



New South Wales

Criminal Procedure Amendment (Sexual and Other Offences) Bill 2006

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Criminal Procedure Act 1986* as follows:

- (a) to clarify the circumstances in which complainants may be called to give evidence in committal proceedings for certain sexual offences and to make it clear that child complainants may never be called,
- (b) to provide that witnesses in criminal proceedings who have difficulty communicating are entitled to use a person or a communication aid to assist in giving evidence,
- (c) to make further provision with respect to the non-publication of the names of sexual assault complainants and make provision for the non-publication of evidence in relation to certain sexual assault proceedings,
- (d) to clarify and provide for various jury directions given in certain sexual offence proceedings in relation to complainants,
- (e) to give lawyers who are appointed in certain sexual offence proceedings to ask questions of a complainant on behalf of an accused person immunity from liability,

- (f) to permit the admission of a record of evidence given by a complainant in certain sexual offence proceedings in any new trial that is listed following a trial that has been discontinued.

The Bill also makes other miscellaneous amendments of a minor, consequential or savings or transitional nature.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the amendments to the *Criminal Procedure Act 1986* and the *Crimes Act 1900* set out in Schedules 1 and 2.

Clause 4 provides for the repeal of the proposed Act after all the amendments made by the proposed Act have commenced. Once the amendments have commenced the proposed Act will be spent and section 30 of the *Interpretation Act 1987* provides that the repeal of an amending Act does not affect the amendments made by that Act.

Amendments relating to committal proceedings

Section 91 of the *Criminal Procedure Act 1986* provides that a person who made a written statement tendered as evidence in committal proceedings may be directed by a Magistrate to attend at the proceedings.

Schedule 1 [1] amends section 91 to provide that the statement of a witness directed to attend to give evidence in committal proceedings may be admissible in the proceedings as evidence if the accused person and prosecutor consent and the Magistrate is satisfied there are substantial reasons why, in the interests of justice, the statement should be admitted (which is currently not the case). **Schedule 1 [2]** makes a consequential amendment.

Section 93 of the *Criminal Procedure Act 1986* currently provides that in any committal proceedings in which the accused person is charged with an offence involving violence, the Magistrate may not, under section 91, direct the attendance of an alleged victim of the offence who made a written statement unless the Magistrate is of the opinion that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence. **Schedule 1 [3]** amends section 93 to clarify that such a direction should not be given even if the parties consent to the attendance. In addition, Schedule 1 [3] amends section 93 to clarify that a child complainant in proceedings for certain child sexual assault offences can never be directed to attend the relevant committal proceedings.

Amendment relating to evidence of witnesses with communication difficulties

Schedule 1 [4] inserts a new section 275B into the *Criminal Procedure Act 1986* to provide that in any criminal proceedings a witness who has difficulty communicating is entitled to use a person or a communication aid to assist the witness with giving evidence, but only if the witness ordinarily uses such a person or communication aid on a daily basis. The provisions of the *Evidence Act 1995* in relation to interpreters will apply to persons who give such witnesses assistance in giving evidence.

Amendments relating to non-publication orders

Section 292 of the *Criminal Procedure Act 1986* currently provides that a court may make an order forbidding publication of evidence or any report or account of that evidence in certain sexual offence proceedings. **Schedule 1 [5]** amends that section to provide that the publication of evidence or any report or account of that evidence includes the broadcast of evidence or any report or account of that evidence by radio or television or the dissemination of evidence by any other electronic means such as the internet. The amendment also provides that the court must consult with the complainant in such proceedings when determining whether to make an order for non-publication and that an order may continue to have effect after the proceedings have been finally disposed of.

Currently, section 578A of the *Crimes Act 1900* provides that it is an offence to publish (which includes broadcast by radio or television) any matter which identifies the complainant in certain sexual offence proceedings or any matter which is likely to lead to the identification of the complainant. **Schedule 2** amends that section to provide that publishing also includes the dissemination of any matter by any other electronic means such as the internet.

Amendments relating to jury directions

Section 294 of the *Criminal Procedure Act 1986* currently provides that in certain sexual offence proceedings where evidence is given or a question is asked of a witness that tends to suggest an absence of a complaint or delay in complaining about the alleged offence, the Judge is to warn the jury that the lack of complaint or delay in complaining by a complainant does not necessarily indicate that the allegation that the offence was committed is false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault.

