

[Act 1997 No 143]



New South Wales

Evidence (Children) Bill 1997

Explanatory note

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

Overview of Bill

Many children who are witnesses in criminal or other proceedings are required to attend and give oral evidence in the proceedings. The *Crimes Amendment (Children's Evidence) Act 1996* reformed the law by conferring an entitlement on children to instead give evidence in criminal and certain other proceedings by means of closed-circuit television facilities or other similar technology and made related changes to the law relating to children's evidence in such proceedings (sections 405C–405I of the *Crimes Act 1900*).

The objects of this Bill are:

- (a) to further reform the law relating to children's evidence in criminal and certain other proceedings by:
 - (i) requiring police officers and certain other investigating officials to electronically record interviews with children concerning the commission or possible commission of an offence, and
 - (ii) enabling electronically recorded interviews with a child witness (other than a defendant) to be admitted into evidence as part or all of a child's evidence in chief in any criminal proceeding, and

* Amended in committee—see table at end of volume.

- (b) to repeal and re-enact (with some minor modifications) sections 405C–405I of the *Crimes Act 1900*.

A number of clauses contain bracketed notes in headings, drawing attention (“cf”) to the equivalent (though not necessarily identical) provision of the Crimes Act 1900 proposed to be repealed and re-enacted by this Bill.

Outline of provisions

Part 1 Preliminary

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 defines certain words and expressions used in the proposed Act. These include *investigating official*, *personal assault offence* and *recording*. Investigating official is defined so that it will include certain police officers and persons engaged, in conjunction with such investigating officials, in an investigation under section 22 (Notification of child abuse) of the *Children (Care and Protection) Act 1987*. A *recording* means an audio or video recording or a video recording accompanied by a separately but contemporaneously recorded audio recording.

Clause 4 provides for words and expressions used in the *Evidence Act 1995* and the proposed Act to generally have the same meanings as they have in the *Evidence Act 1995*.

Clause 5 makes it clear that the provisions of the proposed Act are in addition to the provisions of the *Evidence Act 1995* and do not, unless the contrary intention is shown, affect the operation of that Act.

Clause 6 provides that the proposed Act generally applies in relation to evidence given by a child who is under the age of 16 years at the time the evidence is given.

Part 2 Recording out of court statements

Clause 7 requires an investigating official who questions a child, who the investigating official has reason to believe is under the age of 16 years, in connection with the investigation of the commission or possible commission

of an offence by the child or any other person to ensure that any representation made by the child in the course of the interview, and that the investigating official considers may be adduced as evidence in a court, is recorded.

Part 3 Giving evidence of children's out of court representations

Part 3 makes the reforms to the law described in paragraph (a) of the objects of the Bill set out in the Overview of the Bill.

Clause 8 provides for the proposed Part to apply to evidence of a previous representation of a child made (after the commencement of the Part) in the course of questioning by an investigating official in connection with the investigation of the commission or possible commission of an offence. The expressions *previous representation* and *representation* are defined in the *Evidence Act 1995*.

A previous representation means a representation made otherwise than in the course of giving evidence in the proceeding in which evidence of the representation is sought to be adduced. A *representation* includes (among other things) an express or implied representation (whether oral or in writing) or a representation to be inferred from conduct.

Clause 9 sets out 3 alternative ways in which a child may give evidence of a previous representation made by the child. A child may give evidence in the form of a recording of the previous representation made in accordance with clause 7, orally in the courtroom or in accordance with alternative arrangements made as referred to in clause 13.

Clause 10 requires the wishes of a child to be taken into account before a child is called to give evidence of a previous representation to which the proposed Part applies otherwise than in the form of a recording.

Clause 11 creates a presumption that a child is entitled to give evidence in chief of a previous representation made to an investigating official in the form of a recording made as required by clause 7, regardless of whether the child is the accused person in the proceeding or is giving evidence against the accused person. However, if a child other than an accused person gives such evidence the child must be available for cross-examination or re-examination either orally in the courtroom or in accordance with alternative arrangements made as referred to in clause 13.

Clause 12 ensures that the hearsay rule and the opinion rule do not prevent the admission or use of a recording of a child's previous representation. However, if the child is not the accused person in the proceeding, the recording is to be admissible only if it is proved that the accused person and his or her lawyer (if any) were given a reasonable opportunity to listen to, and in the case of a video recording, view, the recording.

Clause 13 provides for a court to direct that alternative arrangements be made in accordance with Part 4 for the giving of evidence by a child in certain proceedings.

Clause 14 requires a judge in proceedings in which there is a jury to warn the jury not to draw any inference adverse to the accused or to give the evidence any greater or lesser weight because evidence of a child is given in the form of a recording.

