

# **Criminal Law Amendment (Sexual Assault and Other Matters) Bill 2004**

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Western Australia

LEGISLATIVE ASSEMBLY

*(As amended in Committee)*

**Criminal Law Amendment (Sexual Assault and  
Other Matters) Bill 2004**

**A Bill for**

**An Act to amend —**

- *The Criminal Code*; and
  - *the Evidence Act 1906*,
- and for related purposes.**

The Parliament of Western Australia enacts as follows:

## **Part 1 — Preliminary**

**1. Short title**

This Act may be cited as the *Criminal Law Amendment (Sexual Assault and Other Matters) Act 2004*.

5 **2. Commencement**

- (1) This Act comes into operation on a day fixed by proclamation.
- (2) Different days can be fixed under subsection (1) for different provisions.

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**Part 2 — Amendments to *The Criminal Code***

**3. The Act amended**

The amendments in this Part are to *The Criminal Code*\*.

[\* Reprint 10 as at 7 February 2003 (see the Schedule to the  
5 *Criminal Code Act 1913* appearing as Appendix B to the  
*Criminal Code Compilation Act 1913*).

For subsequent amendments see *Western Australian  
Legislation Information Tables for 2003, Table 1, p. 95 and  
Acts Nos. 50 of 2003 and 4 of 2004.*]

10 **4. Section 585 amended**

(1) Section 585 is amended as follows:

(a) by inserting before “Except” the subsection designation  
“(1)”;

15 (b) by deleting “offences:” and inserting instead —  
“ offences. ”;

(c) by deleting “Provided that when” and inserting  
instead —

“

(2) When

20

”.

(d) by deleting “In any such case” and inserting instead —

“

(3) If charges are joined under subsection (2),

”;

25

(e) by deleting “But, if in any such case” and inserting  
instead —

“

(4) But, if charges are joined under subsection (2) and

”;

30

(f) by inserting after “court may” —

“ , in proceedings under section 611A, ”.

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- (2) At the end of section 585 the following subsections are inserted —

“

5

- (5) A court may decide that any likelihood of the accused person being prejudiced by the joinder of charges of offences can be guarded against by a direction to the jury.

The court can so decide —

10

- (a) irrespective of the nature of the offences charged; and  
(b) even if evidence on one of the charges is inadmissible on another.

15

- (6) In considering any likelihood of the accused person being prejudiced by the joinder of charges of offences of a sexual nature, a court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

20

- (7) Despite anything in this section and any rule of law to the contrary, if charges of offences of a sexual nature are joined under subsection (2), it shall be presumed that those charges are triable together.

25

That presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

”

**5. Section 611A amended**

After section 611A(4) the following subsection is inserted —

“

5 (5) Without limiting section 610, if after an indictment has been presented to a court the court in proceedings under subsection (1) —

(a) makes a requirement or gives a direction under section 585(4); or

10 (b) refuses to make a requirement or give a direction under section 585(4),

the court is to adjourn the trial to enable any appeal under section 688 to be made and determined.

”.

**6. Section 688 amended**

15 (1) Section 688 is amended by inserting before subsection (2)(b) —

“

(aa) against any decision referred to in section 611A(5)(a); or

”.

20 (2) After section 688(2) the following subsections are inserted —

“

(3) A person charged with 2 or more offences in the same indictment may appeal to the Court of Criminal Appeal against any decision referred to in section 611A(5)(b).

25 (4) If a person charged with 2 or more offences in the same indictment is convicted of any of those offences, an appeal by the person to the Court of Criminal Appeal against that conviction on any ground that relates to the joinder of the charges in the indictment cannot be  
30 allowed on that ground if the person has already exercised a right of appeal under subsection (3) (the “preliminary appeal”) except on the basis of relevant

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matters that emerged at any time after the making of the decision that was the subject of the preliminary appeal.

”.

5 **7. Section 690 amended**

After section 690(3) the following subsections are inserted —

“

10 (4) On an appeal under section 688(2)(aa) the Court may affirm or reverse the decision or may make any requirement or give any direction that ought to have been made or given in the first instance.