Schedule 1 [6] amends section 294 to further provide that the Judge must not warn the jury that delay in complaining is relevant to a victim's credibility unless there is sufficient evidence to justify such a warning. However, **Schedule 1 [7]** provides that if the delay is significant and the Judge is satisfied that the accused person has suffered a significant forensic disadvantage caused by the delay, the Judge may warn the jury (but only if a party to the proceedings so requests) of the nature of the disadvantage and the need for caution in determining whether to accept or give any

weight to the evidence or question suggesting the absence of a complaint or delay in complaining.

Schedule 1 [8] inserts a new section 294AA into the *Criminal Procedure Act 1986* to provide that in certain sexual offence proceedings a judge must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses. The proposed section specifically prohibits the giving of a warning to a jury of the danger of convicting on the uncorroborated evidence of a complainant.

Amendment relating to lawyers appointed to examine complainant for accused person

Section 294A of the *Criminal Procedure Act 1986* currently prohibits an unrepresented accused person from examining a complainant in certain sexual offence proceedings. Such examination may only be carried out by a person appointed by the court. **Schedule 1 [9]** provides that a lawyer who is appointed under section 294A is immune from any action, liability, claim or demand when acting in the course of the appointment.

Amendments relating to subsequent trials of sexual offence proceedings

Schedule 1 [10] inserts a new Division 4 (proposed sections 306H–306L) into Part 5 of Chapter 6 of the *Criminal Procedure Act 1986* so as to permit the admission of a record of evidence given by a complainant in a sexual offence proceeding in any new trial that is listed following a trial that has been discontinued. The amendments are similar in nature to the provisions of Division 3 of that Part which apply to a retrial of proceedings that follows an appeal against a conviction for a prescribed sexual offence.

Proposed section 306H contains definitions for the purposes of the proposed Division.

Proposed section 306I permits the prosecutor to tender as evidence in the new trial proceedings a record of the evidence of the complainant given in the discontinued proceedings. This will include the evidence given by the complainant on examination in chief and any further evidence given on cross-examination or re-examination.

The record will be admissible only if the prosecutor gives the court and the accused person notice of the prosecutor's intention to tender the record. The hearsay rule under the *Evidence Act 1995* will not prevent the admission or use of the record as evidence.

The provisions of the proposed Division extend to new trials listed before the commencement of the Division.

Proposed section 306J provides that if a record of the evidence of a complainant is admitted in the new trial proceedings, the complainant will not be compellable to provide any further evidence unless the court hearing the new trial proceedings is satisfied of various matters. However, proposed section 306K provides that the complainant may elect to give further oral evidence (with leave of the court) if the complainant so chooses.

Proposed section 306L applies the provisions of current sections 306E–306G of Division 3 of Part 5 of Chapter 6 which relate to the form in which a record of the original evidence given by a complainant is to be tendered in new trial proceedings, access to recordings and exhibits.

Other amendments

Schedule 1 [11] enables savings and transitional regulations to be made as a consequence of the proposed Act.

Schedule 1 [12] inserts savings and transitional provisions as a consequence of the enactment of the proposed Act.

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Explanatory note

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First print



New South Wales

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No. , 2006

A Bill for

An Act to amend the *Criminal Procedure Act 1986* to make further provision with respect to proceedings for sexual and other offences and the protection of certain persons in such proceedings; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Criminal Procedure Amendment (Sexual and Other Offences) Act 2006</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6
3 Amendment of Acts	7
The Acts specified in Schedules 1 and 2 are amended as set out in those Schedules.	8 9
4 Repeal of Act	10
(1) This Act is repealed on the day following the day on which all of the provisions of this Act have commenced.	11 12
(2) The repeal of this Act does not, because of the operation of section 30 of the <i>Interpretation Act 1987</i> , affect any amendment made by this Act.	13 14

