EVIDENCE (PROTECTION OF CHILDREN) AMENDMENT BILL 2003

EXPLANATORY NOTES

General Outline

Objectives of the Legislation

This Bill amends the Criminal Code, the *Evidence Act 1977* and other statutes to improve the treatment of child witnesses by the criminal justice system.

Reasons for the objectives and how they will be achieved

The plight of children who are victims of sexual and physical abuse is an important issue of concern to all members of the community in Queensland. The tangible and intangible costs of this abuse to the victim and to our community are significant.

In order to protect our community, it is vital that perpetrators of child sexual and physical abuse are brought to justice by our criminal justice system. This can only occur if children report the abuse and participate in the court process. If children do not feel safe and supported by our criminal justice system, they will not participate in these processes and there is a very real risk perpetrators will not be brought to justice for their actions.

It is therefore of vital importance that children are treated with dignity, respect, care and humanity by our criminal justice system so that they will continue to report abuse and participate as witnesses in the court process.

A great deal of reputable research has criticised the Queensland criminal justice system's treatment of child witnesses, particularly child victims of sexual assault. Recent research indicates that children's experiences in the criminal justice system deter them from making further reports of sexual abuse.

This Bill is part of a comprehensive reform package directed at improving the way the criminal justice system treats child witnesses and ensuring that those who offend against children are detected and punished for their crimes. It is a significant initiative that delivers on this Government's priorities of building safer and more supportive communities and delivering a better quality of life to all Queenslanders. It will be an important achievement of this Government during its term in office.

The first part of the reform package was the introduction and passage of the *Sexual Offences (Protection of Children) Amendment Act 2003*. That Act made immediate changes to the sentencing of child sex offenders by changing sentencing principles, increasing penalties and introducing two new offences into the Criminal Code. It also enhanced the powers of courts and corrections boards to require ongoing reporting by offenders.

This part of the reform package will bring Queensland into line with other states that have already taken steps to improve the way the criminal justice system treats children. It also implements various recommendations made by the Queensland Law Reform Commission in Report No. 55, Part 2, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* and the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission in Report No. 84, *Seen and Heard: Priority for Children in the Legal Process*.

The reforms aim to ensure that ordinarily, a child should not have to give evidence more than once, alternative measures should be used where possible, and trials should be resolved as quickly as possible.

The Bill also introduces a comprehensive disclosure regime to ensure that an accused person is properly informed of the case against him or her.

Accordingly, the amendments are designed to meet the following objectives –

- to preserve, to the greatest extent possible, the integrity of the evidence of a child witness;
- to limit, to the greatest extent possible, the distress or trauma experienced by a child witness as a result of giving evidence; and
- to ensure that, in a criminal matter, an accused person receives a fair trial.

Administrative cost to Government of implementation

Potential financial implications exist in relation to pre-recording of evidence and the mandatory use of audio visual links for certain witnesses. The Department of Justice and Attorney-General is continuing to provide audiovisual links and recording facilities for courthouses using existing budget allocations from the Court Improvement Program.

Consistency with Fundamental Legislative Principles

Does the legislation have sufficient regard for the rights and liberties of individuals?

New sections 21AE to 21AH of the *Evidence Act 1977* will restrict the right of a defendant to require an affected child witness to attend at and be cross-examined at committal.

A wealth of research has indicated that committals can have a devastating effect on child witnesses. The research shows that cross-examination by defence counsel at committal can be more stressful than at trial where there is the additional constraining influence of the jury. Techniques used by defence counsel in committals include: focussing on inconsistency in minor detail (rather than any major inconsistency in the child's evidence that would go to issues affecting the magistrate's decision to commit a person to trial or not) and adopting confusing sentence structures and repetition (suggesting to a child that the first answer was incorrect). Defence counsel also employ aggressive and intimidatory mannerisms and tone of voice.

If a child is traumatised by cross-examination at committal, he or she may refuse to testify at trial or the prosecution may discontinue in the interests of the child's emotional well-being. Perpetrators therefore evade justice, not through legitimate issues relating to the child's evidence, but through intimidation of the child.

With the exception of Western Australia, all Australian jurisdictions retain the committal process. However, in most jurisdictions the calling of oral evidence (by both the prosecution and the defence) is restricted, either in relation to the calling of any oral evidence at all or in relation to calling particular witnesses. These restrictions encourage the use of "paper" committals, while still recognising the function of the committal as a preliminary hearing to gather evidence and screen charges. Cross-examination may still occur, with the test to be satisfied varying from special circumstances (for child complainants in sexual offences in

Tasmania) to special reasons (for all witnesses in South Australia) to substantial reasons (for ordinary witnesses in New South Wales). In New South Wales, the higher test of special reasons applies to complainants in sexual or violent offences.

The Western Australian Parliament recently passed the *Criminal Law (Procedure) Amendment Bill 2002,* abolishing committals altogether in that State and replacing them with a comprehensive disclosure scheme. This Act gives effect to recommendations of the Law Reform Commission of Western Australia.

According to the High Court (*Grassby v The Queen* (1988) 168 CLR 1 and *Barton v The Queen* (1980) 147 CLR 75), the principal purposes of a committal hearing are to:

- ensure the defendant is not put to trial on indictment without sufficient cause;
- allow the defendant to learn the case against him or her; and
- marshal the evidence into deposition (written) form.

Restricting the right to cross-examine a child witness in the manner proposed in the Bill does not compromise the purposes of a committal hearing.

While recognising the vulnerability of child witnesses and the undesirability of requiring a child to give evidence at committal, the Bill also recognises that in some cases it may be necessary in the interests of justice to permit cross-examination at the committal.

In considering the interests of justice and whether cross-examination at committal is justified, the court must be satisfied that a legitimate issue has been identified and that cross-examination about the issue will serve the proper purposes of the committal, in particular that the defendant is aware of the case he or she has to meet.

There are a number of other measures proposed or in place that will ensure that defendants are not unduly prejudiced by limits on the right to cross-examine at committal, for example –

- Pre-recording of all of the evidence of a child witness will enable the defence to cross-examine the child prior to the trial commencing, which will facilitate pleas of guilty and no case submissions;

- The use of recorded statements under existing section 93A of the *Evidence Act 1977* gives the defence the opportunity to see and hear how the witness describes events in that recorded statement;
- Additional screening of the appropriateness of the charge is conducted by the Director of Public Prosecutions, who can decline to indict notwithstanding a magistrate's decision to commit; and
- Formalised disclosure obligations on the Director of Public Prosecutions and the Queensland Police Service will ensure that the defendant is advised of the case against him/her.

The proposed reform will still ensure unsustainable prosecutions are disposed of at an early stage, but also will reduce unnecessary delays in the criminal justice process and reduce the trauma to vulnerable witnesses.

Subdivisions 3 and 4 of the new division 4A of the *Evidence Act 1977* create a presumption in favour of pre-recording the evidence of an affected child witness, and, where pre-recording has not occurred, the mandatory use of audiovisual links, if available.

These amendments are in response to recommendations made by the Queensland Law Reform Commission (the QLRC). The QLRC considered a number of issues relating to the use of such measures, including whether it infringes the right of the accused to confront the witness; and whether the evidence of the witness might appear either more or less credible through the medium of the audiovisual link

In its Report, the QLRC details evaluation of the use of closed-circuit television (CCTV) in other jurisdictions, including Western Australia, the Australian Capital Territory, Scotland, and England.

Overall the responses were positive, with the use of the facilities neither enhancing nor diminishing the value of a child's evidence. There appeared to be no overall impact on conviction rates. The use of the facilities was seen to be fair to both the accused and the witness. The real advantage is that cases proceed that might not otherwise proceed, and trauma to the witness is minimised.

The QLRC also reports that a 1991 English study indicated that there was nothing to suggest that jurors watching a witness give evidence over CCTV would produce decisions or judgments on the credibility of the witness radically different from those made under regular court conditions. There was no significant difference in communication for "live" interviews as opposed to interviews given over CCTV.

Where any of the special measures provided for under division 4A are used, new section 21AW requires the judge to instruct the jury that –

- the use of the measure is a routine practice of the court and they should not draw any inference as to the defendant's guilt from it;
- the probative value of the evidence is not increased or decreased because of the use of the measure; and
- the evidence is not to be given any greater or lesser weight because of the use of the measure.

