



New South Wales

# **Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 No 46**

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New South Wales

# **Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 No 46**

Act No 46, 2015

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An Act to amend the *Criminal Procedure Act 1986* in relation to a pilot scheme to make further provision with respect to the giving of evidence by children in criminal proceedings concerning prescribed sexual offences. [Assented to 5 November 2015]

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**The Legislature of New South Wales enacts:**

**1 Name of Act**

This Act is the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015*.

**2 Commencement**

This Act commences on the date of assent to this Act.

## **Schedule 1      Amendment of Criminal Procedure Act 1986 No 209**

### **Schedule 2 Savings, transitional and other provisions**

Insert after Part 28:

## **Part 29 Provisions relating to child sexual offence evidence pilot scheme**

### **Division 1      Preliminary**

#### **81      Duration of pilot scheme**

This Part operates from 31 March 2016 until 31 March 2019 (or such later date as is prescribed by the regulations).

#### **82      Definitions**

In this Part:

*child* means a child who is under 18 years of age.

*children's champion* or *witness intermediary*—see clause 88.

*Court* means the District Court.

*pre-recorded evidence hearing*—see clause 84.

*prescribed places* means the following:

- (a) Newcastle,
- (b) Downing Centre, Sydney,
- (c) such other places as may be prescribed by the regulations.

*prescribed sexual offence*—see section 3 (1).

*recording* means:

- (a) an audio recording, or
- (b) a video and audio recording.

*witness*, in relation to proceedings to which this Part applies, means a child who is a complainant in the proceedings.

#### **83      Application of Part**

- (1) This Part applies to proceedings before the Court sitting at a prescribed place in relation to a prescribed sexual offence (whenever committed) commenced by a court attendance notice filed or indictment presented:
  - (a) on or after the commencement of this Part, or
  - (b) before the commencement of this Part but only if the matter has not been listed for trial before that commencement.
- (2) This Part applies at any stage of such a proceeding, including an appeal or rehearing.

## **Division 2 Pre-recorded evidence hearings**

### **84 Pre-recorded evidence hearing**

- (1) Subject to any contrary order of the Court, evidence of a witness in proceedings to which this Part applies who is less than 16 years of age when the evidence is given must be given at a hearing under clause 85 (a *pre-recorded evidence hearing*) in accordance with that clause.
- (2) The Court may, on its own motion or on the application of a party to proceedings to which this Part applies, order that evidence of a witness in the proceedings who is 16 or more years of age when the order is made, be given at a pre-recorded evidence hearing in accordance with clause 85.
- (3) The evidence is to be subsequently dealt with in accordance with clause 85.
- (4) The Court may make an order under subclause (1) or (2) only if it is satisfied that it is appropriate to do so in the interests of justice.
- (5) The wishes and circumstances of the witness and the availability of court and other facilities necessary for a pre-recorded evidence hearing to take place are the primary factors to be considered by the Court in determining whether to make an order under subclause (1).
- (6) Without limiting the other factors that the Court may take into account in determining whether to make an order under subclause (1), the Court may also take into consideration the following:
  - (a) sufficiency of preparation time for both parties,
  - (b) continuity and availability of counsel at both the pre-recorded evidence hearing and the trial,
  - (c) any other relevant matter.
- (7) A witness who was a child when an order was made under this clause is entitled to continue to give evidence in accordance with the order even if the person becomes an adult before the conclusion of the proceeding concerned.

### **85 Provisions relating to timing and other aspects of pre-recorded evidence hearing**

- (1) A pre-recorded evidence hearing is to be held as soon as practicable after the date listed for the accused person's first appearance in the Court in the proceedings, but not before the prosecution has made the pre-trial disclosure required by section 141.
- (2) At the pre-recorded evidence hearing, the witness is entitled to give, and may give:
  - (a) evidence in chief—as provided by section 306U, and
  - (b) any other evidence—by closed-circuit television facilities or by means of any other technology prescribed by the regulations for the purposes of this clause.
- (3) The pre-recorded evidence hearing is to be held in the absence of the jury (if any).
- (4) Evidence given at the pre-recorded evidence hearing is to be recorded and subsequently viewed or heard (or both) by the Court in the presence of the jury (if any).
- (5) A witness who gives evidence at a pre-recorded evidence hearing must not, unless the witness otherwise chooses, be present in the Court, or be visible or

audible to the Court by closed-circuit television or other technology while it is viewing or hearing a recording made as provided by section 306U or made at the hearing.

- (6) If evidence in chief is given under subclause (2) (a), section 306U (3) is to be read as if it required the witness to be available for cross-examination or re-examination under subclause (2) (b).

#### **86 Access to recording and transcripts**

- (1) The accused person, and his or her Australian legal practitioner (if any), are not entitled to be given possession of a recording made under this Part or a copy of it (despite anything to the contrary in this Act or the *Evidence Act 1995*).
- (2) However, the accused person and his or her Australian legal practitioner (if any) are to be given reasonable access to the recording to enable them to listen or view the recording, or both.
- (3) This may require access to be given on more than one occasion.
- (4) The regulations may make provision for the procedures to be followed in connection with the giving of access under this clause, and may provide for the giving of access to other persons assisting the accused person or his or her Australian legal practitioner.
- (5) The Court may order that a transcript be supplied to the Court or jury (if any), or both, of all or part of a recording made under this Part if it appears to the Court that a transcript would be likely to aid its or the jury's comprehension of the evidence.

