

Criminal Procedure Further Amendment (Evidence) Bill 2005

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 impose a duty on a court hearing any criminal proceeding to disallow improper questions that are put to witnesses in cross-examination,
- (b) to prevent the circulation, and the unauthorised copying, of sensitive evidence,
- (c) to require any part of proceedings for a sexual offence in which evidence is given by the complainant to be held in camera,
- (d) to confer an entitlement on a complainant in such a case to have one or more persons present near the complainant when giving evidence,
- (e) to simplify and standardise the coverage of various provisions of the Act that relate to the protection of a complainant in sexual offence proceedings,
- (f) to make it clear that a complainant in a sexual offence proceeding is entitled to give evidence by use of arrangements to restrict contact between the complainant and the accused person, instead of by the use of closed-circuit television, whether or not closed-circuit television facilities are available in the proceedings.

The Bill also amends the *Children (Criminal Proceedings) Act 1987*, the *Crimes Act 1900*, the *Evidence Act 1995* and the *Evidence (Children) Act 1997* consequentially, provides for savings and transitional matters and makes minor amendments by way of statute law revision.

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* set out in Schedule 1.

Clause 4 is a formal provision that gives effect to the amendments to the other Acts specified in Schedule 2.

Schedule 1 Amendment of Criminal Procedure Act 1986

Improper questions

At present, section 41 of the *Evidence Act 1995* gives a court power to disallow a question put to a witness in cross-examination, or to inform the witness that the question need not be answered, if the question is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

The amendments set a new standard for the cross-examination of witnesses in criminal proceedings.

Under the amendments, a court will be required to disallow a question put to a witness in cross-examination, or to inform the witness that it need not be answered, if the question:

- (a) is misleading or confusing, or
- (b) is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
- (c) is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- (d) has no basis other than a sexist, racial, cultural or ethnic stereotype.

The factors which may be taken into account by the court in determining whether a question should be disallowed are extended to include the ethnic and cultural background of the witness, the language background and skills of the witness and the

level of maturity and understanding of the witness.

The parties to proceedings are entitled to object to a disallowable question. However, the duty imposed on the court by the new provision applies whether or not an objection is raised to a particular question. A failure to exercise that duty will not affect the admissibility of any evidence given in response to a question.

Section 41 of the *Evidence Act 1995* will no longer apply to the cross-examination of witnesses in criminal proceedings but will continue to apply to civil proceedings.

Savings and transitional provisions make it clear that the new requirements extend to proceedings already instituted or partly heard.

See **Schedule 1 [4] and [26]** (proposed clause 42).

Sensitive evidence

Under the amendments, a thing that contains or displays an image of a person (referred to as the **protected person**) is **sensitive evidence** if:

- (a) the image is obscene or indecent, or
- (b) providing a copy of the image to another person without the protected person's consent would interfere with the protected person's privacy, or
- (c) the image was taken after the death of the protected person.

The following are examples of sensitive evidence:

- (a) a photograph of an alleged sexual assault victim, taken in connection with a criminal investigation or criminal proceedings, that shows the person's genitalia or otherwise shows the person in a state of undress,
- (b) a video, held or seized by a prosecuting authority, showing a person committing a sexual offence,
- (c) a computer hard drive, held or seized by a prosecuting authority, containing images of child pornography,
- (d) a photograph of a deceased person taken in connection with a post mortem examination,
- (e) a photograph of a deceased person taken at a crime scene.

The amendments prevent the unauthorised circulation or copying of sensitive evidence by:

- (a) allowing a prosecuting authority to refuse to provide an accused person with a copy of the sensitive evidence (but providing for an alternative means by which the accused person is to be given access to view, but not copy, the sensitive evidence), and
- (b) allowing the prosecuting authority to retain or regain possession of sensitive evidence, or copies of sensitive evidence, tendered in criminal proceedings, and
- (c) creating offences for the unauthorised or improper copying or circulation of sensitive evidence.

Savings and transitional provisions make it clear that the new requirements extend to criminal investigations already instituted and criminal proceedings already instituted or partly heard.

See **Schedule 1 [5] and [26]** (proposed clause 43).

Evidence of complainant in sexual offence proceedings to be given in camera

At present, section 291 of the *Criminal Procedure Act 1986* gives a court hearing proceedings in respect of a sexual offence power to direct that the proceedings, or any part of the proceedings, be held in camera. The amendments replace the section.

The new provisions require any part of proceedings in respect of a prescribed sexual offence in which evidence is given by a complainant to be held in camera, unless the court otherwise directs. This applies even if the complainant gives evidence by means of closed-circuit television or other technology or under any alternative arrangements available to the complainant. The court may direct the evidence to be given in open court only if a party to the proceedings requests it and the court is

satisfied that:

(a) special reasons in the interests of justice require the part of the proceedings to be held in open court, or

(b) the complainant consents to giving his or her evidence in open court.

The court will retain a discretion to direct that other parts of the proceedings, or the entire proceedings, be held in camera.

