

Evidence (Children) Act 1997 No 143

[1997-143]



New South Wales

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Provisions in force

Some, but not all, of the provisions displayed in this version of the legislation have commenced.

Notes—

- **Does not include amendments by**
Criminal Procedure Further Amendment (Evidence) Act 2005 No 25 (not commenced)

Authorisation

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New South Wales

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Evidence (Children) Act 1997 No 143



New South Wales

An Act with respect to the giving of evidence by children in criminal and certain other related proceedings; to make consequential amendments to certain Acts; and for other purposes.

Part 1 Preliminary

1 Name of Act

This Act is the *Evidence (Children) Act 1997*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

apprehended violence order means an apprehended violence order made under Part 15A of the *Crimes Act 1900* and includes an interim apprehended violence order made under that Part.

child protection prohibition order means a prohibition order within the meaning of the *Child Protection (Offenders Prohibition Orders) Act 2004*, and includes an interim child protection prohibition order made under that Act.

exercise a function includes perform a duty.

function includes a power, authority or duty.

investigating official means:

- (a) a police officer (other than a police officer who is engaged in covert investigations under the orders of a superior), or
- (b) a person who is engaged, in conjunction with an investigating official described in paragraph (a), in an investigation caused to be made by the Director-General of the Department of Community Services under section 27 (Mandatory reporting) of the *Children and Young Persons (Care and Protection) Act 1998*, or

(c) any other person prescribed by the regulations for the purposes of this definition.

personal assault offence means any of the following offences:

- (a) an offence under Part 3 (Offences against the person) of the *Crimes Act 1900*,
- (b) an offence under section 562AB (Stalking, intimidation with intent to cause fear for personal safety) of the *Crimes Act 1900*,
- (c) an offence under section 562I (Offence of contravening an apprehended violence order) of the *Crimes Act 1900*,
- (d) an offence under section 227 (Child and young person abuse) of the *Children and Young Persons (Care and Protection) Act 1998*,
- (e) an offence which includes the commission of, or an intention to commit, any of the above offences,
- (f) an offence of attempting, or of conspiracy or incitement, to commit any of the above offences.

recording means:

- (a) an audio recording, or
- (b) a video recording, or
- (c) a video recording accompanied by a separately but contemporaneously recorded audio recording.

(2) Notes included in this Act do not form part of this Act.

4 Words and expressions used in *Evidence Act 1995*

- (1) Words and expressions that are defined in the *Evidence Act 1995* and that are used in this Act have the same meanings in this Act as they have in the *Evidence Act 1995*.
- (2) This section applies except so far as the context or subject-matter otherwise indicates or requires.
- (3) However, this section does not apply to a word or expression defined in section 3.

Note—

Examples of words and expressions that are defined in the *Evidence Act 1995* that are used in this Act are:

court means NSW court.

criminal proceeding means a prosecution for an offence and includes:

- (a) a proceeding for the committal of a person for trial or sentence for an offence, and
- (b) a proceeding relating to bail,

but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953* of the Commonwealth.

judge, in relation to a proceeding, means the judge, magistrate or other person before whom the proceeding is being held.

NSW court means:

- (a) the Supreme Court, or
- (b) any other court created by Parliament,

(including such a court exercising federal jurisdiction) and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

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.

representation includes:

- (a) an express or implied representation (whether oral or in writing), or
- (b) a representation to be inferred from conduct, or
- (c) a representation not intended by its maker to be communicated to or seen by another person, or
- (d) a representation that for any reason is not communicated.

5 Relationship to Evidence Act 1995

The provisions of this Act are in addition to the provisions of the *Evidence Act 1995* and do not, unless a contrary intention is shown, affect the operation of that Act.

6 Children's evidence to which this Act applies

This Act applies (unless a contrary intention is shown) 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

7 Interviews with children to be recorded

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 is to ensure that any representation made by the child in the course of the interview during which the child is questioned, 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

8 Evidence to which this Part applies

- (1) This Part applies to evidence of a previous representation of a child made in the course of an interview during which the child is questioned by an investigating official in connection with the investigation of the commission or possible commission of an offence.
- (2) This Part does not apply to evidence of a previous representation made before the commencement of this Part.