#### **87 Witness may give further evidence only with leave**

- (1) A witness in proceedings to which this Part applies whose evidence is pre-recorded at a pre-recorded evidence hearing cannot give further evidence without the leave of the Court.
- (2) An application for leave may be made by any party to the proceedings.
- (3) The Court must not give leave under subclause (1) unless it is satisfied:
  - (a) that the witness or other party is seeking leave because of becoming aware of a matter of which the party could not reasonably have been aware at the time of the recording, or
  - (b) it is otherwise in the interests of justice to give leave.
- (4) The further evidence is, so far as practicable, to be given by pre-recording at a hearing in the same way as the original pre-recorded evidence unless the Court otherwise directs.
- (5) Subclause (1) applies despite anything to the contrary in this Act or the *Evidence Act 1995*.

### **Division 3 Children's champions**

#### **88 Role of children's champions**

- (1) A person appointed as a *children's champion* (who may also be called a *witness intermediary*) for a witness is to communicate and explain:
  - (a) to the witness, questions put to the witness, and

(b) to any person asking such a question, the answers given by the witness in replying to them,

and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

(2) A children's champion for a witness is an officer of the Court and has a duty to impartially facilitate the communication of, and with, the witness so the witness can provide the witness's best evidence.

#### **89 Appointment of children's champions**

(1) Victims Services in the Department of Justice (or another agency nominated by the Attorney General) is to establish a panel of persons who are suitable persons to be appointed as children's champions.

(2) A person must not be included on a panel unless the person has a tertiary qualification in Psychology, Social Work, Speech Pathology or Occupational Therapy or such other qualifications, training, experience or skills as may be prescribed by the regulations (or both).

(3) For the purposes of proceedings to which this Part applies, the Court:

(a) must (except as provided by subclause (4)) appoint a children's champion for a witness who is less than 16 years of age, and

(b) may, on its own motion or the application of a party to the proceedings, appoint a children's champion for a witness who is 16 or more years of age if satisfied that the witness has difficulty communicating.

(4) The Court is not required to appoint a children's champion if it considers:

(a) there is no person on the panel established under this clause available to meet the needs of the witness, or

(b) it is otherwise not practical to appoint a children's champion, or

(c) it is unnecessary or inappropriate to appoint a children's champion, or

(d) it is not otherwise in the interests of justice to appoint a children's champion.

(5) A person must not be appointed as a children's champion for a witness if the person:

(a) is a relative, friend or acquaintance of the witness, or

(b) has assisted the witness in a professional capacity (otherwise than as a children's champion), or

(c) is a party or potential witness in the proceedings concerned.

(6) The children's champion appointed for a witness must, if requested by the Court, provide a written report, on the communication needs of the witness.

(7) A copy of any such report is to be provided to the parties to the proceedings concerned before the witness gives evidence in the proceedings.

#### **90 Giving of evidence of witness in presence of children's champion**

(1) Subject to the rules of court and any practice direction, in a proceeding to which this Part applies, the evidence of a witness for whom a children's champion has been appointed is to be given in the presence of the children's champion.

- (2) The evidence is to be given in circumstances in which:
  - (a) the Court and any Australian legal practitioner acting in the proceedings are able to see and hear the giving of the evidence and are able to communicate with the children's champion, and
  - (b) except in the case of evidence given under Part 6 of Chapter 6 or this Part by a recording, the jury are able to see and hear the giving of the evidence.
- (3) During any part of the proceedings to which this Part applies in which a children's champion for a witness is present, the children's champion is exempt from any requirement or direction under this Act that requires the proceedings or part of the proceedings to be heard in camera.
- (4) The provisions of the *Evidence Act 1995* apply to and in respect of a person who acts as a children's champion for a witness in the same way as they apply to and in respect of an interpreter under that Act.

**Note.** Section 22 of the *Evidence Act 1995* requires an interpreter to take an oath, or make an affirmation, before acting as an interpreter.
- (5) The regulations may prescribe the form of oath or affirmation to be taken by the children's champion for the purposes of subclause (4).

## **Division 4      General**

### **91    Warnings**

In any proceedings to which this Part applies, in which evidence of a witness is given by a pre-recording or a children's champion is used, the Court must:

- (a) inform the jury that it is standard procedure to give evidence in that way or to use a children's champion in such proceedings, and
- (b) warn the jury not to draw any inference adverse to the accused person or to give the evidence any greater or lesser weight because evidence was given in that way or a children's champion used.

### **92    Relationship to other provisions of this Act**

- (1) Except as provided by this Part, the regulations or rules of court, this Part does not affect the application of this Act to proceedings for offences to which this Part applies.
- (2) In particular, and without limiting subclause (1), the provisions of this Part are in addition to, and do not affect the following:
  - (a) the entitlement of a witness to give, and the giving of, evidence under Parts 5 and 6 of Chapter 6,
  - (b) the rights of the accused person under those Parts,
  - (c) any powers of the Court under those Parts.

### **93    Regulations and rules of court**

- (1) The regulations may make provision for or with respect to the following:
  - (a) the giving, taking, recording and access to evidence of witnesses under this Part,
  - (b) children's champions.
- (2) Rules of court may (subject to the regulations) be made for or with respect to any matter referred to in subclause (1).



**94 Practice directions**

The Chief Judge may give such directions as the Chief Judge considers appropriate in connection with the following:

- (a) the taking and giving of evidence of witnesses under this Part,
- (b) children's champions.

[Second reading speech made in—  
Legislative Assembly on 22 October 2015  
Legislative Council on 28 October 2015]