15 (5) On an appeal under section 688(3) the Court may affirm the decision or may make any requirement or give any direction that ought to have been made or given in the first instance.

”.

**8. Section 695 amended**

After the first paragraph of section 695(1) the following paragraph is inserted —

20 “

In the case of an appeal under section 688(2)(aa) or (3) notice of appeal must be given within 7 days after the decision complained of and cannot be given after a jury is sworn.

25

”.

---

**Part 3 — Amendments to the *Evidence Act 1906***

**9. The Act amended**

The amendments in this Part are to the *Evidence Act 1906*\*.

[\* *Reprint 12 as at 10 October 2003.*

5        For subsequent amendments see *Western Australian  
Legislation Information Tables for 2003, Table 1, p. 128 and  
Act No. 4 of 2004.*]

**10. Sections 19A to 19M inserted**

10       (1) After section 19 the following heading and sections are  
inserted —

“

*Sexual assault communications privilege*

**19A. Terms used in these provisions**

- 15       (1) In this section and sections 19B to 19M —
- “application for leave”** means an application for leave  
to disclose or require disclosure of a protected  
communication in, or in connection with, any  
criminal proceedings;
- 20       **“counselling communication”** means a  
communication —
- (a) made in confidence by a person upon or in  
respect of whom sexual assault was  
committed or is alleged to have been  
committed (the **“complainant”**) to another  
25       person (the **“counsellor”**) who is  
counselling the complainant in relation to  
any harm the complainant may have  
suffered;
- (b) made in confidence to or about the  
30       complainant by the counsellor in the course  
of the counselling process;

**s. 10**

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- (c) made in confidence about the complainant by a support person in the course of the counselling process; or
- 5 (d) made in confidence by or to the counsellor to or by another person who is counselling, or has at any time counselled, the complainant, and includes a communication made through an interpreter;
- 10 **“counsels”** has the meaning given to that term in subsection (2);
- “disclose”** a protected communication means to disclose, or adduce or produce anything that would disclose —
- 15 (a) the protected communication; or
- (b) the contents of a document recording the protected communication;
- 20 **“harm”** includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear);
- “protected communication”** means a counselling communication made by, to or about a complainant and includes —
- 25 (a) a counselling communication made before the commission, or alleged commission, of sexual assault;
- (b) a counselling communication not made in connection with sexual assault or alleged sexual assault or any condition arising from sexual assault or alleged sexual assault; and
- 30 (c) a counselling communication made before the protection provisions were inserted into this Act;

**“protected person”**, in relation to a protected communication, means —

- (a) the complainant;
- 5 (b) any person who made the protected communication; or
- (c) an interpreter through whom the protected communication was made;

**“require disclosure”** of a protected communication includes —

- 10 (a) to require (whether by the issue of a subpoena or any other process or procedure) the production of a document recording the protected communication; and
- 15 (b) to seek an order of the court that will, if made, result in the disclosure of the protected communication or the production of a document recording the protected communication;

**“support person”** means a parent, carer or other supportive person who is present when a person counsels the complainant to facilitate communication between the complainant and the counsellor or to further the counselling process in some other way;

25 **“supporting affidavit”** means the affidavit accompanying an application for leave;

**“the protection provisions”** means this section and sections 19B to 19M.

- (2) A person **“counsels”** another person if —
  - 30 (a) the person has undertaken training or study or has experience that is relevant to the process of counselling persons who have suffered harm; and

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---

- (b) the person —
- (i) listens to and gives verbal or other support or encouragement to the other person; or
  - (ii) advises, gives therapy to or treats the other person,  
whether or not for fee or reward.
- (3) In the protection provisions, a reference to a document recording a protected communication —
- (a) is a reference to any part of the document that records a protected communication or any report, observation, opinion, advice, recommendation or other matter that relates to the protected communication made by a protected person; and
  - (b) includes a reference to any copy, reproduction or duplicate of that part of the document.
- (4) For the purposes of the definition of “counselling communication” in subsection (1), a communication can be regarded as being made in confidence even if it is made in the presence of a support person or through or in the presence of an interpreter.

