (d) after considering the out of court statement, the circumstances in which it was made and any other relevant
- 30 factor, the judge is of the opinion that the evidence has sufficient probative value to justify its admission.
- (3) Subsection (2)(b) applies regardless of the age of the person or the person's capacity at the time the judge is considering whether to admit the evidence of the out of court statement in the proceedings.
- 35 (4) Evidence of an out of court statement admitted under this section may be used to prove the truth of the facts asserted in the statement.
- (5) If evidence of an out of court statement is admitted under this section, the judge must warn the jury to treat the evidence of the out of court statement with particular care because it has not been tested
- 40 by way of examination or cross-examination of the alleged victim.

17—Amendment of section 34M—Evidence relating to complaint in sexual cases

Section 34M(4)(a)(ii)—after "as evidence of the" insert:
degree of

18—Amendment of section 67H—Meaning of sensitive material

(1) Section 67H(1)—delete subsection (1) and substitute:

(1) For the purposes of this Division, *sensitive material* includes—

(a) the whole or a part of—

(i) an audio visual record; or

(ii) the transcript of any such record,

of the interview of a witness to whom this paragraph applies that has been made pursuant to—

(iii) section 12AB; or

(iv) Part 17 Division 3 of the *Summary Offences Act 1953*; and

(b) anything that contains or displays an image of a person if—

(i) the image is of the person engaged or apparently engaged in a private act; or

(ii) 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

(iii) the image is of the person taken or made after the person's death.

(2) Section 67H—after subsection (2) insert:

(3) Paragraph (a) of subsection (1) applies to a witness—

(a) who is—

(i) a young child; or

(ii) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions; and

(b) who is the victim of a sexual offence.

19—Insertion of section 67HA

After section 67H insert:

67HA—Court may give access to certain sensitive material in certain circumstances

5 A court may, if of the opinion that giving access to sensitive material of a kind referred to in section 67H(1)(a) that has been, or may be, admitted as evidence in proceedings before the court would assist a medical practitioner or psychologist—

(a) to prepare an expert report for the court; or

10 (b) to provide treatment or therapy to the witness,

make the sensitive material available to the medical practitioner or psychologist (as the case may be) subject to such conditions as the court thinks fit.

20—Amendment of section 69—Order for clearing court

15 Section 69(1a)—after "is to give evidence" insert:

(including evidence admitted in the form of an audio visual record)

Part 4—Amendment of *Magistrates Court Act 1991*

21—Amendment of section 48B—Certain trials of sexual offences to be given priority

20 (1) Section 48B(1)—delete "child" and substitute:

person to whom this section applies

(2) Section 48B(2)—before the definition of *sexual offence* insert:

person to whom this section applies means—

(a) a child; or

25 (b) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions;

(3) Section 48B(2), definition of *sexual offence*—after paragraph (e) insert:

30 (ea) an offence of sexual exploitation of a person with a cognitive impairment under section 51 of the *Criminal Law Consolidation Act 1935*; or

Part 5—Amendment of *Summary Offences Act 1953*

22—Insertion of heading to Part 17 Division 1

Part 17—before section 74C insert:

35 **Division 1—Interpretation**

23—Insertion of heading to Part 17 Division 2

Part 17—before section 74D insert:

