

Passed by both Houses



New South Wales

# Criminal Procedure Amendment (Evidence) Bill 2005

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Clerk of the Legislative Assembly,  
Legislative Assembly,  
Sydney, , 2005*



New South Wales

## **Criminal Procedure Amendment (Evidence) Bill 2005**

Act No , 2005

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An Act to amend the *Criminal Procedure Act 1986* with respect to evidence in criminal trials, including retrials of sexual assault proceedings; and for other purposes.

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*I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.*

*Chairman of Committees of the Legislative Assembly.*

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

**1 Name of Act**

This Act is the *Criminal Procedure Amendment (Evidence) Act 2005*.

**2 Commencement**

This Act commences on the date of assent.

**3 Amendment of Criminal Procedure Act 1986 No 209**

The *Criminal Procedure Act 1986* is amended as set out in Schedule 1.

**4 Amendment of Criminal Procedure Regulation 2000**

The *Criminal Procedure Regulation 2000* is amended as set out in Schedule 2.

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## Schedule 1      Amendment of Criminal Procedure Act 1986

(Section 3)

### [1] Chapter 6, Part 5, Division 3

Insert after Division 2 of Part 5 of Chapter 6:

### Division 3      Special provisions relating to retrials of sexual offence proceedings

#### 306A Definitions

In this Division:

***accused person***, in relation to any proceedings, means the person who stands, or any of the persons who stand, charged in those proceedings with a sexual offence.

***complainant***, in relation to any proceedings, means the person, or any of the persons, against whom a sexual offence with which the accused person stands charged in those proceedings is alleged to have been committed, and includes:

- (a) in relation to an offence under section 91D, 91E or 91F of the *Crimes Act 1900*, the person under the age of 18 years who is alleged to have participated in an act of child prostitution, and
- (b) in relation to an offence under section 91G of the *Crimes Act 1900*, the person under the age of 18 years who is alleged to have been used for pornographic purposes.

***original evidence*** of the complainant has the meaning given by section 306B.

***sexual offence*** means:

- (a) a prescribed sexual offence, or
- (b) an offence against section 73, 78A, 78B, 80D, 91A, 91B, 91D, 91E, 91F or 91G of the *Crimes Act 1900*, or
- (c) an offence that, at the time it was committed, was a sexual offence under this section, or
- (d) an offence that includes the commission of, or an intention to commit, an offence referred to in paragraph (a), (b) or (c), or
- (e) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b), (c) or (d).

**306B Admission of evidence of complainant in new trial proceedings**

- (1) If a person is convicted of a sexual offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant.
- (2) For the purposes of this Division, the *original evidence* of the complainant means all evidence given by the complainant in the proceedings from which the conviction arose (referred to in this Division as the *original proceedings*), including the evidence given by the complainant on examination in chief in the original proceedings and any further evidence given on cross-examination or re-examination in those proceedings.
- (3) Despite anything to the contrary in the *Evidence Act 1995*, or any other Act or law, a record of the original evidence of the complainant is admissible in the new trial proceedings if:
  - (a) the prosecutor gives written notice to the accused person, in accordance with the regulations, of the prosecutor's intention to tender the record under this section, and
  - (b) the prosecutor gives written notice to the court of the prosecutor's intention to tender the record under this section, and
  - (c) the notices referred to in paragraphs (a) and (b) are given no less than 21 days before the court commences hearing the new trial proceedings or within such other period as the court may allow.
- (4) The hearsay rule (within the meaning of the *Evidence Act 1995*) does not prevent the admission of a record of the original evidence of the complainant under this Division or the use of that record to prove the existence of a fact that the complainant intended to assert by a representation made in the original evidence.
- (5) The court hearing the new trial proceedings does not have any discretion to decline to admit a record of the original evidence of the complainant if it is admissible under this Division.
- (6) However, the court may give directions requiring a record of the original evidence of the complainant to be altered or edited for the purpose of removing any statements that would not be admissible if the original evidence of the complainant had been given orally before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court.

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- (7) In addition, a record of the original evidence of the complainant may be altered or edited in accordance with an agreement between the prosecutor and the accused person or his or her counsel (if any).
  - (8) This Division applies in respect of proceedings for a new trial in which a person stands charged with a sexual offence whether or not the person stands charged with that offence alone or together with any other offence (as an additional or alternative count) and whether or not the person is liable, on the charge, to be found guilty of any other offence.
  - (9) This Division extends to proceedings for a new trial ordered before the commencement of this Division, including new trial proceedings that have been commenced or partly heard.

**306C Complainant not compellable to give further evidence**

If a record of the original evidence of the complainant (or any part of the record) is admitted in proceedings under this Division, the complainant is not compellable to give any further evidence in the proceedings (despite anything to the contrary in this Act or the *Evidence Act 1995*), including for the purpose of any examination in chief, cross-examination or re-examination by or at the request of the accused person or his or her counsel.