Schedule 1	Amendment of Criminal Procedure Act 1986	1
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	(Section 3)	3
[1] Section 91 Witness may be directed to attend		4
Omit section 91 (4). Insert instead:		5
(4) The written statement may be admissible in evidence in the proceedings after the direction is given if:		6
(a) the accused person and the prosecutor consent to the statement being admitted, or		7
(b) the Magistrate is satisfied that there are substantial reasons why, in the interests of justice, the statement should be admitted.		8
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[2] Section 91 (6)		13
Omit “subsection (3)”. Insert instead “subsections (3) and (4)”.		14
[3] Section 93 Victim witnesses generally not to be directed to attend		15
Omit section 93 (1). Insert instead:		16
(1) Despite section 91 (other than subsection (8) of that section), in any committal proceedings in which the accused person is charged with an offence involving violence, the Magistrate may not, under that section, direct the attendance of an alleged victim of the offence who made a written statement (even if the parties to the proceedings consent to the attendance) unless the Magistrate is satisfied that there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence.		17
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[4] Section 275B		26
Insert after section 275A:		27
275B Witness with communication difficulty entitled to assistance from person or communication aid		28
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(1) In any criminal proceedings, a witness who has difficulty communicating is entitled to use a person or persons who may assist the witness with giving evidence, but only if the witness ordinarily receives assistance to communicate from such a person or persons on a daily basis.		30
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- (2) In any criminal proceedings, a witness who has difficulty communicating is entitled to use a communication aid to assist the witness with giving evidence, but only if the witness ordinarily uses such an aid to assist him or her to communicate on a daily basis. 1
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- (3) To the extent that the court considers it reasonable to do so, the court must make whatever direction is appropriate to give effect to a witness' right to use a person or persons, or to use a communication aid, under this section when the witness is giving evidence. 6
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- (4) The provisions of the *Evidence Act 1995* apply to and in respect of a person who gives a witness assistance under this section in the same way as they apply to and in respect of an interpreter under that Act. 11
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- (5) In this section:
communication aid includes any thing, whether electronic or otherwise, that can be used to assist in communication. 15
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- [5] Section 292 Publication of evidence may be forbidden in certain cases** 18
- Insert after section 292 (4): 19
- (5) A reference in subsection (1) or (2) to publication of evidence or any report or account of that evidence includes a reference to: 20
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- (a) the broadcast of evidence or any report or account of that evidence by radio or television, or 22
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- (b) the dissemination of evidence or any report or account of that evidence by any other electronic means such as the internet. 24
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- (6) An order under this section must not be made unless the court concerned: 27
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- (a) has sought and considered any views of the complainant, and 29
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- (b) is satisfied that the publication is not in the public interest. 31
- (7) In making an order under this section, the court may specify that the order continues to have effect after the relevant proceedings have been finally disposed of. However, the court may, on application by any person, vary or revoke the order at any time. 32
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[6] Section 294 Warning to be given by Judge in relation to lack of complaint in certain sexual offence proceedings	1 2
Insert at the end of section 294 (2) (b):	3
, and	4
(c) must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.	5 6 7
[7] Section 294 (3)–(5)	8
Insert after section 294 (2):	9
(3) However, if:	10
(a) the delay in making a complaint by the person on whom the offence is alleged to have been committed is significant, and	11 12 13
(b) the Judge is satisfied that the person on trial for the offence has suffered a significant forensic disadvantage caused by that delay, and	14 15 16
the Judge may inform the jury (but only if a party to the proceedings so requests) of the nature of the disadvantage and of the need for caution in determining whether to accept, or give any weight to, the evidence or question referred to in subsection (1).	17 18 19 20
(4) For the purposes of subsection (3) (b), the factors that may be regarded as establishing a <i>significant forensic disadvantage</i> include, but are not limited to, the following:	21 22 23
(a) the fact that any potential witnesses have died or are not able to be located,	24 25
(b) the fact that any potential evidence has been lost or is otherwise unavailable.	26 27
(5) The mere passage of time is not in itself to be regarded as establishing a significant forensic disadvantage.	28 29
[8] Section 294AA	30
Insert after section 294:	31
294AA Warning to be given by Judge in relation to complainants' evidence	32 33
(1) A judge in any proceedings to which this Division applies must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.	34 35 36

(2)	Without limiting subsection (1), that subsection prohibits a warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant.	1 2 3
(3)	Sections 164 and 165 of the <i>Evidence Act 1995</i> are subject to this section.	4 5
[9]	Section 294A Arrangements for complainant in prescribed sexual offence proceedings giving evidence when accused person is unrepresented	6 7 8
	Insert after section 294A (8):	9
(9)	Any thing done or omitted to be done by a person who:	10
(a)	is appointed under this section, and	11
(b)	is an Australian lawyer,	12
	when acting in the course of the appointment or otherwise in accordance with this section does not, if the thing was done or omitted to be done in good faith, subject the person personally to any action, liability, claim or demand.	13 14 15 16
[10]	Chapter 6, Part 5, Division 4	17
	Insert after Division 3:	18
	Division 4 Special provisions relating to subsequent trials of sexual offence proceedings	19 20
	Note. Division 3 of this Part applies in relation to a retrial of proceedings that follows an appeal against a conviction for a prescribed sexual offence. This Division, on the other hand, applies when a trial for a prescribed sexual offence has been discontinued and a new trial is listed.	21 22 23 24
306H	Definitions	25
	In this Division:	26
	<i>accused person</i> has the same meaning as in section 306A.	27
	<i>complainant</i> has the same meaning as in section 306A.	28
	<i>original evidence</i> of the complainant has the meaning given by section 306I.	29 30
306I	Admission of evidence of complainant in new trial proceedings	31
(1)	If the trial of an accused person is discontinued following the jury being discharged because the jurors could not reach a verdict, or discontinued for any other reason, and, as a result, a new trial is listed, the prosecutor may tender as evidence in the new trial proceedings a record of the original evidence of the complainant.	32 33 34 35 36