Division 2—Recording interviews with suspects

24—Amendment of section 74D—Obligation to record interviews with suspects

- 5 (1) Section 74D(1)(a) and (b)—delete paragraphs (a) and (b) and substitute:
- (a) if it is reasonably practicable to make an audio visual record of the interview, an audio visual record of the interview must be made;
 - (b) if it is not reasonably practicable to make an audio visual record of the interview but it is reasonably practicable to make an audio record of the interview, an audio record of the interview must be made;
- 10 (2) Section 74D(1)(c)—delete "if it is neither reasonably practicable to record the interview on videotape nor reasonably practicable to record the interview on audiotape" and substitute:
- if it is not reasonably practicable to make either an audio visual record or audio record of the interview
- 15 (3) Section 74D(1)(c)(ii)—delete "the reading must be recorded on videotape" and substitute:
- an audio visual record made of the reading
- (4) Section 74D(1)(c)(iii)—delete "videotape" and substitute:
- 20 audio visual
- (5) Section 74D(1)(c)(v)—delete "videotape" and substitute:
- audio visual
- (6) Section 74D(3)—delete "a videotape or audiotape recording" and substitute:
- an audio visual record or audio record
- 25 (7) Section 74D(3)(c)—delete paragraph (c) and substitute:
- (c) a refusal of the interviewee to allow an audio visual record or audio record of the interview to be made;
- (8) Section 74D(4)—delete subsection (4) and substitute:
- (4) As soon as practicable after an audio visual record or audio record of an interview is made under this Part, the investigating officer must give the suspect a written statement—
 - (a) if an audio visual record was made—of the right of the suspect or the suspect's legal adviser (or both) to view the recording and to obtain from the audio visual record an audio record; or
 - (b) if an audio record but no audio visual record was made—of the right of the suspect to obtain a copy of the audio record.
- 30
- 35 (9) Section 74D(5)—delete "a videotape" and substitute:
- an audio visual record

(10) Section 74D(6)(a) and (b)—delete paragraphs (a) and (b) and substitute:

- (a) an audio record of the audio visual record of an interview with the suspect under this Division; or
- (b) a copy of an audio record of an interview with the suspect under this Division.

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25—Amendment of section 74E—Admissibility of evidence of interview

Section 74E(1)(a)—delete "Part" and substitute:

Division

26—Insertion of Part 17 Division 3

After section 74E insert:

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Division 3—Recording interviews with certain vulnerable witnesses

74EA—Application and interpretation

- (1) This Division applies to a person being interviewed as a potential witness who is—
 - (a) a child of or under the age of 14 years; or
 - (b) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions.
- (2) In this Division—

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
 - (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
 - (vi) an attempt to commit, or assault with intent to commit, any of the offences in the preceding subparagraphs; or

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- (e) an offence of contravening or failing to comply with an intervention order under the *Intervention Orders (Prevention of Abuse) Act 2009*; or
- (f) an offence of contravening or failing to comply with a restraining order under the *Summary Procedure Act 1921*;

sexual offence means—

- (a) rape; or
- (b) compelled sexual manipulation; or
- (c) indecent assault; or
- (d) any offence involving unlawful sexual intercourse or an act of gross indecency; or
- (e) incest; or
- (f) any offence involving sexual exploitation or abuse of a child, or exploitation of a child as an object of prurient interest; or
- (fa) an offence of sexual exploitation of a person with a cognitive impairment under section 51 of the *Criminal Law Consolidation Act 1935*; or
- (g) any attempt to commit, or assault with intent to commit, any of the foregoing offences.

74EB—Obligation to record interviews with certain vulnerable witnesses

If a person to whom this Division applies is to be interviewed as a potential witness in relation to the investigation of a serious offence against the person, the interview must be conducted as follows:

- (a) an audio visual recording of the interview must be made in accordance with the regulations;
- (b) the interview must be conducted by a prescribed interviewer;
- (c) the manner in which the interview is conducted must meet the prescribed requirements to the prescribed extent.

74EC—Admissibility of evidence of interview

- (1) In proceedings for a charge of a serious offence against the person, evidence of an interview between a prescribed person and a person to whom this Division applies is inadmissible unless—
- (a) the prescribed person complied with this Division in relation to the conduct and recording of the interview; or
- (b) the court is satisfied that the interests of justice require the admission of the evidence despite the prescribed person's non-compliance.

- (2) If, in the course of a trial by jury, the court admits evidence of an interview under subsection (1)(b), the court must—
- (a) draw the jury's attention to the non-compliance by the prescribed person; and
 - (b) give an appropriate warning in view of the non-compliance, unless the court is of the opinion that the non-compliance was trivial.