9 Ways in which evidence of child may be given

- (1) Subject to this Act, a child may give evidence of a previous representation to which this Part applies made by the child in any criminal proceeding wholly or partly:
 - (a) in the form of a recording of the previous representation made by an investigating official of the interview in the course of which the previous representation was made and that is viewed or heard, or both, by the court, or
 - (b) orally in the courtroom, or
 - (c) if the evidence is given in any proceeding to which Part 4 applies—in accordance with alternative arrangements made under section 13.

Note—

See section 17.

- (2) Nothing in this section affects the giving of evidence by means of a written statement for the purposes of Division 3 of Part 2 of Chapter 3 of the [Criminal Procedure Act 1986](#).

Note—

See also section 30.

10 Wishes of child to be taken into account

A person must not call a child to give evidence of a previous representation to which this Part applies made by the child by means other than a recording made by an investigating official of the interview in the course of which the previous representation was made unless the person has taken into account the wishes of the child (considered in the light of the child's age and understanding). However, nothing in this section permits a person to require a child to express his or her wishes in relation to the matter.

11 Child entitled to give evidence in chief in form of recording

- (1) A child is entitled to give, and may give, evidence in chief of a previous representation to which this Part applies made by the child wholly or partly in the form of a recording

made by an investigating official of the interview in the course of which the previous representation was made and that is viewed or heard, or both, by the court. The child must not be present in, or be visible or audible to the court by closed-circuit television or by means of any similar technology, while it is viewing or hearing the recording.

(1AA) Despite subsection (1), a child may, if the child so chooses, be present in court while it is viewing or hearing a recording as referred to in that subsection.

(1A) Subject to section 15, a child who is 16 or more but less than 18 years of age at the time evidence is given is entitled to give, and may give, evidence as referred to in subsection (1) of a recording of a previous representation to which this Part applies made by the child when the child was less than 16 years of age.

Note—

Under section 15 a court may order that a child not give evidence in the form of a recording if it is satisfied that it is not in the interests of justice for the evidence to be given by a recording.

(2) If a child who gives evidence as referred to in subsection (1) is not the accused person in the proceeding, the child must subsequently be available for cross-examination and re-examination:

(a) orally in the courtroom, or

(b) if the evidence is given in any proceeding to which Part 4 applies—in accordance with alternative arrangements made under section 13.

(3) Section 5BBA of the *Evidence (Audio and Audio Visual Links) Act 1998* does not apply to evidence given as referred to in subsection (1).

12 Admissibility of recorded evidence

(1) The hearsay rule and the opinion rule (within the meaning of the *Evidence Act 1995*) do not prevent the admission or use of evidence of a previous representation to which this Part applies given by a child under this Part, in the form of a recording made by an investigating official.

(2) Evidence of a previous representation to which this Part applies of a child who is not the accused person in a proceeding that is given by the child in the form of a recording made by an investigating official is not to be admitted unless it is proved that the accused person and his or her lawyer (if any) were given, in accordance with the regulations, a reasonable opportunity to listen to and, in the case of a video recording, view the recording.

(3) The court may rule as inadmissible the whole or any part of the contents of a recording adduced as evidence under this Part.

13 Alternative arrangements for giving evidence

The court may order that alternative arrangements be made in accordance with Part 4 for the giving of evidence by the child in any proceeding to which that Part applies.

14 Warning to jury

If a child gives evidence of a previous representation wholly or partly in the form of a recording made by an investigating official in accordance with this Part in any proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the evidence being given in that way.

15 Evidence not to be given in form of recording if contrary to interests of justice

- (1) A child must not give evidence by means of a recording made by an investigating official in accordance with this Part if the court orders that such means not be used.
- (2) The court may only make such an order if it is satisfied that it is not in the interests of justice for the child's evidence to be given by a recording.

15A Transcripts of recordings

The court may order that a transcript be supplied to the court or, if there is a jury, to the jury, or both, of all or part of evidence of a previous representation to which this Part applies made by a child that is given in the form of a recording if it appears to the court that a transcript would be likely to aid its or the jury's comprehension of the evidence.