**19B. Protected communications recorded electronically**

- For the purposes of the protection provisions, if —
- (a) a document recording a protected communication is stored electronically; and
  - (b) a written document recording the protected communication could be created by use of equipment that is usually available for retrieving or collating such stored information,
- the document stored electronically is to be dealt with as if it were a written document so created.

**19C. Protected communications not to be disclosed in criminal proceedings except with leave of court**

- 5
- (1) A person cannot disclose or require disclosure of a protected communication in, or in connection with, any criminal proceedings except with, and in accordance with, the leave of the court.
- 10
- (2) If a subpoena that purports to require the disclosure of a protected communication is issued without the leave of the court required by subsection (1), the subpoena is of no effect.
- 15
- (3) An application for leave must be made to the court in writing and must be accompanied by an affidavit stating why the applicant has a legitimate forensic purpose for having leave to disclose or require disclosure of the protected communication.
- 20
- (4) If the court considers that the supporting affidavit establishes a prima facie case that the applicant has a legitimate forensic purpose for having the leave, the court is to —
- (a) fix a day and time for hearing the application; or
- (b) determine that the application will be heard during the criminal proceedings referred to in subsection (1),
- 25
- and send notification of when the application will be heard, together with copies of the application and the supporting affidavit, to —
- (c) the applicant and each other party;
- (d) each protected person identified in the application or the supporting affidavit; and
- 30
- (e) any other person identified in the application or the supporting affidavit as a person to whom the protected communication was made.

**s. 10**

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- 5 (5) If the court does not consider that the supporting affidavit establishes a prima facie case that the applicant has a legitimate forensic purpose for having the leave, the court is to notify the applicant accordingly and the application for leave is taken to have been refused.
- 10 (6) Section 19E(2) and (3) apply in relation to the court's consideration of whether the supporting affidavit establishes a prima facie case that the applicant has a legitimate forensic purpose for having the leave.
- (7) In this section —  
“party” means a party to the criminal proceedings referred to in subsection (1).

**19D. Procedure on hearing of application for leave**

- 15 (1) A protected person or a person referred to in section 19C(4)(e) may appear, or be represented by counsel or solicitor, at the hearing of an application for leave and is to be informed of that right when a notification is sent under section 19C(4)(d) or (e).
- 20 (2) If there is a jury, the court is to hear and determine an application for leave in the absence of the jury.

**19E. Application for leave to be dismissed if there is no legitimate forensic purpose for it**

- 25 (1) On the hearing of an application for leave, leave is to be refused by the court if the applicant does not satisfy the court —
- (a) that the applicant has a legitimate forensic purpose for having leave to disclose or require disclosure of the protected communication; and
- 30 (b) that other evidence to the same effect as —
- (i) the protected communication; or

(ii) the contents of the document recording the protected communication, as the case may be, is not available.

5 (2) In order to establish that the applicant has a legitimate forensic purpose under subsection (1)(a) it is not sufficient for the applicant —

(a) to assert, without proving, one or more of the following —

- 10 (i) that the protected communication discloses a prior inconsistent statement of the complainant;
- 15 (ii) that the protected communication relates to the credibility of the complainant or another witness in the criminal proceedings;
- 20 (iii) that the protected communication relates to the reliability of the testimony of the complainant merely because the complainant has received or is receiving counselling;

or

(b) to prove one or more of the following —

- 25 (i) that the protected communication exists;
- (ii) that the protected communication relates to activity that is the subject of the criminal proceedings;
- (iii) that the protected communication was made close in time to the activity that is the subject of the criminal proceedings;
- 30 (iv) that the protected communication reveals allegations of the commission of sexual assault against the complainant by a person other than the applicant.