Clause 15 prevents a child from giving evidence in chief in a proceeding in the form of a recording if the court so orders. A court may make such an order if satisfied that it would not be in the interests of justice for evidence to be given by a recording.

Part 4 Giving of children's evidence by closed-circuit television

Part 4 re-enacts the provisions (other than sections 405CA, 405FA and 405I) of the *Crimes Act 1900* to be repealed by proposed Schedule 1. (Sections 405CA, 405FA and 405I are re-enacted in proposed Part 5).

Clause 16 contains definitions of expressions used in the proposed Part.

Clause 17 states the proceedings to which the proposed Part applies.

Clause 18 sets out the presumption that the evidence of any child witness is to be given by means of closed-circuit television facilities or other similar technology, regardless of whether or not the child is the victim. Such facilities will not be used if the child witness does not wish to use them, or if the court is satisfied that it is not in the interests of justice for them to be used.

Clause 19 makes provision for children who are accused persons in proceedings and who give evidence in the court. The court is given the power to order the use of closed-circuit television facilities or other similar technology for the purposes of a child's evidence, but such an order can only be made if the court is satisfied that the child would suffer mental or emotional harm if evidence were given by ordinary means, or that the facts would be better ascertained if evidence were given by means of closed-circuit television facilities or other similar technology.

Clause 20 treats a place outside a court at which a child gives evidence as part of the court and enables the court to order certain persons (such as interpreters and court officials) to be present.

Clause 21 makes it clear that closed-circuit television facilities and other similar technology used for giving the evidence of a child are not to be used for the giving of identification evidence.

Clause 22 enables a court to adjourn a proceeding to another place if the place where the court is sitting is not equipped with closed-circuit television facilities.

Clause 23 provides for closed circuit-television facilities or other similar technology used for giving the evidence of a child to be operated in a manner that enables persons who are interested in the proceedings to see the child (and any person present with the child) on the same or another television monitor.

Clause 24 requires alternative arrangements to be made when a child entitled or permitted to give evidence by means of closed-circuit television does not do so. Special arrangements may be made to minimise as much as possible the contact between the child and any person or persons, and to minimise the effect of that contact on the child's evidence.

Clause 25 requires a court to give certain warnings in proceedings in which a child gives evidence by closed-circuit television or by means of any "alternative arrangements" under the proposed Part.

Part 5 Miscellaneous

Clause 26 makes it clear that the failure of a child to give evidence in accordance with certain provisions of the proposed Act does not affect the validity of the proceeding or any decision made in connection with the proceeding and that failure of an investigating official to record a previous representation in accordance with clause 7 does not affect the validity of any proceeding in which evidence of the previous representation is given.

Clause 27 re-enacts section 405CA of the *Crimes Act 1900*. It states that it is an absolute right for all children who give evidence in specified proceedings to have a person of their choice with them. That person may be there to give support, assistance with a language problem or assistance with any difficulty associated with a disability.

Clause 28 re-enacts section 405FA of the *Crimes Act 1900*. It makes special provision for proceedings in which the accused person or defendant is not represented by a lawyer. The court may make alternative arrangements to avoid the child having to be questioned directly by the accused person, or having to hear the accused person's voice. Clause 28 contains a modification to section 405FA to remove any implication that a person appointed by a court to examine a child in proceedings when the accused person is unrepresented should be a lawyer.

Clause 29 provides for the making of court orders.

Clause 30 makes it clear that the proposed Act does not, unless the contrary intention is shown, limit any discretion of a court.

Clause 31 provides for the making of regulations.

Clause 32 provides for the making of rules of court.

Clause 33 gives effect to the Schedule of amendments.

Clause 34 gives effect to the Schedule of savings and transitional provisions.

Clause 35 provides for review of the proposed Act after a period of 5 years after the date of assent to the Act.

Schedule 1 Amendment of Acts

Schedule 1 repeals sections 405C–405I of the *Crimes Act 1900* and makes a consequential amendment to the *Children (Criminal Proceedings) Act 1987* to make it clear that the prohibition on the publication and broadcasting of a child's name extends to a child who gives recorded evidence. The Schedule also repeals section 562NA (4) of the *Crimes Act 1900* (a provision to the same effect as the repealed provision is included in clause 27 (1) (c) of the proposed Act).

Schedule 2 Savings, transitional and other provisions

Schedule 2 enables regulations of a savings or transitional nature to be made as a consequence of the enactment of the proposed Act and contains a transitional provision that provides that the new provisions about children's evidence do not have effect in relation to proceedings that commenced before the commencement of the provisions.