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

16 Definitions

In this Part:

court, in relation to a proceeding referred to in section 17 (d), includes the Victims Compensation Tribunal.

courtroom, in relation to a proceeding referred to in section 17 (d), includes the place where the Victims Compensation Tribunal is sitting.

17 Proceedings to which Part applies (cf Crimes Act ss 405D (1) and 405DA)

This Part applies to:

- (a) a proceeding in which it is alleged that a person has committed a personal assault offence, and
- (b) a proceeding in relation to a complaint for an apprehended violence order, and
- (c) a civil proceeding arising from the commission of a personal assault offence, and

- (d) a proceeding before the Victims Compensation Tribunal in respect of the hearing of a matter arising from the commission of a personal assault offence that is the subject of an appeal or a reference to it, and
- (e) a proceeding in relation to an application for a child protection prohibition order or to vary or revoke any such order or a proceeding in relation to a contravention of any such order.

18 Children have a right to give evidence by closed-circuit television (cf Crimes Act s 405D (2)–(5), (7) and (9))

- (1) Subject to this Act, a child who gives evidence in any proceeding to which this Part applies is entitled to give that evidence by means of closed-circuit television facilities or by means of any other similar technology prescribed for the purposes of this section.
- (1A) Subject to subsections (3) and (4), a child who is 16 or more but less than 18 years of age at the time evidence is given in a proceeding to which this Part applies is entitled to give the evidence as referred to in subsection (1) if the child was under 16 years of age when the charge for the personal assault offence to which the proceedings relate was laid.
- (2) A child may choose not to give evidence by those means.
- (3) A child must not give evidence by means of closed-circuit television facilities or any other prescribed technology if the court orders that such means not be used.
- (4) The court may only make such an order if it is satisfied that there are special reasons, in the interests of justice, for the child's evidence not to be given by such means.
- (5) This section does not apply in the Children's Court to a child:
 - (a) who is the accused or defendant in any proceeding referred to in section 17 (a), (b) or (c), or
 - (b) who is or was accused of committing the offence that gave rise to a proceeding referred to in section 17 (d).
- (6) Nothing in this section affects the operation of section 13 of the *Evidence Act 1995*.

19 Accused children may be allowed to give evidence by closed-circuit television (cf Crimes Act s 405DA (2)–(4))

- (1) This section applies to a child who is the accused person, or person against whom a complaint is made, in any proceeding in the Children's Court to which this Part applies.
- (2) The court may make an order permitting a child's evidence in a proceeding to which this Part applies to be given by means of closed-circuit television facilities or any other

similar technology prescribed for the purposes of this section.

- (3) Such an order may be made only if the court is satisfied:
- (a) that the child may suffer mental or emotional harm if required to give evidence in the ordinary way, or
 - (b) that the facts may be better ascertained if the child's evidence is given in accordance with such an order.
- (3A) A court may make an order under this section permitting a child to whom this section applies who is an accused child detainee within the meaning of the *Evidence (Audio and Audio Visual Links) Act 1998* to give evidence in a proceeding to which this Part applies by means of closed-circuit television facilities or any other similar technology prescribed for the purposes of this section despite section 5BBA of that Act.
- (4) A child may choose not to give evidence by means of closed-circuit television facilities or other similar technology.

20 Giving evidence by closed-circuit television (cf Crimes Act s 405DB (1)-(3))

- (1) If the evidence of a child who is entitled or permitted to give evidence by means of closed-circuit television facilities or any other similar technology under this Part is given from a location outside a court, that location is taken to be part of the court in which the proceeding is being held.
- (2) If the evidence of a child who is entitled or permitted to give evidence by means of closed-circuit television facilities or any other similar technology under this Part is given from a location outside a court, the court may order:
- (a) that a court officer be present at that other location, and
 - (b) that any other person be present with the child as an interpreter, for the purpose of assisting the child with any difficulty in giving evidence associated with a disability, or for the purpose of providing the child with other support.
- (3) Any such order does not limit the entitlement that a child has under section 27 (Children have a right to the presence of a supportive person while giving evidence) to choose another person to be present with him or her when giving evidence.