The amendments do not affect the existing requirement that proceedings for certain incest offences must be held entirely in camera (subject to the power of the court to exempt persons).

Savings and transitional provisions make it clear that the new requirements extend to proceedings already instituted or partly heard.

See **Schedule 1 [7] and [26]** (proposed clause 44).

Support person or persons for complainant in sexual offence proceedings

The amendments confer on a complainant who gives evidence in sexual offence proceedings an entitlement to have one or more persons chosen by the complainant present near the complainant, and within the complainant's sight, when the complainant gives evidence in the proceedings.

The entitlement applies:

(a) even if the complainant gives evidence by means of closed-circuit television or other technology or under any alternative arrangements available to the complainant, and

(b) even if the proceedings, or the part of the proceedings in which the complainant gives evidence, are held in camera.

The amendments limit the right of the accused person to object to the suitability of the person or persons chosen by the complainant to be with the complainant when giving evidence.

The entitlement conferred by the new provision extends to a complainant of any age, and to cases heard in the Children's Court. If the complainant is under the age of 16 years at the time of giving evidence, the entitlement applies instead of the entitlement that the complainant would have under the *Evidence (Children) Act 1997*.

Savings and transitional provisions make it clear that the entitlement extends to proceedings already instituted or partly heard.

See **Schedule 1 [18] and [26]** (proposed clause 45).

Simplification and standardisation of sexual offence provisions

At present, various provisions of the *Criminal Procedure Act 1986* provide a complainant in proceedings for a sexual offence with special protections when it comes to giving evidence, being questioned by or on behalf of the accused person, and other matters. However, there is no standard definition of the types of offences to which those provisions apply. Each of the relevant provisions contains its own definition of the types of offences to which the provision applies. As a consequence, the provisions do not apply uniformly to all complainants in all sexual offence proceedings.

The amendments address this issue by providing for a new, comprehensive definition of **prescribed sexual offence**. The definition is intended to cover all offences of a sexual nature (including repealed offences) under the *Crimes Act 1900* and various related offences. The various provisions of the Act that provide special protection to a complainant in proceedings for a sexual offence, including the proposed new provision to allow a record of the original evidence of a complainant to be tendered as evidence in any retrial proceedings and existing provisions relating to compellability of child complainants and sexual assault communications privilege, are amended so that they all apply in respect of all proceedings for a prescribed sexual offence.

The principal amendments relating to this proposal are contained in **Schedule 1 [1]**,

[2], [6], [8], [10], [12], [14], [20], [23] and [24]. Consequential amendments are contained in **Schedule 1 [9], [11], [13], [16], [17], [21] and [22]**.

Savings and transitional provisions extend the amendments to proceedings already instituted or partly heard, but make it clear that the amendments do not affect the validity of anything already done in such proceedings. See **Schedule 1 [26]** (proposed clause 41).

Arrangements for giving evidence of complainant

At present, the *Criminal Procedure Act 1986* allows a complainant in sexual offence proceedings to give evidence from a place other than the courtroom by means of closed-circuit television facilities or other technology that enables communication between that place and the courtroom. If such technology is unavailable, the complainant may give evidence by use of alternative arrangements to restrict contact between the complainant and the accused person.

The amendments make it clear that the complainant is entitled to choose to give evidence by use of those alternative arrangements whether or not the technology is available for the giving of evidence by closed-circuit television.

See **Schedule 1 [15] and [26]** (proposed clause 45).

Other amendments

The Bill allows savings and transitional regulations to be made as a consequence of the amendments, and provides for the other savings and transitional matters previously mentioned. See **Schedule 1 [25] and [26]**.

The Bill also makes 2 minor amendments by way of statute law revision. See **Schedule 1 [3] and [19]**.

Schedule 2 Amendment of other Acts

The amendment to the *Children (Criminal Proceedings) Act 1987* in **Schedule 2.1** is consequential on the proposal to require evidence given by a complainant in sexual offence proceedings to be given in camera, and to allow the complainant to have one or more persons present near the complainant when giving evidence. The amendment makes it clear that the new provisions extend to proceedings to which a child is a party (generally heard by the Children's Court), and that the support person or persons chosen by the complainant cannot be directed to leave under provisions in the *Children (Criminal Proceedings) Act 1987* that allow the court to direct persons to leave the court.

The amendment to the *Crimes Act 1900* in **Schedule 2.2** is consequential on the proposal to standardise and simplify the provisions of the *Criminal Procedure Act 1986* relating to sexual offences.

The amendment to the *Evidence Act 1995* in **Schedule 2.3** is consequential on the proposal to require the court in criminal proceedings to disallow improper questions put in cross-examination of a witness.

The amendment to the *Evidence (Children) Act 1997* in **Schedule 2.4** is consequential on the proposal to confer an entitlement on complainants to have one or more persons present near the complainant when giving evidence. If the complainant is a child, the provisions of the *Criminal Procedure Act 1986* apply instead of the provisions relating to support persons that might otherwise apply under the *Evidence (Children) Act 1997*.