

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the Criminal Procedure Act 1986 as follows:

- (a) to clarify the circumstances in which complainants may be called to give evidence in committal proceedings for certain sexual offences and to make it clear that child complainants may never be called,
- (b) to provide that witnesses in criminal proceedings who have difficulty communicating are entitled to use a person or a communication aid to assist in giving evidence,
- (c) to make further provision with respect to the non-publication of the names of sexual assault complainants and make provision for the non-publication of evidence in relation to certain sexual assault proceedings,
- (d) to clarify and provide for various jury directions given in certain sexual offence proceedings in relation to complainants,
- (e) to give lawyers who are appointed in certain sexual offence proceedings to ask questions of a complainant on behalf of an accused person immunity from liability,
- (f) to permit the admission of a record of evidence given by a complainant in certain sexual offence proceedings in any new trial that is listed following a trial that has been discontinued.

The Bill also makes other miscellaneous amendments of a minor, consequential or savings or transitional nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the Criminal Procedure Act 1986 and the Crimes Act 1900 set out in Schedules 1 and 2.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the Interpretation Act 1987 provides that the repeal of an amending Act does not affect the amendments made by that Act.

Amendments relating to committal proceedings

Section 91 of the Criminal Procedure Act 1986 provides that a person who made a written statement tendered as evidence in committal proceedings may be directed by a Magistrate to attend at the proceedings.

Schedule 1 [1] amends section 91 to provide that the statement of a witness directed to attend to give evidence in committal proceedings may be admissible in the proceedings as evidence if the accused person and prosecutor consent and the Magistrate is satisfied there are substantial reasons why, in the interests of justice, the statement should be admitted (which is currently not the case). Schedule 1 [2] makes a consequential amendment.

Section 93 of the Criminal Procedure Act 1986 currently provides that in any committal proceedings in which the accused person is charged with an offence involving violence, the Magistrate may not, under section 91, direct the attendance of an alleged victim of the offence who made a written statement unless the Magistrate is of the opinion that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence. Schedule 1 [3] amends section 93 to clarify that such a direction should not be given even if the parties consent to the attendance. In addition, Schedule 1 [3] amends section 93 to clarify that a child complainant in proceedings for certain child sexual assault offences can never be directed to attend the relevant committal proceedings.

Amendment relating to evidence of witnesses with communication difficulties

Schedule 1 [4] inserts a new section 275B into the Criminal Procedure Act 1986 to provide that in any criminal proceedings a witness who has difficulty communicating is entitled to use a person or a communication aid to assist the witness with giving evidence, but only if the witness ordinarily uses such a person or communication aid on a daily basis. The provisions of the Evidence Act 1995 in relation to interpreters will apply to persons who give such witnesses assistance in giving evidence.

Amendments relating to non-publication orders

Section 292 of the Criminal Procedure Act 1986 currently provides that a court may make an order forbidding publication of evidence or any report or account of that evidence in certain sexual offence proceedings. Schedule 1 [5] amends that section to provide that the publication of evidence or any report or account of that evidence includes the broadcast of evidence or any report or account of that evidence by radio or television or the dissemination of evidence by any other electronic means such as the internet. The amendment also provides that the court must consult with the complainant in such proceedings when determining whether to make an order for non-publication and that an order may continue to have effect after the proceedings have been finally disposed of.

Currently, section 578A of the Crimes Act 1900 provides that it is an offence to publish (which includes broadcast by radio or television) any matter which identifies the complainant in certain sexual offence proceedings or any matter which is likely to lead to the identification of the complainant. Schedule 2 amends that section to provide that publishing also includes the dissemination of any matter by any other electronic means such as the internet.

Amendments relating to jury directions

Section 294 of the Criminal Procedure Act 1986 currently provides that in certain sexual offence proceedings where evidence is given or a question is asked of a witness that tends to suggest an absence of a complaint or delay in complaining about the alleged offence, the Judge is to warn the jury that the lack of complaint or delay in complaining by a complainant does not necessarily indicate that the allegation that the offence was committed is false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

Schedule 1 [6] amends section 294 to further provide that the Judge must not warn the jury that delay in complaining is relevant to a victim's credibility unless there is sufficient evidence to justify such a warning. However, Schedule 1 [7] provides that if the delay is significant and the Judge is satisfied that the accused person has suffered a significant forensic disadvantage caused by the delay, the Judge may warn the jury (but only if a party to the proceedings so requests) of the nature of the disadvantage and the need for caution in determining whether to accept or give any weight to the evidence or question suggesting the absence of a complaint or delay in complaining.

Schedule 1 [8] inserts a new section 294AA into the Criminal Procedure Act 1986 to provide that in certain sexual offence proceedings a judge must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses. The proposed section specifically prohibits the giving of a warning to a jury of the danger of convicting on the uncorroborated evidence of a complainant.

Amendment relating to lawyers appointed to examine complainant for accused person

Section 294A of the Criminal Procedure Act 1986 currently prohibits an unrepresented accused person from examining a complainant in certain sexual offence proceedings. Such examination may only be carried out by a person appointed by the court. Schedule 1 [9] provides that a lawyer who is appointed under section 294A is immune from any action, liability, claim or demand when acting in the course of the appointment.

Amendments relating to subsequent trials of sexual offence proceedings

Schedule 1 [10] inserts a new Division 4 (proposed sections 306H–306L) into Part 5 of Chapter 6 of the Criminal Procedure Act 1986 so as to permit the admission of a record of evidence given by a complainant in a sexual offence proceeding in any new trial that is listed following a trial that has been discontinued. The amendments are similar in nature to the provisions of Division 3 of that Part which apply to a retrial of proceedings that follows an appeal against a conviction for a prescribed sexual offence.

Proposed section 306H contains definitions for the purposes of the proposed Division.

Proposed section 306I permits the prosecutor to tender as evidence in the new trial proceedings a record of the evidence of the complainant given in the discontinued proceedings. This will include the evidence given by the complainant on examination in chief and any further evidence given on cross-examination or re-examination.

The record will be admissible only if the prosecutor gives the court and the accused person notice of the prosecutor's intention to tender the record. The hearsay rule under the Evidence Act 1995 will not prevent the admission or use of the record as evidence.

The provisions of the proposed Division extend to new trials listed before the commencement of the Division.

Proposed section 306J provides that if a record of the evidence of a complainant is admitted in the new trial proceedings, the complainant will not be compellable to provide any further evidence unless the court hearing the new trial proceedings is satisfied of various matters. However, proposed section 306K provides that the complainant may elect to give further oral evidence (with leave of the court) if the complainant so chooses.

Proposed section 306L applies the provisions of current sections 306E–306G of Division 3 of Part 5 of Chapter 6 which relate to the form in which a record of the original evidence given by a complainant is to be tendered in new trial proceedings, access to recordings and exhibits.

Other amendments

Schedule 1 [11] enables savings and transitional regulations to be made as a consequence of the proposed Act.

Schedule 1 [12] inserts savings and transitional provisions as a consequence of the enactment of the proposed Act.