21 Giving identification evidence when closed-circuit television is used (cf Crimes Act s 405DC)

- (1) If a child is entitled to give evidence by means of closed-circuit television facilities or any other similar technology that child may not give identification evidence by those means.

- (2) However, such a child is entitled to refuse to give identification evidence until after the completion of the child's other evidence (including examination in chief, cross-examination and re-examination).
- (3) In addition, the court must ensure that such a child is not in the presence of the accused for any longer than is necessary for the child to give identification evidence.

Note—

Identification evidence is defined in the [Evidence Act 1995](#).

22 Proceedings may be moved to allow use of closed-circuit television facilities (cf Crimes Act s 405DD)

- (1) This section applies if a child is entitled or permitted to give evidence by means of closed-circuit television facilities or any other similar technology under this Part.
- (2) If the court is not equipped with such facilities or technology, or it otherwise considers it appropriate to do so, the court may adjourn the proceeding or any part of the proceeding to a court or place that is equipped with such facilities or technology so that the child's evidence may be given by such means.

23 Use of closed-circuit television or similar technology (cf Crimes Act s 405E (1))

Closed-circuit television facilities or similar technology used under this Part for the giving of evidence by a child are to be operated in such a manner that the persons who have an interest in the proceeding are able to see the child (and any person present with the child) on the same or another television monitor.

24 Children have a right to alternative arrangements for giving evidence when closed-circuit television facilities not available (cf Crimes Act s 405F)

- (1) This section applies to any proceeding in which a child is entitled or permitted to give evidence by means of closed-circuit television facilities or other similar technology (by virtue of section 18 or an order made under section 19) but does not do so because:
 - (a) such facilities and such technology are not available (and the court does not move the proceeding under section 22), or
 - (b) the child chooses not to give evidence by those means, or
 - (c) the court orders that the child may not give evidence by those means (or, in the case of a child to whom section 19 applies, the court does not order that the child may give evidence by those means).
- (2) In such a proceeding, the court must make alternative arrangements for the giving of evidence by the child, in order to restrict contact (including visual contact) between the child and any other person or persons.

- (3) Those alternative arrangements may include any of the following:
 - (a) the use of screens,
 - (b) planned seating arrangements for people who have an interest in the proceeding (including the level at which they are seated and the people in the child's line of vision),
 - (c) the adjournment of the proceeding or any part of the proceeding to other premises.
- (4) A child may choose not to use any such alternative arrangements. In that case, the court must direct that the child be permitted to give evidence orally in the courtroom.
- (5) Any premises to which a proceeding is adjourned under this section are taken to be part of the court in which the proceeding is being heard.

25 Warning to jury (cf Crimes Act s 405H)

- (1) In any criminal proceeding in which the evidence of a child is given by means of closed-circuit television facilities or any other similar technology (by virtue of section 18), the judge must:
 - (a) inform the jury that it is standard procedure for children's evidence in such cases to be given by those means, and
 - (b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of those facilities or that technology.
- (2) In any criminal proceeding in which the evidence of a child is given by means of closed-circuit television facilities or any other similar technology (by virtue of section 19), the judge must warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of those facilities or that technology.
- (3) In any criminal proceeding in which arrangements are made for a person to be with a child giving evidence (by virtue of section 20 or 27), the judge must:
 - (a) inform the jury that it is standard procedure in such cases for children to choose a person to be with them, and
 - (b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the presence of that person.
- (4) In any criminal proceeding in which alternative arrangements for the giving of evidence by a child are made (by virtue of section 24 or 28), the judge must:
 - (a) inform the jury that it is standard procedure in such cases for alternative

arrangements to be used when children give evidence, and

- (b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of those alternative arrangements.

Part 5 Miscellaneous

26 Validity of proceedings not affected (cf Crimes Act s 405I)

- (1) The failure of a child to give evidence in accordance with a provision of this Act does not affect the validity of any proceeding or any decision made in connection with that proceeding.
- (2) The failure of an investigating official to record a previous representation of a child in accordance with section 7 does not affect the validity of any proceeding in which evidence of the previous representation is given.