**s. 10**

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- (3) Subsection (2) does not limit —
- (a) the matters which the court can consider in deciding whether the applicant has a legitimate forensic purpose under subsection (1)(a); or
  - (b) the grounds on which the court can decide that the applicant does not have a legitimate forensic purpose under subsection (1)(a).

**19F. Determination of application**

- (1) If the court is satisfied as to the matters set out in section 19E(1)(a) and (b), the court is to determine the application for leave.
- (2) The court may, if it thinks it necessary in order to enable it to determine the application, conduct a preliminary examination of the evidence that is the subject of the application.
- (3) For the purpose of a preliminary examination the court may require a protected person —
- (a) to provide written answers to questions; or
  - (b) to appear for oral examination.
- (4) A preliminary examination is to be conducted in the absence of the parties.

**19G. Public interest test**

- (1) In determining the application for leave, the court may grant leave to disclose, or require the disclosure of, the protected communication if, and only if, the court determines that it is in the public interest to do so.
- (2) For the purposes of subsection (1) the court is to have regard to the following —
- (a) the extent to which disclosing, or requiring the disclosure of, the protected communication is

- necessary to allow the applicant for leave to  
make a full defence;
- 5 (b) whether the evidence of the protected  
communication or the contents of the document  
recording the protected communication will  
have substantial probative value;
- (c) the likelihood that disclosing, or requiring the  
disclosure of, the protected communication will  
affect the outcome of the proceedings;
- 10 (d) the public interest in ensuring that complainants  
receive effective counselling, and the extent to  
which failure to preserve the confidentiality of  
protected communications may dissuade  
complainants from seeking counselling or  
15 diminish the effectiveness of counselling;
- (e) the public interest in ensuring that adequate  
records are kept of counselling  
communications;
- (f) the likelihood that disclosing, or requiring the  
disclosure of, the protected communication will  
20 cause harm to the complainant, and the nature  
and extent of that harm;
- (g) any other matter that the court considers  
relevant.

25 **19H. Effect of consent**

- (1) The protection provisions do not prevent a protected  
communication from being disclosed or being required  
to be disclosed in, or in connection with, any criminal  
proceedings if the complainant has consented to the  
30 disclosure.
- (2) Consent is not effective for the purposes of this section  
unless —
- (a) it is given in writing; and

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(b) it is given expressly for the purposes of the protection provisions.

(3) This section does not apply if the complainant is a child.

5       **19I. Loss of sexual assault communications privilege: misconduct**

10       (1) The protection provisions do not prevent the production or adducing of evidence of a communication made, or the production of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

15       (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that —

      (a) the fraud, offence or act was committed; and

      (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

20       the court may find that the communication was so made or document so prepared.

**19J. Ancillary orders**

25       Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of, or the contents of a document recording, a protected communication, the court may —

      (a) order that all or part of the evidence be heard or document produced in camera;

30       (b) make any orders relating to the production, inspection, copying or reproduction of the

document that, in the opinion of the court, are necessary to protect the safety and welfare of any protected person;

- 5 (c) make any orders relating to the suppression of publication of all or part of the evidence given before the court that, in its opinion, are necessary to protect the safety and welfare of any protected person; and
- 10 (d) make any orders relating to disclosure of identity information that would tend to identify any protected person that, in the opinion of the court, are necessary to protect the safety and welfare of any protected person.

15 **19K. Inadmissibility of evidence that must not be adduced or given**

Evidence that, because of the protection provisions, cannot be disclosed or required to be disclosed in proceedings is not admissible in the proceedings.

20 **19L. Application of other laws**

- 20 (1) The protection provisions do not affect the operation of any rule of law in relation to evidence in criminal proceedings except to the extent that they expressly or necessarily have that effect.
- 25 (2) Without limiting subsection (1), the protection provisions do not affect the operation of a rule of law so far as it relates to the inspection of a document required to be produced in, or in connection with, criminal proceedings.
- 30 (3) Subject to subsection (4), sections 238 and 239 of the *Children and Community Services Act 2004* do not apply to the production or disclosure of a protected communication in criminal proceedings.

