



New South Wales

Crimes Legislation Amendment (Victims) Bill 2018

Explanatory note

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

This Bill is cognate with the *Justice Legislation Amendment Bill (No 3) 2018*.

Overview of Bill

The objects of this Bill are as follows:

- (a) to amend the *Children (Criminal Proceedings) Act 1987*:
 - (i) to establish a new procedure to be adopted by the Children's Court for the purpose of deciding whether proceedings in which a person is charged with a child sexual assault offence should be dealt with on indictment when the prosecution requests that the proceedings be dealt with according to law, and
 - (ii) to minimise the circumstances in which a complainant or other witness can be called to give oral evidence in proceedings before the Children's Court,
- (b) to amend the *Crimes (Domestic and Personal Violence) Act 2007*:
 - (i) to require proceedings or parts of proceedings relating to apprehended violence orders to be closed to the public if a child aged 16 or 17 is involved (whether as a witness, as the defendant or as the person protected by the order), unless the court hearing the proceedings directs otherwise, and
 - (ii) to require proceedings in relation to an application for a final apprehended violence order or an interim court order to be closed to the public if the defendant is under 18 years of age,
- (c) to amend provisions of the *Crimes (Sentencing Procedure) Act 1999* relating to the preparation and reading of victim impact statements:

- (i) to allow victims of additional offences that are sexual, private or indecent in nature, and additional members of the immediate family of a primary victim who has died, to prepare and read a victim impact statement, and
- (ii) to provide for victim impact statements to contain particulars of harms other than actual physical bodily harm, psychological harm or psychiatric harm, and
- (iii) to extend the right of victims to read their victim impact statements with a support person present so that it applies to all victims, and to extend protections allowing victim impact statements to be read in the absence of the public or using closed-circuit television arrangements to all victims, subject to those facilities being reasonably available, and
- (iv) to relax certain formal requirements,
- (d) to amend the *Crimes (Sentencing Procedure) Regulation 2017* consequential on the amendments made to the *Crimes (Sentencing Procedure) Act 1999* to make further provision with respect to victim impact statements,
- (e) to amend the *Criminal Procedure Act 1986* to extend protections available to certain witnesses, including:
 - (i) to extend protections that complainants in sexual offence proceedings have when giving evidence, so that they apply also to victims of female genital mutilation, and
 - (ii) to extend the category of complainants who are protected from being directed to attend and give oral evidence at committal proceedings for sexual offences or offences involving violence to include complainants under certain Commonwealth offences, and
 - (iii) to extend the protections that complainants in retrials and subsequent trials of sexual offence proceedings have, so that they apply to sexual offence witnesses (also known as tendency witnesses) in those proceedings and to witnesses who have a cognitive impairment or are under 18, and
 - (iv) to extend the right to have a support person present when giving evidence to young persons, witnesses with a cognitive impairment and complainants in criminal proceedings for domestic violence offences, and
 - (v) to allow for a record of the original evidence of sexual offence witnesses and vulnerable witnesses to be admitted in a retrial or subsequent trial with respect to prescribed sexual offence proceedings.

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.

Schedule 1 Amendment of Children (Criminal Proceedings) Act 1987 No 55

The amendments provide for the procedure to be adopted by the Children's Court if a person is charged with a child sexual assault offence and the prosecution requests that the person be dealt with according to law (and not summarily). The amendments enable the Children's Court to decide that proceedings for the offence should be dealt with as committal proceedings after hearing the case for the prosecution and any evidence of the accused person. The procedure for taking evidence requires the prosecution's case to be dealt with by written statements and minimises the circumstances in which the complainant or any other witnesses in the case can be called to give oral evidence.

Schedule 1 [5] provides for the new procedure, which applies if a person is charged with a child sexual assault offence (whether or not the person is charged with other offences).

A **child sexual assault offence** means a child sexual assault offence within the meaning of section 83 of the *Criminal Procedure Act 1986*, other than a serious children's indictable offence, in respect of which the complainant:

- (a) was under the age of 16 years on the date of the alleged offence or at the beginning of the period during which the offence is alleged to have been committed, or
- (b) in the case of an offence against section 73 of the *Crimes Act 1900*, was under the age of 18 years on the date of the alleged offence.