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- (2) For the purposes of this Division, the *original evidence* of the complainant means all evidence given by the complainant in the discontinued trial (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. 1
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- (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: 8
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- (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 11
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- (b) the prosecutor gives written notice to the court of the prosecutor's intention to tender the record under this section, and 14
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- (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. 17
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- (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. 21
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- (5) Despite subsection (3), the court hearing the new trial proceedings may decline to admit a record of the original evidence of the complainant if, in the court's opinion, the accused would be unfairly disadvantaged by the admission of the record, having regard to the following: 27
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- (a) the completeness of the original evidence, including whether the complainant has been cross-examined on the evidence, 32
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- (b) the effect of editing any inadmissible evidence from the original evidence, 35
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- (c) the availability or willingness of the complainant to attend to give further evidence and to clarify any matters relating to the original evidence, 37
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- (d) the interests of justice, 40
- (e) any other matter the court thinks relevant. 41

- (6) If the court allows a record of the original evidence of the complainant to be admitted, the court may give directions requiring the record 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. 1
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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
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- (8) This Division applies in respect of proceedings for a new trial in which a person stands charged with a prescribed 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. 12
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- (9) This Division extends to proceedings for a new trial listed before the commencement of this Division, including new trial proceedings that have been commenced or partly heard. 18
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- 306J Whether complainant compellable to give further evidence** 21
- (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 is not compellable to give further evidence in the proceedings unless the court is satisfied that it is necessary for the complainant to give further evidence: 22
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- (a) to clarify any matters relating to the original evidence of the complainant, or 27
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- (b) to canvas information or material that has become available since the original proceedings, or 29
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- (c) in the interests of justice. 31
- (2) Subsection (1) applies despite anything to the contrary in this Act or the *Evidence Act 1995*. 32
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- (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 matters mentioned in subsection (1). 34
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- (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. 37
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306K	Complainant may elect to give further evidence	1
(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 3 4 5 6
(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:	7 8 9 10
(a)	to clarify any matters relating to the original evidence of the complainant, or	11 12
(b)	to canvas information or material that has become available since the original proceedings, or	13 14
(c)	in the interests of justice.	15
(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.	16 17 18
(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.	19 20 21
306L	Application of provisions dealing with form of record of original evidence, access to recordings and exhibits	22 23
	Sections 306E–306G (including any regulations made for the purposes of those sections) apply for the purposes of this Division with such modifications as are necessary.	24 25 26
[11]	Schedule 2 Savings, transitional and other provisions	27
	Insert at the end of clause 1 (1):	28
	<i>Criminal Procedure Amendment (Sexual and Other Offences) Act 2006</i> , to the extent that it amends this Act	29 30

[12] Schedule 2, Part 12	1
Insert after Part 11:	2
Part 12 Provisions consequent on enactment of Criminal Procedure Amendment (Sexual and Other Offences) Act 2006	3 4 5
51 Amendments	6
(1) The amendments made by the <i>Criminal Procedure Amendment (Sexual and Other Offences) Act 2006</i> do not extend to any proceedings commenced before the commencement of the amendments and any such proceedings may continue as if that Act had not been enacted.	7 8 9 10 11
(2) This clause does not apply to the amendments inserted by Schedule 1 [10] to the <i>Criminal Procedure Amendment (Sexual and Other Offences) Act 2006</i> .	12 13 14

Schedule 2 Amendment of Crimes Act 1900

(Section 3)

Section 578A Prohibition of publication identifying victims of certain sexual offences

Omit the definition of *publish* in section 578A (1). Insert instead:

publish includes:

- (a) broadcast by radio or television, or
- (b) disseminate by any other electronic means such as the internet.