There is an increasing acceptance of a large variety of witnesses (for example professional witnesses) giving evidence through video or telephone links, as well as the long term use of video recorded interviews between police and accused, and the use of recorded statements as a child's evidence-in-chief (since 1989) under section 93A of the *Evidence Act 1977.*

The prosecution disclosure provisions (clause 15 of the Bill) are a statutory codification of the existing prosecution disclosure obligations.

There are restrictions imposed on the disclosure of sensitive evidence, witness contact details and disclosure contrary to the public interest.

Section 590AO provides that sensitive material (that is, material that the prosecution reasonably considers contains obscene or indecent images or objects) is disclosed to the defence only under conditions to ensure that the privacy of the complainant (or the person depicted in the images) is not compromised. If the prosecution refuses to provide a copy of sensitive evidence or to permit it to be examined, the court may direct that a copy be provided if satisfied that there is a legitimate purpose to be served by the accused person being given a copy of the sensitive evidence, and that the disclosure can be made without unauthorised reproduction or circulation of the evidence.

Limits on disclosure of witness contact details to the accused person (including the witness's address) ensure that a witness can provide evidence to the prosecution without fear of retaliation. Again, new section 590AP does not deprive the defendant of the opportunity to properly prepare for his or her trial. New section 590AP(4)(a) permits the court to direct a witness contact detail be given to the accused if satisfied that there is a legitimate purpose to be served by the disclosure and the giving of the detail is not likely to present a reasonably ascertainable risk to the welfare or protection of any person. New section 590AP(6) also states that nothing in the section is intended to discourage the prosecution from passing onto a

witness a request from the defence for contact. Such contact would provide the defence the opportunity to interview a witness for the prosecution.

The limit in section 590AQ on disclosing material that is contrary to the public interest to disclose, reflects existing case law.

Unless the disclosure is also prohibited by law, where disclosure is restricted, the accused's right to be properly appraised of all prosecution evidence is protected by the court's power to direct that the material be disclosed, subject to limitations designed to protect the material, the public interest, or the interests of individuals.

New section 668A (Reference of pre-trial direction or ruling by Attorney-General) permits the Attorney-General to refer to the Court of Appeal a point of law arising in relation to a direction or ruling under section 590AA. At present, rulings on evidence made before the arraignment of the accused are not appellable under section 669A. As a result, the prosecution has no remedy to challenge a pre-trial ruling that results in a case being discontinued. The prosecution also cannot appeal an acquittal.

The accused is not being given the same right of appeal, although he or she does have a right to be heard on the reference. While the defence may also have cause to complain about pre-trial rulings, the accused may be acquitted notwithstanding those rulings, but if convicted can appeal against that conviction, including by challenging the ruling.

Does the legislation adversely affect rights and liberties and impose obligations, retrospectively?

Section 11 of the Criminal Code ensures that where an existing offence is changed or a new offence created, a person cannot be punished for an act unless the act was committed after the law making it an offence came into force.

Changes to procedures (for example, the amendments to the *Evidence Act 1977)*, will have retrospective effect, in that they will apply regardless of when the offence was committed.

In the absence of any indication to the contrary, a "procedural" statute is to be construed as retrospective, that is, it can apply to past events. The High Court considered the issue of "procedural" statutes in *Rodway v The Queen* (1990) 169 CLR 515, where it held that-

> *. . . ordinarily an amendment to the practice or procedure of a court, including the admissibility of evidence and the effect to be given to evidence, will not operate retrospectively so as to impair any existing right. It may govern the way in which the right is to be enforced or vindicated, but that does not bring it within the presumption against retrospectivity. A person who commits a crime does not have a right to be tried in any particular way; merely a right to be tried according to the practice and procedure prevailing at the time of trial. The principle is sometimes succinctly, if somewhat sweepingly, expressed by saying, as did Mellish LJ in the passage cited by Dixon CJ in Maxwell v Murphy, that no one has a vested right in any form of procedure. It is a principle which has been well established for many years . . .*

In *Rodway,* the High Court was considering the abolition of the corroboration warning, and held that the abolition applied regardless of the fact that the rule was in place at the time the offence was committed. In other words, despite the fact that the warning was required to be given at the time the offence was committed, it did not have to be given at the trial and the accused had not been deprived of a substantive right.

The Bill contains transitional provisions to ensure that, in most cases, only proceedings started or indictments presented after the Act commences will be subject to the new provisions.

CONSULTATION

The Queensland Law Reform Commission conducted extensive consultation in the preparation of its Discussion Paper and following its release.

Following the release of Part 1 of the Queensland Law Reform Commission Report in June 2000 and Part 2 in December 2000, the Department of Justice and Attorney-General sought submissions from the key stakeholders, such as the judiciary, the legal profession and organisations concerned with children and young people.

A consultation draft of the Bill was released for public comment on 6 November 2002. Copies of the Bill and draft Explanatory Notes were sent to all the key legal stakeholders (including individual copies to each judge of the Supreme and District Courts), Government departments and advocacy groups for children and young people. It was also published on the Department of Justice and Attorney-General web page.

On 6 March 2003, a further draft of the Bill was sent to the Chief Justice of the Supreme Court, the Chief Judge of the District Court, the Acting Chief Magistrate, the Bar Association of Queensland, Legal Aid Queensland, the Director of Public Prosecutions and the Queensland Police Service.

As well, on 16 April 2003, a further draft of the Bill was sent to the Department of the Premier and Cabinet, the Department of Families, the Department of Aboriginal and Torres Strait Islander Policy, the Commission for Children and Young People, Education Queensland and Queensland Health.

As a result of the comments received on the various drafts, between 7 April 2003 and 29 April 2003 further drafts of the Bill or excerpts of it, were provided to the Chief Judge of the District Court, the Bar Association of Queensland, Legal Aid Queensland, the Director of Public Prosecutions and the Queensland Police Service.

The Commissioner for Children and Young People, the Queensland Police Service and all Government departments were consulted in relation to the proposed amendments to the *Commission for Children and Young People Act 2000*.

With respect to the amendments to Part 9 of the *Justices Act 1886,* the Chief Judge of the District Court, the Chief Magistrate, the Director of Public Prosecutions and Legal Aid Queensland were consulted extensively over an extended period of time.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title of the Act.

Clause 2 provides that the Act commences on a date to be fixed by proclamation.

PART 2—AMENDMENT OF BAIL ACT 1980

Clause 3 provides that this part amends the *Bail Act 1980*.

Clause 4 amends section 8 (Power of court as to bail) to insert a new subsection (1)(a)(ia) to allow a Magistrates Court to grant bail to a person appealing under section 222 of the *Justices Act 1886*. Previously, persons appealing from conviction on summary matters (but not in respect to indictable offences dealt with summarily) could enter into a recognisance with a justice of the peace for release from prison. This amendment, which expands the Magistrates Court's jurisdiction to grant bail, ensures appellants will have ready access to courts to make bail applications.

PART 3—AMENDMENT OF CHILDRENS COURT ACT 1992

Clause 5 provides that this part amends the *Childrens Court Act 1992*.

Clause 6 amends section 20 (Who may be present at a proceeding) to insert a new s20(2)(d) to permit the court, in a criminal proceeding conducted in the Childrens Court, to allow the presence of any person who has a proper interest in the proceeding whose presence is not prejudicial to the interests of the child. This will permit a Childrens Court, in appropriate circumstances, to permit a victim of crime to witness proceedings.

PART 4—AMENDMENT OF COMMISSION FOR CHILDREN AND YOUNG PEOPLE ACT 2000

Clause 7 provides that this part amends the *Commission for Children and Young People Act 2000*.

Clause 8 inserts a new section 122A (Notice of change in criminal history) to allow the Police Commissioner to inform the Commissioner for

Children and Young People when a person whom the police reasonably suspect holds a positive suitability notice is charged with an offence.

The amendments also apply to a person who has applied for a suitability notice, and has not withdrawn their application or their consent to employment screening or has applied to cancel a negative notice.

The Police Commissioner may provide the Commissioner for Children and Young People with the name, address and date of birth of the person, the nature and particulars of the charge and the date of the charge. On receipt of that information, the Commissioner for Children and Young People may write to the person to inform them of their obligations under the Act.