The prosecution may request that the proceedings be dealt with according to law:

- (a) on or before the first return date for service of a brief of evidence in the proceedings, or
- (b) on or before a later date nominated by the Children's Court, if the Children's Court is satisfied that it is in the interests of justice to allow the request to be made later than would otherwise be required under paragraph (a).

If the request is duly made, the Children's Court is to take evidence from both the prosecution and the accused person.

Evidence for the prosecution must be given in the form of written statements. The Court may require a complainant to be called to give oral evidence only if satisfied that there are special reasons why the complainant should, in the interests of justice, attend to give oral evidence. The Court may require any other witness to attend to give oral evidence only if:

- (a) the accused person and the prosecution consent, or
- (b) the Court is satisfied that there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence.

Under **Schedule 1 [2]**, the proceedings for the child sexual assault offence are to be dealt with as committal proceedings, and not summarily, if the Court is of the opinion, after taking evidence under the new procedure, that:

- (a) having regard to all the evidence before the Children's Court, the evidence is capable of satisfying a jury beyond reasonable doubt that the accused person has committed a child sexual assault offence, and
- (b) the charge may not properly be disposed of in a summary manner.

If the Children's Court does not form that opinion, the proceedings are to be dealt with summarily, subject to any other exceptions that currently apply under section 31 of the *Children (Criminal Proceedings) Act 1987*.

Schedule 1 [1], [3], [4] and [6]–[8] are consequential and related amendments.

Schedule 1 [9] makes it clear that the amendments proposed to be made by Schedule 1 apply only to proceedings commenced after the commencement of the relevant amendments.

Schedule 2 Amendment of Crimes (Domestic and Personal Violence) Act 2007 No 80

Schedule 2 [2] extends the protection that currently applies to children aged under 16 years involved in apprehended violence order proceedings to young persons aged 16 or 17 years. **Schedule 2 [1]** makes a consequential amendment.

Schedule 2 [3] requires application proceedings to be heard in open court, unless the defendant is under the age of 18 years. The court may, despite proceedings being heard in closed court, permit certain persons to be present during the hearing of the proceedings.

Schedule 2 [4] makes it clear that the amendments proposed to be made by Schedule 2 apply only to proceedings commenced after the commencement of the relevant amendments.

Schedule 3 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92

Schedule 3 [1] substitutes Division 2 (Victim impact statements) of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*. Proposed Division 2 comprises the following provisions.

Subdivision 1 Preliminary

Proposed section 26 defines terms used in the proposed Division.

Proposed section 27 provides that the proposed Division applies to certain offences dealt with by the Supreme Court, Industrial Relations Commission, District Court or Local Court.

Subdivision 2 Preparation of statements

Proposed section 28 specifies the matters that are to be included in a victim impact statement.

Proposed section 29 sets out the formal requirements for a victim impact statement and that the preparation of a statement is not mandatory.

Proposed section 30 sets out when a victim may be assisted in doing certain things under the proposed Division.

Subdivision 3 Consideration of statements by court

Proposed section 30A provides that after it is prepared, a victim impact statement is to be provided to the prosecutor in the relevant proceedings who is to tender it to the court.

Proposed section 30B provides that a court must accept a victim impact statement tendered by a prosecutor if the statement complies with the requirements of the proposed Division and the regulations and requires a court to which a victim impact statement is tendered to acknowledge receipt of the statement.

Proposed section 30C allows a victim to whom a victim impact statement relates to object to the statement being tendered to a court and provides that a victim impact statement may not be received or considered by a court if any victim to whom the statement relates objects to the statement being tendered to the court.

Proposed section 30D provides that a victim to whom a victim impact statement relates may read out the whole or part of a victim impact statement if the statement has been tendered to a court in accordance with the proposed Division. The statement may be read out at any time that the court determines after the court has convicted, but before it sentences, the offender.