**s. 10**

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- 5 (4) If in criminal proceedings leave is given under the protection provisions to require disclosure of a departmental record as defined in subsection (1) of section 238 of the *Children and Community Services Act 2004*, subsections (5) to (8) of that section apply as if the departmental record had been produced in response to a requirement referred to in subsection (2) of that section.
- 10 (5) The protection provisions do not affect the operation of section 240 of the *Children and Community Services Act 2004*.

**19M. Regulations as to disclosure of protected communications**

The Governor may make regulations as to —

- 15 (a) the forms to be used for an application for leave and the supporting affidavit;
- (b) the manner in which a protected communication is to be described in an application for leave or the supporting affidavit;
- 20 (c) other matters to be included in an application for leave or the supporting affidavit;
- (d) the procedure relating to an application for leave; and
- 25 (e) any other matter that is necessary or convenient to be prescribed for the purposes of the protection provisions.

”.

**11. Section 26 replaced**

Section 26 is repealed and the following section is inserted instead —

“

5

**26. Improper questions**

(1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is —

(a) misleading; or

10

(b) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Subsection (1) extends to a question that is otherwise proper if the putting of the question is unduly annoying, harassing, intimidating, offensive or oppressive.

15

(3) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account —

20

(a) any relevant condition or characteristic of the witness, including age, language, personality and education; and

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

”.

25 **12. Section 27 amended**

Section 27 is amended as follows:

(a) in paragraph (a) by deleting “forbidden or”;

(b) in paragraph (b) by deleting “warned” and inserting instead —

30

“ informed ”.

**s. 13**

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**13. Section 31A inserted**

After section 31 the following section is inserted —

“

**31A. Propensity and relationship evidence**

5

(1) In this section —

“**propensity evidence**” means —

10

- (a) similar fact evidence or other evidence of the conduct of the accused person; or
- (b) evidence of the character or reputation of the accused person or of a tendency that the accused person has or had;

15

“**relationship evidence**” means evidence of the attitude or conduct of the accused person towards another person, or a class of persons, over a period of time.

20

(2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers —

25

- (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
- (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

30

(3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

”.

**14. Section 106A amended and consequential amendments**

- (1) Section 106A is amended by inserting in the appropriate alphabetical positions —

“

5

**“serious sexual offence”** means —

10

- (a) an offence under a section or Chapter of *The Criminal Code* mentioned in Part B of Schedule 7 for which the maximum penalty that may be imposed is 7 years, or more than 7 years;

15

- (b) an offence under a repealed section of *The Criminal Code* if —
- (i) the acts or omissions that constituted an offence under that section are substantially the same as the acts or omissions that constitute an offence (the **“new offence”**) under a section or Chapter of *The Criminal Code* mentioned in Part B of Schedule 7; and

20

- (ii) the maximum penalty that may be imposed for the new offence is 7 years, or more than 7 years;

or

25

- (c) an offence of attempting to commit an offence described in paragraph (a) or (b);

**“special witness”** means a person declared to be a special witness under section 106R(1);

**“visually recorded interview”** has the meaning given to that term in section 106HA(3).

30

”.

**s. 14**

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(2) Section 106A is amended as follows:

(a) in the definition of “video-taped recording” by deleting “video-taped” and inserting instead —

“ **visual** ”;

5 (b) in the definition of “video-taped recording of evidence” —

(i) by deleting “video-taped” in the first place where it occurs and inserting instead —

“ **visual** ”;

10 (ii) by deleting “video-taped” in the second place where it occurs and inserting instead —

“ visual ”; and

(iii) in paragraph (c), by deleting “or (5).” and inserting instead —

15 “ or (5); ”.

(3) The provisions set out in the Table to this subsection are amended by deleting “video-tape” and inserting instead —

“ a visual recording ”.

**Table**

s. 106H(2c)	s. 106R(4)(b)(i)
s. 106I(1)(b)(i)	s. 106T(1) and (2)
s. 106N(3a) and (5)	

20 (4) The provisions set out in the Table to this subsection are amended by deleting “video-taped” and inserting instead —

“ visual ”.