PART 5—AMENDMENT OF CRIMINAL CODE

Clause 9 provides that this part amends the Criminal Code.

Clause 10 amends section 1 (Definitions) by inserting definitions for the purposes of the new chapter division 3 (Disclosure by the prosecution) in Chapter 62. Signpost definitions are also included for the terms "the offender cannot be arrested without warrant" and "the offender may be arrested without warrant".

Clause 11 inserts a new subsection (3) into section 349 (Rape) to provide that for the offence of rape, a child under the age of 12 years is incapable of giving consent.

Clause 12 amends section 354A by omitting subsection (5), to ensure that spouses are as compellable as any other witness.

Clause 13 inserts a new section 560A (Place where indictment presented) to allow an indictment to be presented at a court other than the court of trial.

The purpose of this provision is to allow action to be taken on an indictment (such as pre-trial directions) in another court centre. At present, if a matter is committed to a court without a resident judge, the indictment cannot be presented until the court sits, and therefore no pre-trial applications can be made to the court in respect of that indictment.

The section does not operate as a change of venue or affect the ultimate place of trial. The proper officer of the court must transfer the indictment to the place of trial as soon as practicable after the indictment is presented.

Clause 14 inserts a new chapter division heading prior to section 590, Chapter division 1 (Bringing accused person to trial).

Clause 15 inserts a new heading following section 590 for Chapter division 2 (Directions and rulings before trial), inserts a new Chapter division 3 (Disclosure by prosecution), and inserts a new heading for Chapter division 4 (Disclosure by accused person).

The new Chapter division 3 comprises Chapter subdivisions A to F. The purpose of the new Chapter division 3 is to put the disclosure obligations of the prosecution in statute.

Until now the obligations of the prosecution (including the Queensland Police Service and the Office of the Director of Public Prosecutions) to disclose their case to the defence have depended on a number of different guidelines, procedures, policies, case law, unwritten rules, and general practice.

While the requirements of prosecution disclosure are generally well understood and complied with by police, prosecution and defence, there is no easily referenced code setting out the rules of disclosure.

New section 590AB (Disclosure obligation) provides statutory acknowledgement of the role of the prosecution in criminal proceedings and the fundamental principles underpinning disclosure.

There is a long line of authority that sets out the fundamental duty of fairness of the prosecution. Two of the well known formulations are *R v Lucas* [1973] VR 693 and *R v M* [1991] 2 Qd R 68:

> *Although as was pointed out by Diplock, LJ in Dallison v Caffery, [1965] 1 QB 348, at pp. 375-6; [1964] 2 All ER 610, the duty of a prosecutor is to prosecute and not to defend, nevertheless it has long been established that a prosecution must be conducted with fairness towards the accused and with a single view to determining and establishing the truth: cf. R v Bull (1839) 9 Car and P 22; R v Puddick (1865) 4 F and F 497; Boucher v R, [1955] Can LR (Supreme Court) 16; Ziems v Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279, at pp. 292-4 and 307-8; sub nom. Re Ziems, [1957] ALR 620; and for illustrations see Archibald, 37th ed. s1374.*
> **(*R v Lucas* [1973] VR 693)**
> *… W.B. Campbell J. (as he then was) said, at 476:*

"The duty of prosecuting counsel is clearly stated by the author of the 17th edition of Kenny's Outlines of Criminal Law, at p. 569:

'A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this latter advocate has a private duty- that of doing everything that he honourably can to protect the interests of his clients. He is entitled to "fight for a verdict". But the Crown counsel is a representative of the State, "a minister of justice"; his function is to assist the jury in arriving at the truth. He must not urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused. It is not his duty to obtain a conviction by all means; but simply to lay before the jury the whole of the facts which compose his case, and to make these perfectly intelligible, and to see that the jury are instructed with regard to the law and are able to apply the law to the facts It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done '

Sheehy S.P.J. agreed in the order and reasons of Hart J. (see at 461).

(*R v M* [1991] 2 Qd R 68 at 80).

The duty of disclosure flows from the obligation that the prosecution conducts a trial with fairness. Hence, the obligations of disclosure involve disclosing to the accused the material that the prosecution intends to lead in evidence and also all evidence held by the prosecution that will tend to assist the defence case. Again there is much authority to support these well accepted propositions (*R v Spizzeri* [2000] QCA 469, *R v TSR* [2002] VSCA 87, *R v Ward* (1992) 96 Cr App R 1, *Richardson v R* (1974) 131 CLR 116), *R v Higgins* [1994] VSCA 79).

These principles are also reflected in the **Guidelines to Crown Prosecutors** issued by the Director of Public Prosecutions (Duties of Prosecuting Counsel):

- *The Crown should assist the courts to operate efficiently. Therefore, the Crown's case should be fully disclosed to the defence at the earliest opportunity and any evidence that tends to the proof of innocence should also be disclosed at the earliest possible time.*

- *Where the prosecuting counsel knows that a crown witness has prior convictions and/or is indemnified in respect of the matter before the court, it is the Crown Prosecutor's duty to reveal the convictions or the indemnity to the defence.*

New section 590AC (Chapter division does not have particular consequences) provides that nothing in the chapter division requires disclosure of a thing it is unlawful to disclose (under this or another law); or affects an accused's right to a thing under another law.

New section 590AC (2) also provides that failure to comply with the division does not invalidate proceedings.

New section 590AD (Definitions for ch div 3) sets out the definitions for terms to be used in the new division.

New section 590AE (Meaning of "possession of the prosecution") sets out when a thing is in the possession of the prosecution.

A thing will be in the possession of the prosecution in two circumstances. Firstly, a thing is in the possession of the prosecution when it is in the possession of the arresting officer or a person appearing for the prosecution (a police prosecutor or a crown prosecutor). Secondly, a thing will be in the possession of the prosecution when it is in the possession of the Director of Public Prosecutions (or if the Queensland Police Service is conducting the prosecution, the Commissioner of Police) and the arresting officer or a person appearing for the prosecution is aware of the thing and is able, or would be able, to locate the thing without unreasonable effort.

"Arresting officer" is defined in section 590AD to include both the police officer who commenced proceedings against the defendant or, if that person is unavailable, another police officer designated the arresting officer for the proceedings.

New section 590AF (Meaning of "sensitive evidence") defines the term "sensitive evidence". The new division permits the disclosure of sensitive evidence under rules to minimise the dissemination of images that may be distressing to alleged complainants, victims or other persons involved in criminal proceedings. These restrictions are subject to powers of the court to permit copies to be provided to the defendant in certain circumstances.

New section 590AG (Particular references to an accused person include references to a lawyer acting for the accused person) ensures that division 3 reflects the common practices in the criminal jurisdiction that most material is disclosed directly to the lawyer for the defendant rather than to the defendant.

New section 590AH (Disclosure that must always be made) sets out the mandatory disclosure obligations of the prosecution. Section 590AI provides the time frames within which such mandatory disclosure must be made. Mandatory disclosure for a committal proceeding must be made 14 days before the proceeding. Mandatory disclosure for a trial must be made no more than 28 days after presentation of indictment. Special provision is made for shortening the time period for committals and extending the time period for trials on indictment (see s. 590AI(4)). Section 590AH does not limit the obligations of the prosecution to disclose all evidence that it intends to rely upon in the prosecution or any evidence that tends to assist the case for the prosecution.

For a relevant proceeding (defined in section 590AD as a committal proceeding, a prescribed summary trial or a trial on indictment), section 590AH provides that the prosecution must give the accused each of the following things –

- A copy of the bench charge sheet, complaint or indictment containing the charges against the person.
- A copy of the accused person's criminal history.
- A copy of any statement of an accused person in the possession of the prosecution. "Statement" is widely defined in section 590AD to mean a statement signed by a person, a statement potentially admissible under the *Evidence Act 1977* or any other representation of fact, whether in words or otherwise, made by the person. The final limb of the definition embraces taped interviews or statements recorded by a police officer in a notebook.
- A copy of the statement of any proposed witness in the possession of the prosecution, or if there is no statement, the name of the proposed witness.
- If a proposed witness is an affected child, a notice naming the witness and describing why the proposed witness is an affected child. This puts the defence on notice that special procedural rules will apply to this child (for example, a possible limitation of cross-examination of the child at committal, a presumption that a child's evidence will be pre-recorded prior to trial).
- If section 93B of the *Evidence Act 1977* is to be relied on, a notice stating the matters set out in section 590C(2).