27 Children have a right to presence of a supportive person while giving evidence (cf Crimes Act s 405CA)

- (1) This section applies to:
 - (a) a criminal proceeding in any court, and
 - (b) a civil proceeding arising from the commission of a personal assault offence, and
 - (c) a proceeding in relation to a complaint for an apprehended violence order, and
 - (d) a proceeding before the Victims Compensation Tribunal in respect of the hearing of a matter arising from the commission of a personal assault offence that is the subject of an appeal or a reference to it, and
 - (e) a proceeding in relation to an application for a child protection prohibition order or to vary or revoke any such order.
- (2) A child who gives evidence in a proceeding to which this section applies is entitled to choose a person whom the child would like to have present near him or her when giving evidence.
- (3) Without limiting a child's right to choose such a person, that person:
 - (a) may be a parent, guardian, relative, friend or support person of the child, and
 - (b) may be with the child as an interpreter, for the purpose of assisting the child with any difficulty in giving evidence associated with a disability, or for the purpose of providing the child with other support.
- (4) To the extent that the court or tribunal considers it reasonable to do so, the court or

tribunal must make whatever direction is appropriate to give effect to a child's decision to have such a person present near the child, and within the child's sight, when the child is giving evidence.

- (5) The court or tribunal may permit more than one support person to be present with the child if the court or tribunal thinks that it is in the interests of justice to do so.
- (6) This section extends to a child who is the accused or the defendant in the relevant proceeding.

28 Children have a right to alternative arrangements for giving evidence when accused is unrepresented (cf Crimes Act s 405FA)

- (1) This section applies to a criminal proceeding in any court, or a civil proceeding arising from the commission of a personal assault offence, in which the accused or defendant is not represented by a lawyer.
- (2) A child who is a witness (other than the accused or the defendant) in a proceeding to which this section applies is to be examined in chief, cross-examined or re-examined by a person appointed by the court instead of by the accused or the defendant.
- (3) If any such person is appointed, that person is to ask the child only the questions that the accused or the defendant requests the person to put to the child.
- (3A) A person appointed under this section, when acting in the course of his or her appointment, must not independently give the accused or the defendant legal or other advice.
- (4) The court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so.
- (5) This section applies whether or not closed-circuit television facilities or other similar technology is used to give evidence, and whether or not alternative arrangements under section 24 are used in the proceedings.

29 Court orders (cf Crimes Act ss 405D (6), 405DA (5) and 405DB (4))

The court may make, vary or revoke an order under a provision of this Act either on its own motion or on application by a party to the proceeding or by the child giving evidence.

30 General discretion of court not affected

Unless a contrary intention is shown, nothing in this Act limits any discretion that a court has with respect to the conduct of a proceeding.

Note—

See, for example, Part 3.11 (Discretions to exclude evidence) of the [Evidence Act 1995](#).

31 Regulations (cf Crimes Act ss 405D (8), 405DA (6) and 405E (2))

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may make provision for or with respect to the use of closed-circuit television facilities or other similar technology for the giving of evidence by children in accordance with this Act.

32 Rules of court (cf Crimes Act s 405E (3))

- (1) Rules of court may (subject to the regulations) be made in respect of the giving of evidence under this Act.
- (2) In particular, rules of court may (subject to the regulations) also make provision for or with respect to the use of closed-circuit television facilities or other similar technology for the giving of evidence by children in accordance with this Act.

33 (Repealed)

34 Savings, transitional and other provisions

Schedule 2 has effect.

35 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the date of assent to this Act.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

Schedule 1 (Repealed)

Schedule 2 Savings, transitional and other provisions

(Section 34)

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act

Criminal Legislation Amendment Act 2001, to the extent that it amends this Act

- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

2 Proceeding involving children's evidence

A provision of this Act does not extend to a proceeding that commenced before the commencement of the provision and any such proceeding may continue as if this Act had not been enacted.

3 Evidence in chief in form of recording

The amendments made to section 11 by the *Crimes Legislation Amendment Act 2003* extend to evidence in chief given in a proceeding after the commencement of the amendments, regardless of whether the proceeding commenced before or after the commencement of the amendments.