**Table**

s. 106I(1)(b)(ii)	s 106MA(1)(a) and (b), (2) and (3)
s. 106K(1)(b)	s 106MB(1)
s 106M(2)	s. 106R(4)(b)(ii)

(5) Section 106M(1) is amended by deleting “recording of video-taped” and inserting instead —

“ visual recording of ”.

(6) Section 106T(3) is amended as follows:

5 (a) by deleting “video-taped evidence” in the first place where it occurs and inserting instead —

“ evidence on a visual recording ”;

(b) by deleting “video-taped evidence” in the second place where it occurs and inserting instead —

10 “ evidence on the visual recording ”.

**15. Section 106B amended**

Section 106B(2)(b) is amended by deleting “that is over and above the ordinary duty to tell the truth”.

**16. Section 106E amended**

15 Section 106E(1) is amended by deleting “who is under the age of 16 years”.

Note: The heading to section 106E will be altered by deleting “under 16”.

**17. Section 106F amended**

20 Section 106F(1) is amended by deleting “under the age of 16 years”.

Note: The heading to section 106F will be altered by deleting “under 16”.

**18. Section 106G amended**

(1) Section 106G is amended as follows:

25 (a) by inserting before “Where” the subsection designation “(1)”;

(b) by deleting “child who is under 16 years of age” and inserting instead —

“ protected witness ”;

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---

- (c) by deleting “to the child” in both places where it occurs and inserting instead —  
“ to the protected witness ”.

- (2) At the end of section 106G the following subsections are inserted —

“

- (2) Nothing in subsection (1) prevents a protected witness who is not a child from consenting to being cross-examined by the defendant directly.

- (3) In this section —

**“protected witness”** means —

- (a) a child; or  
(b) if the proceeding is for a serious sexual offence, the person upon or in respect of whom it is alleged that the offence was committed, attempted or proposed irrespective of the person’s age.

”.

Note: The heading to section 106G will be altered by inserting “**or sexual offence complainant**” instead of “under 16”.

**19. Section 106H amended**

Section 106H(3) is amended by inserting after “not” —

“ , but does not include a visually recorded interview ”.

**20. Sections 106HA to 106HD inserted**

After section 106H the following sections are inserted —

“

**106HA. Visual recording of interviews with children**

- (1) Section 106HB applies to a visual recording of an interview with a child conducted before or after the coming into operation of section 20 of the *Criminal*

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Act 2004* if —

- 5
- (a) the interview was conducted by a person of a prescribed class who had reason to believe that the child, or another child, had, or may have, suffered physical or sexual abuse; and
  - (b) the manner in which the interview was conducted and recorded meets the prescribed requirements to the prescribed extent.
- 10
- (2) Section 106HB applies to a visual recording of an interview with a child whether or not the interview was conducted with the consent of a parent or guardian of the child.
  - (3) A visual recording of an interview with a child to which section 106HB applies is referred to as a “**visually recorded interview**”.
- 15

**106HB. Admissibility in criminal proceedings of a visual recording of an interview with a child**

- 20
- (1) In any proceeding for an offence (the “**proceeding**”) one or more visually recorded interviews may be admitted as the whole or a part of the evidence in chief of a witness —
    - (a) irrespective of the age or maturity of the witness at the time of the proceeding; and
    - 25 (b) even if the witness is capable of giving evidence at the proceeding.
  - (2) A visually recorded interview is not to be admitted in the proceeding under subsection (1) unless —
    - 30 (a) a transcript of it has been given to the defendant; and
    - (b) the defendant and his or her counsel have, in accordance with the regulations, been given a

**s. 20**

---

reasonable opportunity to view the visually recorded interview.