- A copy of a report of any test or forensic procedure relevant to the prosecution in the possession of the prosecution.
- A notice describing any test or forensic procedure (including a procedure yet to be completed) that the prosecution intends to rely on at the proceeding.
- A notice describing any original evidence on which the prosecution intends to rely at the proceeding (this is colloquially known now as the "exhibits list").
- A copy of any other thing that the prosecution may rely on at committal (for example, photographs or maps).

The items listed in section 590AH generally reflect what is presently called the police brief or the prosecution brief of evidence.

In many prosecutions, the investigators gather evidence which for many reasons does not form part of the prosecution brief of evidence that the prosecution intends to rely upon in a proceeding. Section 590AJ (Disclosure that must be made on request) requires that the prosecution, on request, must give the accused person the following –

- Particulars if a proposed witness for the prosecution is an affected child (as defined in section 21AC of the *Evidence Act 1977*).
- A copy of the criminal history of a proposed witness for the prosecution.
- Notice of anything in the possession of the prosecution that may reasonably be considered to be adverse to the reliability or credibility of a proposed witness for the prosecution or a copy of the thing.
- Notice of anything in the possession of the prosecution that may tend to raise an issue about the competence of a proposed witness for the prosecution to give evidence in the proceeding.
- A copy of any statement of any person relevant to the proceeding and in the possession of the prosecution but which the prosecution does not intend to rely on at the proceeding.
- Notice of any other thing in the possession of the prosecution that is relevant to the proceeding but which the prosecution does not intend to rely on at the proceeding or a copy of that thing.

"Particulars" is defined in new section 590AJ (3) as particulars of a matter alleged in a bench charge sheet, complaint or an indictment. Requests for particulars under section 590AJ do not change the court's power to order the prosecution to deliver particulars under section 573 of the Criminal Code.

Notice in this section may be by any means adapted to the purpose of bringing the material to the defendant's notice (see new section 590AM(2)). For example, the arresting officer may inform the defence by telephone call that there is material to be inspected that may fit the definition of section 590AJ(2). Disclosure made subject to section 590AJ must be made as soon as reasonably practicable (section 590AK). Section 590AJ(1) makes it plain that nothing in the section limits the prosecution's fundamental obligations to ensure that criminal proceedings are conducted fairly with the single aim of determining and establishing truth.

New section 590AL (Ongoing obligation to disclose) provides that the obligation to disclose a thing continues even when a time requirement imposed by statute has not been complied with. The obligation to disclose ends when the prosecution ends. However, where a thing is an "exculpatory thing" (defined in section 590AD as "*reliable evidence of a nature to cause a jury to entertain a reasonable doubt as to the guilt of an accused person*") the obligation to disclose the thing to the defendant continues until the defendant is acquitted or discharged or, if convicted, the person dies.

New section 590AM (How disclosure may be made) provides that if a thing must be given to a person it is sufficient for a lawyer or the accused person to be notified that the thing is available for collection at a stated place. This provision reflects the existing practice for the collection of police briefs of evidence and depositions.

Chapter subdivision C sets out the limitations on disclosure.

The prosecution is not required to give an accused person a copy of something they already have (section 590AN). This provision will ensure that resources of the police and prosecutions are not dissipated in repeatedly providing the same material.

The prosecution is not required to give an accused person material that the prosecution reasonably considers is sensitive evidence (as defined in section 590AF). However, section 590AO does permit the accused person to view the sensitive evidence. If the sensitive evidence is also original evidence (for example, a computer hard drive with pornographic images)

the prosecution may permit an appropriate person to examine the thing subject to any appropriate conditions to ensure that there is no unauthorised reproduction or circulation of the thing and the integrity of the thing is preserved.

If the prosecution refuses to give an accused person a copy of a thing or to permit an examination of sensitive original evidence, the court may direct that a copy of the sensitive evidence be given to an accused person or that the accused person be permitted to examine the thing. The court may authorise the giving of a copy of a thing to an accused person only if the court is satisfied that there is a legitimate purpose to be achieved by the accused person being given a copy of the thing and the court is also satisfied the terms of the direction can ensure that there is no unauthorised reproduction or circulation of the thing.

The prosecution is not required to give witness contact details to the accused person (section 590AP). The court may direct a witness contact detail to be given to an accused person only if the court is satisfied that there is a legitimate purpose for the giving of the contact details and that giving the detail is not likely to present any risk to the welfare or protection of any person.

The prosecution is not required to disclose anything to a person if it reasonably considers the disclosure would be contrary to the public interest (section 590AQ). Without limiting what disclosure is contrary to the public interest, section 590AQ(2) sets out a number of sub-categories of information that the prosecution is not required to disclose. Again, the court may, unless disclosure of a thing is prohibited by law, direct a thing be disclosed to an accused person only if the court is satisfied that disclosure of the thing is not contrary to the public interest.

New sections 590AR and 590AS set out the procedures for an accused person to view evidence, including original evidence.

New sections 590AT and 590AU provide that the accused and the court may waive any requirement in the chapter. However, the court may waive a requirement only if waiving the requirement will not result in a miscarriage of justice.

New section 590AV sets out the powers of a court when making a disclosure direction (defined to mean a direction under sections 590AO (Limit on disclosure of sensitive evidence), 590AP (Limit on disclosure of witness contact details) or 590AQ (Limit on disclosure contrary to the public interest)). Section 590AV(3) permits a court to make disclosure

directions on conditions, for example, that disclosure is only made to a lawyer acting for an accused person.

New section 590AW provides that any issues about compliance with the chapter should be settled before evidence begins.

New section 590AX inserts an offence provision prohibiting the unauthorised copying of sensitive evidence. A person has authority to copy sensitive evidence if the person copies, or permits a person to copy, sensitive evidence for a legitimate purpose connected with a proceeding. A person is in possession of sensitive evidence for the purposes of a relevant proceeding only if the sensitive evidence was given to the person under this chapter or the sensitive evidence came into a person's possession directly or incidentally, including by an opportunity given, because the person is a public official. Public official is defined in section 590AX(4) to include a police officer and a person appointed, engaged or employed under the *Director of Public Prosecutions Act 1984*. The ambit of section 590AX will not include all persons who possess material answering the description of sensitive evidence. It is only concerned with the unauthorised copying of sensitive evidence by those who have access to the material through their official role or because they have received the material under the disclosure provisions.

Clause 16 amends the heading to section 590B (Advanced notice of expert evidence) by replacing "advanced" with "advance"; amends the opening words of subsection (1) so that the section now only refers to the accused; and corrects the reference to section 592A in subsection (2) to reflect the renumbering of that section to 590AA.

Clause 17 amends section 590C by replacing subsection (1) and amending subsection (2) to reflect the fact that these sections now only apply to accused persons, and by correcting the reference to section 592A in subsection (3) to reflect the renumbering of that section to 590AA.

Clause 18 inserts a new Chapter 62, chapter division 5 heading after section 590C.

Clause 19 amends, relocates and renumbers section 592A (Pre-trial directions and rulings) as section 590AA.

The redrafted section will now include directions and rulings as to the conduct of any pre-trial hearings (such as those under the new part 2, division 4A of the *Evidence Act 1977*).

The list of matters in subsection (2) about which a ruling or direction may be given now includes the disclosure of a thing under chapter division

3 of the Code; and matters arising under part 2 (Witnesses), divisions 4A (Evidence of affected children) or 6 (Cross-examination of protected witnesses) of the *Evidence Act 1977.*

Clause 20 relocates and renumbers section 594 (Accused person to be called upon to plead to indictment) as section 597C.

Clause 21 inserts a new chapter 62, chapter division 6 heading before section 594A.

Clause 22 inserts a new chapter 62, chapter division 7 heading before section 595.

Clause 23 inserts a new chapter 62, chapter division 8 heading before section 597A.

Clause 24 inserts a new chapter 62, chapter division 9 heading after section 597A.