**306D Complainant may elect to give further evidence**

- (1) If a record of the original evidence of the complainant (or any part of the record) is admitted in proceedings under this Division, the complainant may, with leave of the court hearing the proceedings, and only if the complainant so chooses, give further oral evidence in the proceedings.
- (2) The court is to give leave to the complainant to give such further evidence in the proceedings only if the court is satisfied, on application by one of the parties to the proceedings, that it is necessary for the complainant to give further oral evidence:
  - (a) to clarify any matters relating to the original evidence of the complainant, or
  - (b) to canvas information or material that has become available since the original proceedings, or
  - (c) in the interests of justice.
- (3) The court is to ensure that the complainant is questioned by any party to the proceedings only in relation to matters that are relevant to the reasons for the grant of leave by the court.

- (4) Subject to subsection (3), if a complainant gives any further oral evidence under this section, the complainant is compellable (for the prosecution or the accused person) to give evidence. This applies despite section 306C.

**306E Form in which record of original evidence of complainant is to be tendered**

- (1) A record of the original evidence of the complainant tendered by the prosecutor under this Division must be the best available record, or be comprised of the best available records, of the original evidence of the complainant, and the record or records concerned must be properly authenticated.
- (2) For the purposes of this section, the *best available record* of the evidence, or any part of the evidence, given by a complainant is:
- (a) an audio visual recording of the evidence, or
  - (b) if an audio visual recording of the evidence is not available, an audio recording of the evidence, or
  - (c) if neither an audio visual recording nor an audio recording of the evidence is available, a transcript of the evidence.
- (3) If the whole or part of the evidence given by the complainant in the original proceedings was given in the form of a recording made by an investigating official, as provided for by the *Evidence (Children) Act 1997*, the best available record of that evidence is the recording viewed or heard by the court in those original proceedings.
- (4) A record of any evidence given by a complainant is *properly authenticated* for the purposes of this section if:
- (a) the record has been authenticated by the court before which the evidence concerned was given or by the registrar or other proper officer of that court in accordance with any directions of the court, or
  - (b) the record has been authenticated by the person or body responsible for producing the record, or
  - (c) the record has been authenticated in any other manner prescribed by the regulations.

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**306F Access to audio visual or audio recording**

- (1) If a record of the original evidence of the complainant tendered or proposed to be tendered by the prosecutor under this Division is an audio visual recording or audio recording, the accused person, and his or her counsel (if any), are not entitled to be given possession of the record 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 counsel (if any) are to be given reasonable access to the recording to enable them to listen to it and, if the record is an audio visual recording, view it.
- (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 section, and may provide for the giving of access to other persons assisting the accused person or his or her counsel.

**306G Exhibits may also be tendered**

- (1) If a record of the original evidence of a complainant is tendered by the prosecutor under this Division, any exhibits tendered in the original proceedings on the basis of the original evidence of the complainant and admitted in the original proceedings are also admissible in the new trial proceedings as if the original evidence of the complainant had been given orally before the court hearing the new trial proceedings in accordance with the usual rules and practice of the court.
- (2) This section does not prevent any other exhibits tendered in the original proceedings from being tendered and admitted in the new trial proceedings in accordance with the usual rules and practice of the court hearing the new trial proceedings.

**[2] Schedule 2 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Criminal Procedure Amendment (Evidence) Act 2005*



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## **Schedule 2 Amendment of Criminal Procedure Regulation 2000**

(Section 4)

### **Clauses 14A and 14B**

Insert after clause 14:

#### **14A New trials of sexual assault proceedings—notice of intention to tender record of original evidence of complainant**

A notice given by the prosecutor to the accused person under section 306B (3) (a) of the Act must:

- (a) specify whether the record or records to be tendered by the prosecutor in the new trial proceedings are an audio visual recording, an audio recording or a transcript of the evidence given by the complainant in the original proceedings, and
- (b) if a record to be tendered is an audio visual recording or audio recording, contain information to the effect that the accused person and his or her counsel are entitled to listen to or view the recording at a place nominated by the prosecutor and set out the name of the person responsible for arranging access to the recording.

#### **14B Procedure for obtaining access to record of original evidence of complainant**

- (1) This clause sets out the procedure for obtaining access to listen to or view an audio visual recording or audio recording of the original evidence of the complainant for the purposes of section 306F of the Act.
- (2) On receipt of a notice under section 306B (3) (a) of the Act specifying the prosecutor's intention to tender in proceedings an audio visual recording or audio recording of the original evidence of the complainant, the accused person, or his or her counsel, may give the responsible person a notice in writing that he or she requires access to the recording.
- (3) A responsible person who receives a notice that complies with this clause must give the accused person and his or her counsel (if any) access to listen to or view the recording as soon as practicable after the day on which the responsible person receives the notice.

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- (4) The responsible person may give any person accompanying the accused person, or his or her counsel, who has been engaged to assist the accused person's case access to listen to or view the recording.
- (5) In this clause:  
*responsible person* means the person nominated by the prosecutor in the notice under section 306B (3) (a) of the Act as the person responsible for arranging access to the recording (as referred to in clause 14A (b)).