Proposed section 30E requires a court to consider a victim impact statement at any time after it convicts, but before it sentences, an offender for the offence and permits a court to make any comment on a victim impact statement that the court considers appropriate. A victim impact statement may also be considered by the Supreme Court when it determines a term and a non-parole period for an existing life sentence. A victim impact statement of a family victim may also be taken into account by a court in connection with the determination of the punishment for the offence on the basis that the harmful impact of a primary victim's death on family victims is an aspect of harm done to the community. The proposed section also makes it clear that, if no victim impact statement is tendered in relation to proceedings for an offence, no inference is to be drawn that the offence had little or no impact on a victim or a member of the victim's immediate family.

Proposed section 30F provides that a court must not consider or take into account a victim impact statement unless it has been prepared by the victim to whom it relates and tendered by the prosecutor. In addition, the proposed section makes it clear that a court must not consider or take into account any material that is not specifically authorised by the proposed Division to be included in a victim impact statement.

Proposed section 30G restricts who can have access to a victim impact statement and limits the ability to retain, copy, disseminate or transmit victim impact statements.

Subdivision 4 Special provisions relating to the reading of statements

Proposed section 30H provides that victims are entitled to have a support person chosen by them to be present near them, and within their sight, when a victim impact statement is read out.

Proposed section 30I provides that victims who are entitled to give evidence in closed court (that is, victims in proceedings for a prescribed sexual offence) may also read their victim impact statements in closed court unless the court directs otherwise.

Proposed section 30J provides that a victim who is entitled to give evidence by means of closed-circuit television arrangements in proceedings is also entitled to read out the victim's victim impact statement in accordance with those closed-circuit television arrangements.

Proposed section 30K enables other victims to read their victim impact statements in closed court or using closed-circuit television arrangements, with leave of the court.

Subdivision 5 Special provisions regarding forensic patients

Subdivision 5 re-enacts provisions that are to be included in the *Crimes (Sentencing Procedure) Act 1999* by the *Mental Health (Forensic Provisions) Amendment (Victims) Bill 2018*. Those provisions are slightly modified to fit with the proposed Division.

Proposed section 30L provides that a court may accept a victim impact statement after a verdict that an accused person is not guilty by reason of mental illness or a verdict, following a special hearing under the *Mental Health (Forensic Provisions) Act 1990* that an accused person committed an offence.

Proposed section 30M provides that a court may seek a submission by the designated carer or principal care provider of an accused person after any such verdict.

Proposed section 30N allows a court, on the request of a victim, to restrict access to victim impact statements in mental health and cognitive impairment forensic proceedings.

Schedule 3 [2] makes it clear that the amendments proposed to be made by Schedule 3 apply only to proceedings commenced after the commencement of the relevant amendments.

Schedule 4 Amendment of Crimes (Sentencing Procedure) Regulation 2017

Schedule 4 replaces existing provisions about victim impact statements in the *Crimes (Sentencing Procedure) Regulation 2017* with the following provisions:

Proposed clause 9 prescribes the persons who may assist a victim with a victim impact statement, so as to include the victim's carer and any person who is important in the victim's life or any other person chosen by the victim.

Proposed clause 10 specifies the form of victim impact statements.

Proposed clause 11 imposes limitations on what may be contained in a victim impact statement.

Proposed clause 12 provides that only one victim impact statement may be tendered for a victim.

Schedule 5 Amendment of Criminal Procedure Act 1986 No 209

Extending protections that complainants in sexual offence proceedings have to victims of female genital mutilation

Schedule 5 [9], [12] and [24] extend the operation of Divisions 1, 3 and 4 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* (the *principal Act*), respectively, to proceedings for female genital mutilation offences (which is achieved by amending the definition of *prescribed sexual*

offence for the purposes of each Division, so as to include female genital mutilation offences).
Schedule 5 [1] defines *female genital mutilation offence*.

Protecting vulnerable complainants from being directed to attend and give oral evidence at committal proceedings

Schedule 5 [2] and [3] extend the operation of section 83 of the principal Act (which protects complainants in child sexual assault offence proceedings from being directed to attend and give evidence in committal proceedings). At present the section applies only to child sexual assault offences under State law. The amended section will extend the protection to complainants in proceedings for a Commonwealth offence that corresponds to a State offence to which that section applies and is prescribed by the regulations under the principal Act.