Clause 25 relocates and renumbers section 606 (Separate trials) as section 597B.

Clause 26 relocates and renumbers section 607 (Juries) as section 617A.

Clause 27 inserts a new chapter 62, chapter division 10 heading before section 616.

Clause 28 inserts a new chapter 62, chapter division 11 heading before section 618.

Clause 29 inserts a new chapter 62, chapter division 12 heading before section 630.

Clause 30 inserts a new section 668A (Reference of pre-trial direction or ruling by Attorney-General) permitting the Attorney-General to refer to the Court of Appeal a point of law arising in relation to a direction or ruling given under section 590AA.

The section also contains procedural steps to reflect those contained in section 669A.

Clause 31 amends section 669 (Power to grant a new trial) by inserting a new subsection (2) to provide that when an appellant is in custody and has not been granted bail, an order to grant a new trial also has the effect of a warrant for the appellant's continued detention under section 9(1)(a) of the *Corrective Services Act 2000.*

Clause 32 inserts a new section 708 in Part 8, Chapter 71, permitting the Governor in Council to make regulations under the Criminal Code.

Clause 33 inserts a new Chapter 78 (Transitional provisions for the *Evidence (Protection of Children) Amendment Act 2003*).

New section 715 (Transitional provisions for disclosure by the prosecution) provides that the new prosecution disclosure regime applies to relevant proceedings started or indictments presented after the commencement of the Act.

PART 6—AMENDMENT OF CRIMINAL LAW (REHABILITATION OF OFFENDERS) ACT 1986

Clause 34 provides that this part amends the *Criminal Law (Rehabilitation Of Offenders Act 1986.*

Clause 35 amends the table in section 9A (Disclosure of particulars in special cases) by including applicants for admission as students-at-law, barristers and solicitors; applicants for consent to enter articles of clerkship; and applicants for appointment as judges' associates in the list of those persons who are required to disclose any contraventions of the law, notwithstanding the operation of the Act.

PART 7—AMENDMENT OF CRIMINAL LAW (SEXUAL OFFENCES) ACT 1978

Clause 36 provides that this part amends the *Criminal Law (Sexual Offences) Act 1978*.

Clause 37 inserts a new heading, Part 1 – Preliminary, before section 1.

Clause 38 inserts a new heading, Part 2 – Evidence, before section 4.

Clause 39 replaces the heading to section 4 with "Special rules limiting particular evidence for sexual offences".

Clause 40 inserts a new section 4A (Evidence of complaint generally admissible) which abolishes the special rule relating to "recent complaint" evidence.

The recent complaint rule says that, in sexual offence cases, evidence of complaint (how, when and to whom the person first complained) is only admissible where the complaint is recent, that is, when it is made at the first reasonable opportunity. The judge must also direct the jury that a recent complaint supports the evidence of the complainant as it is consistent with the conduct complained of, and a delayed complaint is therefore more likely to be false. This direction is required because of cases such as *Kilby v The Queen* (1973) 129 CLR 460, in which the High Court assumes that a delay in complaint by a person who has been sexually assaulted is inconsistent conduct and therefore adversely affects the complainant's credibility.

The rule is based on the expectation that a victim of a sexual offence should or can complain at the first opportunity. It assumes that as a matter of human experience, victims of sexual assault will complain promptly of the assault. The available evidence suggests that, especially in relation to child victims, and for a variety of reasons, an early complaint is not necessarily to be expected, and many genuine victims will never make a formal complaint.

The assumption behind the rule has been criticised by many eminent Judges. Criticisms include that the rule does not accord with the reality of sexual offence complainants, especially children, and that the law has no special insight into the behaviour of victims of abuse, such as to justify the mandatory nature of the direction.

As well, courts recognise that it is of assistance to juries to know how and when any complaint about the conduct of the accused first emerged, regardless of when the complaint was made.

Despite these persuasive opinions, the rule remains part of the common law and can only be changed by legislation.

Section 4A makes two significant changes to the law. Firstly, it makes evidence of complaint admissible in sexual offence cases, regardless of when it was made. Secondly, it prohibits a judge from instructing a jury that the law regards the evidence of a complainant to be more or less reliable based only on the length of time between the commission of the offence and the making of the complaint.

In particular, section 4A is intended to reflect the comments of Thomas JA in *R v S* (1998) 103 A Crim R 101, at 105, about the admissibility and relevance of complaint evidence –

In my view it would assist any jury in a case involving a sexual complaint to know how and when any complaint about the conduct of the accused person first emerged. Evidence of this kind is pivotal to explaining how the complainant comes to be in the witness box and the accused in the dock. An assessment of the truth of the complaint can hardly be attempted without some knowledge of how it first saw the light of day. It is my view that evidence of first complaint should always be receivable in cases involving sexual misconduct, as evidence which permits a better understanding of the story, irrespective of when it was made. To say that an early complaint is merely a bolster, or a later complaint a drawback to the complainant's credibility is an oversimplification. The circumstances of first emergence of the complaint may enable the story to be seen in a different light. To take just one of the factors involved in relation to such a complaint, the identity of the person chosen by the complainant may give an insight into the complainant's motivation. For example if it is made to a member of a peer group or a person from whom a complainant arguably might try to gain attention, some circumspection might be called for. This if added to other features might in the circumstances of a particular case raise reasonable doubt that the complaint may have been an irresponsible one and that the complainant become locked into it, or unwilling to withdraw it when further steps were taken in consequence of it. Conversely, in a family with a dominant father or step-father, and an apparently selfish or weak mother who is dependent upon the financial support of the male in the household, it might be easy to accept that a molested child sees no point in sharing her misery with her mother. Such factors in my view are often far more telling than the single circumstance of recency or lateness.

Unfortunately I do not think that the authorities on this question permit it to be said that the above views currently represent the law. The rules concerning evidence of recent complaint are still fairly rigidly tied to their historical origins and the requirement of recency has recently been affirmed by the High Court as a criterion of the admissibility of such evidence.

Section 4A also makes it clear that nothing in the provision derogates from the power of a court in a criminal proceeding to exclude evidence if it is satisfied that it would be unfair to admit the evidence, nor does it preclude the making of any other comment that is required by law or that it is appropriate to make in the circumstances of the case.

It is not intended that judges should be prevented from identifying to juries any prejudicial effect on a defendant because of a delay in complaint (such as an inability to call alibi evidence), or in pointing to any deficiencies in a complainant's evidence occasioned by delay. Such directions are required by cases such as *Longman v The Queen* (1989) 168 CLR 79.

What the court cannot do is suggest that the law regards a complainant to be more or less reliable based solely on the timing of the complaint, without consideration of the facts of the particular case.

Clause 41 inserts a new heading, Part 3 – Limit on Publicity, before section 5.

Clause 42 inserts a new heading, Part 4 – Transitional provisions, after section 13.

Clause 43 inserts a new section 15 (Transitional provisions for *Evidence (Protection of Children) Amendment Act 2003*) to provide that the new section 4A applies to any examination of witnesses or trial that starts or continues after the commencement of the Act.

PART 8—AMENDMENT OF CRIMINAL PROCEEDS CONFISCATION ACT 2002

Clause 44 provides that this part amends the *Criminal Proceeds Confiscation Act 2002.*

Clause 45 amends section 38 (Particular orders Supreme Court may make) by replacing "judicial registrar" with "stated officer of the court". The amendment will enable oral examinations to also be conducted before officers of the court.

Clause 46 inserts a new section 38A which defines "judicial registrar" for the purposes of Chapter 2, part 3, division 4, subdivision 1. The amendment extends the provisions of the sub-division to examinations conducted before an officer of the court who is not a judicial registrar.

Clause 47 amends section 130 (Particular orders Supreme Court may make) by replacing "judicial registrar" with "stated officer of the court".

The amendment will enable oral examinations to also be conducted before officers of the court.

Clause 48 inserts a new section 130A which defines "judicial registrar" for the purposes of Chapter 3, part 3, division 5, subdivision 1. The amendment extends the provisions of the sub-division to examinations conducted before an officer of the court who is not a judicial registrar.