- 5 (3) Neither the defendant nor his or her counsel is entitled to have possession of, or of a copy of —
- (a) a visually recorded interview; or
  - (b) a visual recording of evidence on which a visually recorded interview is recorded or which incorporates a visually recorded interview.
- 10 (4) A visually recorded interview is admissible under subsection (1) to the same extent as if statements made in it by the witness were given orally in the proceeding in accordance with the usual rules and practice of the court concerned.
- 15 (5) If a visually recorded interview is admissible under subsection (1), the judge in the proceeding may give any directions the judge thinks fit as to —
- (a) the presentation of it and the excision of matters from it; and
  - 20 (b) the manner in which further evidence in chief of the witness may be given and in which any cross-examination and any re-examination of the witness is to be conducted in the proceeding.
- 25 (6) A visually recorded interview is not to be admitted under subsection (1) if it has been edited or altered otherwise than in accordance with a direction under subsection (5)(a).
- 30 (7) The following provisions apply if the proceeding is on indictment —
- (a) if a visually recorded interview is admitted under subsection (1), the judge is to instruct the jury that the procedure is a routine practice of

the court and that they should not draw any inference as to the defendant's guilt from the use of the procedure;

- 5 (b) if the judge is deciding whether or not to warn the jury that it may be dangerous to convict on the evidence of the complainant alone because of the length of the period between the offence and the proceeding, the admission under subsection (1) of a visually recorded interview with the complainant is not a relevant factor except to the extent that the length of the period between the offence and the admission of the official visually recorded interview may have affected the ability to test the evidence so admitted;
- 10
- 15 (c) the fact that there was a visually recorded interview that the prosecutor did not adduce under subsection (1) is not to be the subject of comment to the jury by the judge, the defendant or the defendant's counsel.
- 20

**106HC. Regulations about visual recording of interviews with children**

- (1) The Governor may make regulations —
- 25 (a) prescribing classes of persons for the purposes of section 106HA(1)(a) by reference to the offices or positions held by them, or their training or experience, or any combination of those criteria;
- 30 (b) prescribing requirements to be met for the purposes of section 106HA(1)(b), and the extent to which they are to be met, if section 106HB is to apply to a visual recording of an interview with a child;

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- (c) prescribing the manner in which the application of section 106HB to a visual recording of an interview with a child may be proved in proceedings;
  - (d) regulating the playing, broadcasting, custody, possession, storage, copying, transcription, erasure or destruction of a visually recorded interview;
  - (e) regulating the records that are to be kept about a visually recorded interview;
  - (f) providing for access to a visually recorded interview by the prosecutor for the purposes of proceedings referred to in section 106HB;
  - (g) providing for access to and use of a visually recorded interview for the purposes of proceedings in the Children's Court or the Family Court whether or not it has been admitted in evidence under section 106HB;
  - (h) providing for access to and use of a visually recorded interview otherwise than for the purposes of proceedings referred to in section 106HB or paragraph (g); and
  - (i) prescribing any other matter that is necessary or convenient to be prescribed for the purposes of section 106HA or 106HB.
- (2) The regulations may create offences and provide, in respect of an offence so created, for the imposition of a penalty not exceeding a fine of \$100 000 with or without imprisonment for a term not exceeding 12 months.

**106HD. Admissibility of visually recorded interviews generally**

Section 106HB and regulations under section 106HC have effect in addition to, and do not limit the

operation of, any other enactment or rule of law under which a visually recorded interview may be admissible in proceedings.

”.

5 **21. Section 106I amended**

Section 106I(1) is amended by deleting paragraph (a) and “or” after it.

**22. Section 106J repealed and consequential amendments**

- (1) Section 106J is repealed.
- 10 (2) Section 106A is amended in the definition of “video-taped recording of evidence” by deleting paragraph (a).
- (3) Sections 106MA(3)(b), 106S(1) and 106T(1) and (4) are amended by deleting “106J,”.