27—Insertion of heading to Part 17 Division 4

Part 17—before section 74F insert:

Division 4—Miscellaneous

28—Amendment of section 74F—Prohibition on playing recordings of interviews

- (1) Section 74F—delete "a videotape or audiotape containing an interview or part of an interview recorded under this Part except where the videotape or audiotape" and substitute:
- an audio visual record or audio record of an interview or part of an interview made under this Part except where the recording
- (2) Section 74F(c)—delete "videotape or audiotape" and substitute:
- recording
- (3) Section 74F, Note—delete "videotape or audiotape" and substitute:
- recording

29—Insertion of section 74H

After section 74G insert:

74H—Regulations

- (1) The Governor may make such regulations as are contemplated by, or as are necessary or expedient for the purposes of, this Part.
- (2) Without limiting the generality of subsection (1), the regulations may—
- (a) prescribe a person or class of persons to be a prescribed interviewer for the purposes of section 74EB by reference to the office or position held by the person, or the person's training or experience, or any combination of those criteria; and
 - (b) make provision for a person to whom Division 2 or 3 applies to be accompanied during an interview by a person of a prescribed class for the purposes of providing emotional support, or communication assistance or any other assistance, during the interview; and

Note—

Communication assistance may, for example, be provided by means such as a communication partner or by using a device (such as a speak-and-spell communication device).

- 5 (c) prescribe requirements to be met for the purposes of section 74EB, and the extent to which they are to be met, if section 74EC is to apply to an audio visual record of an interview with a person to whom Division 3 applies; and
- 10 (d) regulate the playing, broadcasting, publishing, custody, possession, storage, copying, transcription, erasure or destruction of an audio visual record of an interview; and
- (e) prescribe the records that are to be kept in relation to an audio visual record of an interview; and
- 15 (f) make provision for access to and the use of an audio visual record for any of the following purposes:
- (i) for purposes related to the investigation of an offence;
 - (ii) for the purposes of, or purposes related to, legal proceedings or proposed legal proceedings;

20 (iii) for training persons for the purposes of Division 3;

 - (iv) for the purposes of reviewing, assessing and evaluating the conduct of interviews under this Part;
 - (v) for any other purpose; and
- 25 (g) fix fines, not exceeding \$5 000, for offences against the regulations.

Part 6—Amendment of *Summary Procedure Act 1921*

30—Amendment of section 104—Preliminary examination of charges of indictable offences

- 30 (1) Section 104(3)(b)—delete "a videotape or audiotape recording" and substitute:
an audio visual record or audio record
- (2) Section 104(4)—delete "child under the age of 12 years or a person who is illiterate or suffers from an intellectual handicap" and substitute:
witness to whom this subsection applies
- (3) Section 104(4)(a)(ii)—delete "a videotape or audiotape" and substitute:
35 an audio visual record or audio
- (4) Section 104(4)(b)—delete "videotape or audiotape" and substitute:
recording
- (5) Section 104(4)—delete "tape" wherever occurring and substitute in each case:
recording

(6) Section 104—after subsection (4) insert:

(4a) Subsection (4) applies to a witness who is—

- (a) illiterate; or
- (b) a child of or under the age of 14 years; or
- (c) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions.

(7) Section 104, Note—delete the note at the foot of the section

31—Amendment of section 106—Taking evidence at preliminary examination

Section 106(3)—delete "under the age of 12 years" and substitute:

of or under the age of 14 years

Part 7—Amendment of *Supreme Court Act 1935*

32—Amendment of section 126A—Certain trials of sexual offences to be given priority

(1) Section 126A(1)—delete "child" and substitute:

person to whom this section applies

(2) Section 126A(2)—before the definition of *sexual offence* insert:

person to whom this section applies means—

- (a) a child; or
- (b) a person with a disability that adversely affects the person's capacity to give a coherent account of the person's experiences or to respond rationally to questions;

(3) Section 126A(2), definition of *sexual offence*—after paragraph (e) insert:

- (ea) an offence of sexual exploitation of a person with a cognitive impairment under section 51 of the *Criminal Law Consolidation Act 1935*; or

Part 8—Amendment of *Victims of Crime Act 2001*

33—Amendment of section 6—Fair and dignified treatment

Section 6(b)(i)—after "cultural or linguistic background; or" insert:

- physical or intellectual ability; or

Schedule 1—Transitional provision

1—Transitional provision

(1) The amendments made by Part 3 of this Act to the *Evidence Act 1929* are intended to apply in respect of—

- 5 (a) proceedings for a sexual offence commenced but not determined before the commencement of this clause; and
- (b) proceedings for a sexual offence commenced after the commencement of this clause.

10 (2) An order made by a court under the *Evidence Act 1929* as in force immediately before the commencement of this clause will remain in force according to its terms.