PART 9—AMENDMENT OF DIRECTOR OF PUBLIC PROSECUTIONS ACT 1984

Clause 49 provides that this part amends the *Director of Public Prosecutions Act 1984.*

Clause 50 inserts a new subsection (2) in section 10 (Functions of director) to ensure that the Director of Public Prosecutions can conduct criminal proceedings for Commonwealth offences.

Clause 51 inserts a new section 24C (Disclosures by police officers) to impose on police officers an ongoing duty of disclosure of relevant information or other things to the Director of Public Prosecutions.

PART 10—AMENDMENT OF EVIDENCE ACT 1977

Clause 52 provides that this part amends the *Evidence Act 1977.*

Clause 53 inserts a new section 2A to provide that a note in the text of the Act is part of the Act.

Clause 54 amends section 3 (Definitions) by inserting definitions for the new division 4A of part 2, and relocates the definition section to a new schedule to the Act.

Clause 55 amends section 4 (Meaning of "copy" of document etc.) to now refer to the definition contained in the schedule.

Clause 56 amends section 8 (Witnesses in a criminal proceeding) to repeal subsections (2) to (7) which related to the competence and compellability of husbands and wives as witnesses.

New subsection (2) now provides that a husband or wife of a person charged is as competent and compellable to give evidence, either for the prosecution or the defence, as is any other witness.

New subsection (3) reflects the repeal of section 11 (see clause 58) and provides that a husband or wife is competent and compellable to disclose communications made between the husband and wife during the marriage.

Clause 57 replaces sections 9 and 9A with a new division 1A (Competency of witnesses and capacity to be sworn), containing sections 9 to 9D, and a new division 1B (Special provision for child witnesses) containing new section 9E.

Existing sections 9 and 9A of the *Evidence Act 1977* are being replaced by new sections 9 to 9D. These new sections replace the existing test for competency to give evidence (contained in old section 9(4)) and introduce a completely new oath competency test. These changes follow the recommendations of the Queensland Law Reform Commission.

The new scheme also reverses the existing approach, so that the witness's competency to give evidence is determined first, and after that, whether or not the evidence should be sworn or unsworn. Other aspects of the existing scheme are unchanged.

New section 9 provides that, subject to the new division, every person is presumed to be competent to give evidence and to give evidence on oath.

New section 9A provides that if an issue is raised about the competency of a witness, the witness is competent to give evidence if, in the court's opinion, he or she is able to give an intelligible account of events which he or she has observed or experienced. This test was recommended by the Queensland Law Reform Commission, and replaces the old test of "sufficient intelligence to give reliable evidence". It is also the test that applies in section 106C of the Western Australian *Evidence Act 1906* to witnesses under the age of 12 years.

New section 9B provides that if an issue is raised about the competency of a witness to be sworn, that witness is competent to give evidence on oath if, in the opinion of the court, the witness understands that the giving of evidence is a serious matter, and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the

truth. This is also the test that applies in section 106B of the Western Australian *Evidence Act 1906* to witnesses under the age of 12 years.

New sections 9C and 9D recreate existing aspects of sections 9 and 9A, including that expert evidence is admissible in relation to the ability of a witness to give evidence; the probative value of the evidence is not diminished just because it is not given on oath; and that the witness is as liable to be convicted of perjury as if the evidence were given on oath.

The new division 1B contains new section 9E, which sets out the general principles to be applied when dealing with a child witness.

Clause 58 omits section 11 (Communications to husband and wife), which provided that a husband or wife was not compellable to disclose in a criminal proceeding, a communication made by the spouse during the marriage. The competence and compellability of spouses is now addressed in new section 8(3) (see clause 56).

Clause 59 makes a number of amendments to extend the operation of section 21A (Evidence of special witnesses) including –

- The definition of "special witness" now includes a child under 16 (instead of under 12);
- This section will only apply to a child to the extent that the new division 4A does not apply to the child; and
- A court may give a direction that the questioning of a special witness be limited by time or by the number of questions asked on a given issue.

Section 21A(6), relating to a video-taped recording of the evidence of a special witness made under subsection (2)(e), has been extended to provide that the recording is, unless the relevant court otherwise orders, admissible in a retrial or a rehearing, or appeal from the proceeding; or, if the evidence was given for a criminal proceeding, admissible in another proceeding in the same court for the relevant charge or for a civil proceeding arising from the commission of the offence.

New subsection (8) also provides that where there is a jury, and where a direction is given or a special measure is used under subsection (2)(a) to (e), the judge must instruct the jury that despite the use of the measure or the direction given –

- they should not draw any inference as to the defendant's guilt; and

- the probative value of the evidence is not increased or decreased; and
- the evidence is not to be given any greater or lesser weight.

Clause 60 inserts new divisions 4A and 4B into part 2 of the Act.

New division 4A (Evidence of affected children) introduces special measures for the giving of evidence by an affected child, giving effect to a number of recommendations made by the Queensland Law Reform Commission.

Subdivision 1 (Preliminary) contains new sections 21AA to 21AD.

Section 21AA sets out that the purposes of division 4A are to preserve the integrity of an affected child's evidence and to reduce the distress and trauma that might be suffered by the child in giving evidence. New section 21AB sets out how these purposes are to be achieved through the use of pre-recording, audiovisual links and by limiting the circumstances under which a child can be required to attend as a witness at a committal proceeding.

Section 21AC contains the definitions for division 4A.

An "affected child" is a child under 16, or a child aged 16 or 17 who also satisfies the definition of a special witness under section 21A, who is a witness in a criminal proceeding for a relevant offence or in a civil proceeding arising out of the commission of a relevant offence (such as an application for criminal compensation). The defendant in the proceeding is not an affected child, but a defendant may be eligible for the use of special measures as a "special witness" under section 21A.

A "relevant offence" is an offence of a sexual nature regardless of any relationship between the witness and the defendant, or an offence involving violence where there is a prescribed relationship between the accused and the witness (such as a close family member or a member of the same household).

Section 21AD (Meaning of child) provides that a child who turns 16 after proceedings have commenced but before they are finalised, can continue to be treated as an affected child for the purposes of giving evidence until they turn 18. However, under section 21AM, if the evidence has been pre-recorded, the tape remains admissible even if the witness turns 18 before the evidence is presented to a court.

Subdivision 2 (Committal proceedings) contains new sections 21AE to 21AH to limit the circumstances under which an affected child may be required to attend to give evidence at a committal.

Section 21AE provides that subdivision 2 applies to the taking of an affected child's evidence for a committal proceeding for a relevant offence, whether or not the committal also relates to other offences.

Section 21AF (Evidence-in-chief) provides that the affected child's evidence-in-chief must be given as a written or recorded statement, without the child being called as a witness. The section also modifies the application of section 110A of the *Justices Act 1886* to committals involving affected child witnesses to reflect the procedural changes made by subdivision 2.

Section 21AG (Cross-examination) provides that an affected child can be cross-examined only if a magistrate requires the prosecution to call the child as a witness for that purpose, on application by the other party. It is intended that the application will be made at a direction hearing prior to the committal, but an application can also be made at the committal if the issue to which the application relates could not reasonably have been anticipated before the committal.

Before a child can be called as a witness for cross-examination, the magistrate must be satisfied that the party seeking to cross-examine the child has –

- identified an issue to which the proposed questioning relates;
- provided a reason why the evidence of the witness is relevant to the issue;
- explained why the evidence disclosed by the prosecution or before the court at the committal does not address the issue; and
- identified the purpose and general nature of the questions to be put to the witness to address the issue.

The magistrate must also be satisfied that the interests of justice cannot adequately be served by leaving cross-examination of the affected child about the issue to the trial. In other words, if the interests of justice would be served by the child being cross-examined about the issue at the trial, then there is no reason to also do so at the committal.

Without limiting the matters to which the magistrate should have regard in considering the interests of justice and whether cross-examination at committal is justified, the court must consider whether the case for the

prosecution is adequately disclosed; and whether the charge is adequately particularised.

The magistrate must also have regard to the vulnerability of children and the undesirability of requiring a child to be cross-examined at the committal.

This test is designed to link the ability to cross-examine to an identified issue relevant to the proper purposes of the committal.

If the magistrate requires the child to be called as a witness for cross-examination, then subsection (7) provides that the child's evidence must be taken under subdivision 3 (Pre-recording of affected child's evidence) or under subdivision 4 (Taking of affected child's evidence using audio visual link or screen), and the magistrate must give the appropriate directions as to how the evidence is to be taken.