**23. Section 106K amended**

- 15 (1) Section 106K(1) is amended as follows:
- (a) in paragraph (b), by inserting before “directions” —  
“ subject to section 106HB(3), ”;
- (b) by inserting after “106M” —  
“ but subject to section 106HB(3) ”.
- 20 (2) After section 106K(3) the following subsection is inserted —  
“
- (4) If an order is made under subsection (1), nothing in this section or section 106I prevents a visually recorded interview from being presented under section 106HB as the whole or a part of the affected child’s evidence in chief at the special hearing, and in that event the judge may give directions as to the manner in which the visually recorded interview is to be —
- 25 (a) presented at the special hearing; and

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- (b) recorded on, incorporated with or referred to in the visual recording of the evidence taken at the special hearing.

”.

5 **24. Section 106M amended**

- (1) Section 106M(1) is amended by deleting “Judge” and inserting instead —

“ judge ”.

- 10 (2) Section 106M(3) is repealed and the following subsection is inserted instead —

“

- (3) In subsection (1) —

15 **“judge”** means the judge who presided at the special hearing or a judge who has jurisdiction co-extensive with that judge.

”.

**25. Section 106Q amended**

Section 106Q is amended as follows:

- 20 (a) by inserting after “child” in the first place where it occurs —  
“ or a special witness ”;
- (b) by inserting after “child” in the second place where it occurs —  
“ or special witness ”;
- 25 (c) in paragraph (b), by deleting “affected child’s evidence” and inserting instead —  
“ evidence of the affected child or special witness ”.

Note: The heading to section 106Q will be altered by inserting “**or special witness**” after “child”.

**26. Section 106R amended**

(1) After section 106R(3) the following subsection is inserted —

“

5 (3a) Despite subsection (3), in any proceeding for a serious sexual offence an order must be made under subsection (1) in respect of the person upon or in respect of whom it is alleged that the offence was committed, attempted or proposed unless the court is satisfied —

- 10 (a) that subsection (3) does not apply to the person; and  
(b) that the person does not wish to be declared to be a special witness.

”.

15 (2) After section 106R(6) the following subsection is inserted —

“

20 (7) Where in any proceeding on indictment a person is declared to be a special witness, the judge is to instruct the jury that the making of the declaration is a routine practice of the court and that they should not draw any inference as to the defendant’s guilt from it.

”.

**27. Section 106S amended**

Section 106S(1) is amended by inserting before “106K” —

25 “ 106HB(5), ”.

**28. Section 119 amended**

(1) Section 119(2) is amended as follows:

- (a) after paragraph (b) by deleting “and”;

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(b) after paragraph (c) by deleting the full stop and inserting —

“

; and

5 (d) persons referred to in sections 106E(1) and 106R(4)(a).

”.

(2) After section 119(2) the following subsection is inserted —

“

10 (2a) Without limiting subsection (2), the Governor may also make regulations authorising the payment of fees and expenses to —

15 (a) children and persons who are, or may be, declared to be special witnesses under section 106R(1) in relation to their attendance at, and participation in, programmes in preparation for giving evidence in proceedings referred to in subsection (2)(a) and (b); and

20 (b) persons who accompany and assist children and persons who are, or may be, declared to be special witnesses under section 106R(1) in order to enable them to —

25 (i) attend and give evidence at proceedings referred to in subsection (2)(a) and (b); or

(ii) attend and participate in programmes referred to in paragraph (a).

”.

**29. Schedule 7 amended**

30 (1) Schedule 7 clause 1(1)(b) is amended by deleting “affected child was under the age of 16 years” and inserting instead —

“ complainant was a child ”.

- (2) Schedule 7 clause 4(c) is amended by deleting “child” and inserting instead —  
“ complainant ”.

**Part 4 — Transitional and validation**

**30. Validation of payments**

(1) In this section —

5           “**fee regulations**” means regulations 6(2) and 13 of the  
              *Evidence (Witnesses’ and Interpreters’ Fees and Expenses)*  
              *Regulations 1976.*

10           (2) Any payment purporting to have been made under the fee  
              regulations before the coming into operation of section 28 is  
              taken to have been, and to have always been, as valid as it  
              would have been if section 28 had come into operation before  
              the fee regulations were made.