Schedule 5 [5] extends the operation of section 84 of the principal Act (which provides that victim witnesses are generally not to be directed to attend committal proceedings for an offence involving violence) to a Commonwealth offence that corresponds to a State offence to which that section applies and is prescribed by the regulations under the principal Act.

Schedule 5 [4] provides that vulnerable persons should not be directed to attend to give evidence at committal proceedings for offences involving violence unless there are special reasons and likewise tendency or coincidence witnesses should not be directed to attend to give evidence at committal proceedings for prescribed sexual offences unless there are special reasons.

Schedule 5 [6] provides that a Magistrate must not allow a person who is an alleged victim of an offence involving violence to be cross-examined in respect of additional matters unless the Magistrate is satisfied that there are special reasons why the person should be cross-examined in respect of those matters.

Extending protections currently available to complainants in sexual offence proceedings to sexual assault witnesses, children and people with cognitive impairment

Schedule 5 [12] and [24] define the term *special witness* as a sexual offence witness, a witness who is a cognitively impaired person or a witness who is under the age of 18 years, for the purposes of Divisions that make special provision for the giving of evidence in retrials of sexual offence proceedings and in subsequent trials in sexual offence proceedings.

Schedule 5 [13]–[15], [17]–[23], [25] and [26] extend, to a special witness, protections that the principal Act currently affords to a complainant in certain sexual offence proceedings.

Extending right currently available to complainants to have a support person present

Schedule 5 [10] provides that a provision that gives a complainant the right to have a support person or person present when giving evidence operates in addition to another provision that gives a vulnerable person the right to the presence of a support person while giving evidence where the complainant is a vulnerable person (that is, a child under 18 years of age or a cognitively impaired person). **Schedule 5 [29]** makes a consequential amendment.

Schedule 5 [27] amends a provision that gives vulnerable persons the right to have a support person present while giving evidence by providing that an accused person is not entitled to object to the suitability of the person or persons chosen by a vulnerable person to be with the vulnerable person when giving evidence, and the court is not to disallow the vulnerable person's choice of person or persons on its own motion, unless the vulnerable person's choice is likely to prejudice the accused person's right to a fair hearing (for example, because the person chosen by the vulnerable person is a witness or potential witness in the proceedings).

Schedule 5 [28] extends, to young persons who are 16 or 17 years of age, the application of a provision that allows vulnerable persons to have a support person present when the vulnerable person gives evidence in criminal proceedings and apprehended violence order proceedings.

Schedule 5 [30] gives complainants in criminal proceedings for domestic violence offences the right to the presence of a support person while giving evidence.

Extending protections relating to original evidence in subsequent proceedings

Schedule 5 [7] allows a record of the original evidence of a complainant in prescribed sexual offence proceedings to be admissible in later related criminal proceedings in which the person is a complainant.

Schedule 5 [11] allows a record of the original evidence of a complainant in prescribed sexual offence proceedings to be admissible in later prescribed sexual offence proceedings in which the person is a sexual offence witness.

Schedule 5 [16] provides that the court hearing the new trial proceedings may decline to admit a record of the original evidence of a special witness if, in the court's opinion, the accused person would be unfairly disadvantaged by the admission of the record. It also provides that, if a record of original evidence is admitted in the current proceedings, the special witness is not compellable to give further evidence about the same matters unless the court is satisfied that it is necessary for the special witness to do so.

Other amendments

Schedule 5 [8] is consequential on the amendments made to the *Children (Criminal Proceedings) Act 1987* by **Schedule 1** and extends the operation of provisions of the *Criminal Procedure Act 1986* about written statements to statements provided under proposed Division 3AA of Part 3 of the *Children (Criminal Proceedings) Act 1987*.

Schedule 5 [31] makes it clear that the amendments proposed to be made by Schedule 5 apply only to proceedings commenced after the commencement of the relevant amendments.