Subsection (8) sets out the factors to which the magistrate must have regard in deciding how the child's evidence is to be taken, including the availability of an audio visual link at the court in which the committal proceeding is to be held, or the availability of another appropriate place.

If a child is called for cross-examination, section 21AH (Limitation on cross-examination) ensures that the child is only questioned about the issues for which the child was required to be called, or additional issues that also satisfy the test set out in section 21AG.

As well, the magistrate must not permit irrelevant questioning or "fishing expeditions", and must disallow a question that offends against sections 20 (Cross-examination as to credit) or 21 (Improper questions).

The party calling the witness may ask the child questions for the purposes of identifying the statement admitted as the child's evidence-in-chief, and may also re-examine the child.

New subdivision 3, comprising sections 21AI to 21AO, creates a scheme for the pre-recording of all of the evidence of an affected child at a preliminary hearing. The tape of the evidence is then used at the trial or hearing instead of the child appearing as a witness.

The scheme reflects the purposes of the new division by ensuring that, if possible, a child's evidence is taken at the earliest opportunity, and once given, can be used in the event of a rehearing or retrial of the same matter. Taking a child's evidence through pre-recording does not affect the admissibility of evidence, for example, a statement admitted under section 93A may still be used as a child's evidence-in-chief.

Section 21AI lists the types of proceedings to which subdivision 3 applies. Pre-recording is available for summary trials and trials on indictment for relevant offences, whether or not the proceeding also relates to other offences. It is also available for committal proceedings, if the magistrate so directs under section 21AG. The subdivision does not apply to civil proceedings, or to a child who is a witness for the defence.

For trials on indictment, section 21AJ requires the indictment to be presented before the evidence can be taken. This will ensure that the charges are settled and particularised and that the examination is conducted on the indictment to which the accused will be called upon to plead.

Section 21AK provides that the affected child's evidence is to be taken and videotaped at a hearing presided over by a judicial officer. It then sets out the types of orders that can be made to facilitate the operation of the section. For example, if the court of trial does not have the facilities to enable the evidence of the child to be taken and recorded, then the hearing can be adjourned to another court, or to another place that enables the evidence to be taken and recorded.

Section 21AL permits the presiding judicial officer to give any necessary orders to enable the child's evidence to be taken and recorded, including whether the child is to be in the court room or a separate room, and who may be present with the child, and enables the hearing to be adjourned from time to time until the child's evidence is completed.

Under section 21AM, the video-taped recording of the child's evidence is as admissible at the proceeding for which it was made as if the evidence were given in the usual way at that proceeding. It is also admissible at any rehearing, re-trial or appeal, or in another proceeding in the same court for the relevant charge, or in a civil proceeding arising from the commission of the relevant offence (such as an application for criminal compensation), unless the later court otherwise orders.

In some cases, a witness who has completed their evidence and has been excused may be recalled to give further evidence. Section 21AN allows a party to apply to the court for an order that a child who has given pre-recorded evidence attend at a further preliminary hearing or at the proceeding itself to give further evidence. The court may only make the order if it is satisfied that if the child were giving evidence in the ordinary way he or she could be recalled, and that it is in the interests of justice to make the order.

It is the intention of subdivision 3 that ordinarily an affected child will give their evidence at a preliminary hearing. However, section 21AO recognises that in some cases there might be good reason for not taking a child's evidence in this way, for example if a preliminary hearing would add to the delay in the matter being dealt with. If the child's evidence is not pre-recorded, then subdivision 4 applies.

New subdivision 4 comprises sections 21AP to 21AR. Section 21AP sets out the types of proceedings to which the subdivision applies. As well as criminal proceedings, the subdivision applies to civil proceedings arising out of the commission of a relevant offence.

Section 21AQ provides for the mandatory use of an audio visual link, if available, or a screen when an affected child is giving evidence. Where an audio visual link is used, and recording facilities are available, then the evidence must also be recorded. As with evidence pre-recorded under subdivision 3, the tape is admissible in any rehearing, re-trial or appeal, or in another proceeding in the same court for the relevant charge, or in a civil proceeding arising from the commission of the relevant offence (such as an application for criminal compensation), unless the later court otherwise orders.

If a child is able and wishes to give evidence in the usual way in the defendant's presence without the use of an audio visual link or a screen, then under section 21AR, the party calling the witness may apply to the court for an order that section 21AQ does not apply to the child.

New subdivision 5 comprises sections 21AS to 21AX, which are a number of general provisions relating to the evidence of affected child witnesses.

In order to ensure that the appropriate arrangements can be made, section 21AS requires the prosecution or applicant to advise the court before the proceeding starts, or when an indictment is presented, that an affected child may give evidence in the proceeding. However, a failure to do so does not affect the status of the witness as an affected child, or the admissibility of the evidence.

If an affected child is required to identify a person or a thing while giving evidence, section 21AT requires the court to ensure that the identification is conducted in a way that does not defeat the purpose of any special measures used for the benefit of the witness.

Under section 21AU, the court is required to exclude non-essential persons from the courtroom in which an affected child is giving evidence

about a sexual offence. This is consistent with existing section 5 of the *Criminal Law (Sexual Offences) Act 1978*. "Essential persons" include the parties and their representatives, court staff, and a support person for the witness. The court may also permit other persons with a proper interest in the proceeding to be present, if that person's presence would not be prejudicial to the interests of the child. For example, a person conducting research could apply to be present in court while an affected child gives evidence.

For an offence of violence, the court must exclude non-essential persons, unless satisfied that the interests of justice require the evidence to be heard in open court.

Section 21AV creates an entitlement for an affected child to have a support person while giving evidence. The support person is to be in close proximity to the child and within the child's sight, while the child is giving evidence. The court must approve the person who is to be the child's support person.

Section 21AW sets out the instructions to be given to a jury if any of the special measures provided for in division 4A is used. The jury is to be advised that –

- the use of the measure is routine and that they should not draw any inference as to the defendant's guilt; and
- the probative value of the evidence is not increased or decreased; and
- the evidence is not to be given any greater or lesser weight.

Section 21AX provides that the court may make any orders, directions or rulings to facilitate the operation of the division.

The new division 4B (Dealing with a recording) comprises sections 21AY to 21AZC.

Section 21AY provides the definitions for division 4B. A "recording" is a video-taped recording of a special witness's evidence made under section 21A; or a video-taped recording of an affected child's evidence made under division 4A, subdivision 3 or 4.

Section 21AZ allows a party to apply to edit a copy of a recording of a child's evidence. The purpose of this section is to allow tapes to be edited to facilitate their admissibility. The original tape cannot be edited or changed in anyway.

Section 21AZA allows the presiding judicial officer to make appropriate orders about the use and safe-keeping of a recording of evidence, including directions about who may have access to the recording.

Section 21AZB creates an offence in relation to a person who, without authority, possesses a recording, supplies a recording to another person, or plays, copies or erases a recording. A person has authority if the person is authorised by a judicial officer under section 21AZA, or if the person is a public official and does the act for a purpose connected with the proceeding for which the recording was made or in which it is admissible.

Section 21AZC creates an offence in relation to a person who publishes all or part of a recording, unless the relevant court has given approval.

Clause 61 omits the definition of “audio visual link” from section 39C as this definition is now contained in the schedule.

Clause 62 amends section 83 by omitting the word “stipendiary”.

Clause 63 amends section 93A (Statement made before proceeding by child under 12 years or intellectually impaired person) to extend the application of the section to children under 16 as well as young people aged 16 or 17 who satisfy the definition of “special witness” under section 21A; and to remove the requirement that a statement made to a person other than a person investigating be made soon after the occurrence of the fact to which the statement relates.

The new subsection (3A) provides that for a committal proceeding for a relevant offence, the requirement that the child be available to give evidence in the proceeding does not apply to an affected child.

Clause 64 inserts a new section 93AA (Unauthorised possession of, or dealing in, s93A criminal statements). This section creates an offence in relation to a person who, without authority, has a section 93A criminal statement in their possession, or who supplies the statement to another person, or who copies, or permits a person to copy, the statement. A person has authority if the act is done for a legitimate purpose connected with the proceeding for which the statement was made. A section 93A criminal statement is a statement made to a person investigating an alleged offence and in anticipation of a criminal proceeding about the offence, and which is potentially admissible under section 93A.

Clause 65 amends section 131 (Witness for defence to be sworn) to provide that this section is subject to the new scheme in part 2, division 1A, dealing with the competency of witnesses and the capacity to be sworn.

Clause 66 inserts a new heading in part 9, before section 136.

Clause 67 inserts a new part 9, division 2 containing the transitional provisions for the *Evidence (Protection of Children) Amendment Act 2003*.

Section 137 defines the terms "amending Act", "commencement day" and "originating step".

Section 138 provides that the new section 8(3) applies to a communication made before or after the Act commences.

Section 139 provides that the new section 9D applies to evidence admitted under the previous section 9.

Section 140 provides that the new scheme limiting the circumstances in which an affected child is required to attend at committal applies only if the defendant was arrested or summonsed or served with a notice to appear after the relevant sections commence.

Section 141 provides that in relation to a summary trial, the new scheme for pre-recording an affected child's evidence applies only if the defendant was arrested or summonsed or served with a notice to appear after the relevant sections commence.

Section 142 provides that in relation to a trial on indictment, the new scheme for pre-recording an affected child's evidence applies only if the indictment was presented after the relevant sections commence.

Clause 68 inserts a new schedule 3 (Dictionary).

PART 11—AMENDMENT OF JUSTICES ACT 1886

Clause 69 provides that this part amends the *Justices Act 1886* .

Clause 70 inserts new definitions in section 4 to accommodate the changes to Part 9 (Decisions from appeals from justices).

Clause 71 inserts a new section 41 in a new division 1A of Part 4 (General Procedure) that informs that the laws relating to prosecution disclosure are set out in the Criminal Code, chapter 62, chapter division 3.

Clause 72 amends section 83A (Direction hearing) to include reference to a Magistrate making a direction about disclosure and also for the

appropriate arrangements in committal proceedings for the giving of evidence by affected child witnesses.

Clause 73 corrects an erroneous reference in section 110A (13A) and inserts a new subsection (16), to inform that an affected child's evidence at committal is to be taken under part 2, division 4A of the *Evidence Act 1977*.

Clause 74 amends section 154 (Copies of record). Section 154 currently permits a clerk of the court to provide copies of depositions, photographs or other exhibits in a proceeding (including a committal proceeding) to any person having sufficient interest. The provision is now amended to provide that a person cannot obtain copies of sensitive evidence (as defined in section 590AF of the Criminal Code), statements made under section 93A of the *Evidence Act 1977* or recordings defined under section 21AY of the *Evidence Act 1977*. Copies of this material may only be obtained under the new prosecution disclosure provisions or court order.

Clause 75 makes substantial amendments to the present provisions for appeals to a single judge of the District Court of Queensland. The procedure for appealing to a District Court judge has been streamlined. Major changes to Part 9 include:

- To start an appeal the appellant must file a notice of appeal in a District Court registry rather than in the Magistrates Court.
- Permitting appellants in remote regions to leave a notice of appeal at a Magistrates Court.
- The procedure for release of convicted appellants by recognisance has been abolished. To ensure imprisoned appellants have easy access to bail both the Magistrates and District Courts are empowered to hear bail applications when a person has filed an appeal under section 222.

A new section 221 is inserted that sets out new definitions for the new division 1.

A new section 222 (Appeal to a single judge) is inserted that permits a person to appeal within 1 month of an order to a District Court Judge save for the exceptions set out in section 222(2). These exceptions echo those in the existing legislation:

- Section 222(2)(a) is the equivalent of the old section 222(1B),
- Section 222(2)(b) is the equivalent of the old section 222(1A),

- Section 222(2)(c) is the equivalent of the old section 222(2)(e).

Section 222(3) provides that appellants must file a notice of appeal in a District Court registry in the district in which the appeal must be decided under section 222(9) (if the appellant is in custody – the District Court district that the appellant is in custody) or the *District Court of Queensland Act 1967*. Section 116 of the *District Court of Queensland Act 1967* sets out the venue for hearing of appeals. These venues are either:

- the district (as defined in section 116(4)) where the order was made,
- a place agreed to by the parties, or
- a place provided for by another Act.

There may be more than one District Court registry in the district in which the order was made. For example, the Magistrates Court at Beenleigh is in the Southern District. District Court registries in this District are at Brisbane, Beenleigh, Southport and Ipswich. In these circumstances, the appellant may lodge an appeal at the District Court registry of their choice. However, section 117 of the *District Court of Queensland Act 1967* permits transfer of hearings.

Section 222(3) – (7) sets out the procedures for starting an appeal in the District Court Registry. Sections (4) and (5) permit notices of appeal left with the clerk of the court of the Magistrates Court or the general manager of prisons to be deemed to be filed in the District Court Registry.

Section 222(8) sets out what a notice of appeal must contain.

New section 222A (Stay of particular matters) replicates section 670 of the Criminal Code to stay, unless otherwise ordered, the payment of restitution or compensation payments and the operation of section 26(1) of the *Sale of Goods Act* 1896 until the expiration of the appeal period. Section 26(1) revests property in stolen goods following the conviction of an offender.

New section 222B provides for the conveying of documents relating to the appeal to the District Court that is the venue of the appeal. There are three scenarios:

- If a notice of appeal is left at the Magistrates Court, the clerk of the court must send the notice of appeal and the relevant file to the relevant registrar (defined in section 221) within 7 days;

- If the notice of appeal is given to the general manager of a prison, then that manager must send the notice of appeal to the relevant registrar within 7 days; and
- If the notice of appeal is filed in the District Court registry, or sent by the general manager, then the registrar must request the court file within 7 days. Such request must be met by a clerk of the court within 7 days.

New section 222C sets out the requirements for contact details for appellants that must be provided to the registrar. This provision is similar to rule 17 of the Uniform Civil Procedure Rules 1999.

New section 222D sets out the duty of the relevant registrar to give notice of appeal and appeal hearing. Previously, the obligation to serve the respondent was on the appellant. However, now the appellant has the obligation to identify the respondent and provide their address. Under section 222D(1) the relevant registrar will notify the respondent of the appeal and give a copy of the notice of appeal.

New section 222E provides that where orders are stayed under sections 222A, the registrar must give notice of the hearing of the appeal to an interested person (the person in whose favour the order was made or who benefited from the operation).

Clause 76 inserts a new section 224 that supplements the existing powers of a judge to adjourn an appeal. A District Court judge may, on application or the judge's own initiative:

- extend the time for filing a notice of appeal;
- make orders and give directions about service of any notice and about any procedure;
- amend the notice of appeal; or
- adjourn the appeal.

Section 224(5) clarifies that the powers to give directions and orders does not affect the responsibility or power of the Chief Judge of the District Court to ensure the orderly and expeditious exercise of the jurisdiction of the court.

Clause 77 inserts a new section 225 that sets out the powers of a judge on hearing an appeal.

Clause 78 amends section 228 by omitting “if amendable” from the heading. Section 228(2) is also omitted. The power of amendment of a notice of appeal is now set out in section 224.

Clause 79 inserts a new section 228A that requires a registrar to issue a warrant when an appeal is discontinued, and the appellant was sentenced to a term of imprisonment, to commit the appellant to prison to serve the term of imprisonment.

Clause 80 inserts a new section 229 changing the process of striking out appeals. Section 229 (1) now permits an appeal to be struck out if there is delay in prosecuting the appeal or failure to take appropriate steps. An appeal can only be struck out if the applicant is given 10 days notice of the date of hearing. Section 229(3) also permits the judge to strike out an appeal if the appellant fails to appear on the date of the hearing provided that notice was sent to the appellant’s address for service at least 10 days before the date for hearing.

Clause 81 amends section 231 by removing references to recognisances.

Clause 82 omits section 241 (Absconding appellant may be arrested).

Clause 83 inserts new Division 1 heading in part 11 .

Clause 84 inserts a new Division 2 heading in part 11 (*Evidence (Protection of Children) Amendment Act 2003*). A new section 273 sets out the transitional arrangements for appeals that are continuing after the commencement of these amendments.

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