



New South Wales

# Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023 No 32

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New South Wales

# **Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023 No 32**

Act No 32, 2023

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An Act to amend the *Criminal Procedure Act 1986* to provide for matters relating to evidence in child sexual offence proceedings; and for related purposes. [Assented to 24 October 2023]

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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) Act 2023*.

**2 Commencement**

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

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

### [1] Section 164A Judge unable to continue in trial by jury

Insert after section 164A(3)—

- (3A) To avoid doubt, this section does not apply—
- (a) to a pre-recorded evidence hearing, or
  - (b) if the former presiding judge presides only over a pre-recorded evidence hearing and does not preside over the proceedings after that hearing.

**Note—** Section 294I(7) further provides for different judicial officers presiding over a pre-recorded evidence hearing and the remainder of the proceedings.

### [2] Chapter 6 Evidentiary matters

Insert after section 294D—

#### Division 1A Evidence in child sexual offence proceedings

##### Subdivision 1 Preliminary

###### 294E Definitions

In this division—

**audio visual link** has the same meaning as in the *Evidence (Audio and Audio Visual Links) Act 1998*.

**child** means an individual who is less than 18 years of age.

**Court** means the District Court.

**pre-recorded evidence hearing**—see section 294G(1)(a).

**recording** means—

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

**witness**, in relation to proceedings to which this division applies, means—

- (a) a child who is a complainant or prosecution witness in the proceedings, or
- (b) a person who—
  - (i) is a complainant or prosecution witness in the proceedings, and
  - (ii) was a child when the accused person was committed for trial or sentence, even if the person has since become an adult.

**witness intermediary** means a person appointed as a witness intermediary under section 294M(3).

###### 294F Application of division

- (1) This division applies to proceedings before the Court—
  - (a) in relation to a prescribed sexual offence whenever committed, or
  - (b) if the proceedings relate to more than 1 offence—if at least 1 of the offences is a prescribed sexual offence whenever committed.
- (2) This division applies at any stage of a proceeding mentioned in subsection (1), including an appeal or rehearing.

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

### **294G Pre-recorded evidence hearings**

- (1) Evidence of a witness in proceedings to which this division applies must—
  - (a) subject to a contrary order of the Court, be given at a hearing under section 294H (a *pre-recorded evidence hearing*) in accordance with section 294I, and
  - (b) be dealt with in accordance with section 294I.
- (2) The Court may make an order under subsection (1)(a) only if the Court is satisfied it is appropriate to do so in the interests of justice.
- (3) The primary factors to be considered by the Court in determining whether to make an order under subsection (1)(a) are the wishes and circumstances of the witness.
- (4) Without limiting the other factors the Court may take into account in deciding whether to make an order under subsection (1)(a), the Court may also take into consideration the following—
  - (a) the availability of court and other facilities necessary for a pre-recorded evidence hearing to take place,
  - (b) the sufficiency of preparation time for both parties,
  - (c) the continuity and availability of counsel at both the pre-recorded evidence hearing and the trial,
  - (d) other relevant matters.

### **294H Timing of pre-recorded evidence hearings**

A pre-recorded evidence hearing must be held—

- (a) as soon as practicable after the date listed for the accused person's first appearance in the Court in the proceedings, but
- (b) not before the prosecution has made the pre-trial disclosure required by section 141.

### **294I Provisions relating to other aspects of pre-recorded evidence hearing**

- (1) 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) other evidence by audio visual link.
- (2) The pre-recorded evidence hearing must be held in the absence of the jury, if any.
- (3) Evidence given at the pre-recorded evidence hearing must be recorded and later viewed or heard by the Court in the presence of the jury, if any.
- (4) 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 audio visual link, while the Court is viewing or hearing a recording made—
  - (a) as provided by section 306U, or
  - (b) at the hearing.
- (5) While the witness is giving evidence at a pre-recorded evidence hearing—

- (a) the accused person must be able to—
    - (i) see and hear the witness giving evidence, or
    - (ii) if the witness is giving evidence by audio visual link—see and hear the witness giving evidence by audio visual link, and
  - (b) the accused person must be able to communicate with the person's Australian legal practitioner, if any, including by audio visual link if the accused person and the person's Australian legal practitioner are not in the same place and are appearing by audio visual link.
- (6) If evidence in chief is given under subsection (1)(a), section 306U(3) applies as if it required the witness to be available for cross-examination or re-examination under subsection (1)(b).
  - (7) It does not matter whether or not the judicial officer presiding is the same judicial officer presiding at the proceeding at which the recording made under this division is viewed or heard by the Court.
  - (8) It also does not matter if, while the pre-recorded evidence hearing is conducted, the judicial officer, an Australian legal practitioner acting in the proceedings, the accused person, the witness and the witness intermediary are at different places and appearing by audio visual link.

**294J Access to recording and transcripts**

- (1) The accused person and the accused person's Australian legal practitioner, if any, are not entitled to be given possession of a recording made under this division or a copy of the recording.
- (2) Subsection (1) applies despite anything to the contrary in—
  - (a) this Act, or
  - (b) the *Evidence Act 1995*.
- (3) However, the accused person and the accused person's Australian legal practitioner, if any, must be given reasonable access to the recording to enable the accused person or the legal practitioner to listen to or view the recording.
- (4) Without limiting subsection (3), reasonable access to the recording to listen to or view the recording may require access to be given on more than 1 occasion.
- (5) 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 either the accused person or the accused person's Australian legal practitioner.
- (6) The Court may order that a transcript of all or part of a recording made under this division be supplied to—
  - (a) the Court, if it appears to the Court a transcript would be likely to aid the Court's comprehension of the evidence, or
  - (b) if the proceedings are being tried by a jury—the jury, if it appears to the Court a transcript would be likely to aid the jury's comprehension of the evidence.

**294K Witness may give further evidence only with leave**

- (1) A witness in proceedings to which this division applies whose evidence is pre-recorded at a pre-recorded evidence hearing must not give further evidence in the proceedings without the leave of the Court.

- (2) An application for leave under subsection (1) may be made by a party to the proceedings.
- (3) The Court must not give leave under subsection (1) unless the Court is satisfied—
  - (a) the party has become 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 must, to the extent practicable, be given by pre-recording at a hearing in the same way as the original pre-recorded evidence, unless the Court otherwise directs.
- (5) Subsection (1) applies despite anything to the contrary in—
  - (a) this Act, or
  - (b) the *Evidence Act 1995*.

### **Subdivision 3 Witness intermediaries**

#### **294L Role of witness intermediaries**

- (1) A person appointed as a witness intermediary for a witness must, to the extent necessary—
  - (a) communicate to the Court whether the witness can understand questions put to the witness, and
  - (b) explain to the Court and the person asking questions the best way a witness can be asked questions the witness can understand.
- (2) A witness intermediary for a witness—
  - (a) is an officer of the Court, and
  - (b) has a duty to impartially facilitate the communication of, and with, the witness so the witness may give the witness's best evidence.

#### **294M Appointment of witness intermediaries**

- (1) The Secretary of the Department in which this Act is administered must establish a panel of persons who are suitable persons to be appointed as witness intermediaries.
- (2) A person must not be included on the panel unless the person has—
  - (a) a tertiary qualification in psychology, social work, speech pathology, teaching or occupational therapy, or
  - (b) other qualifications, training, experience or skills prescribed by the regulations.
- (3) For proceedings to which this division applies, the Court—
  - (a) must appoint a witness intermediary for a witness who is less than 16 years of age, and
  - (b) may, on its own motion or on the application of a party to the proceedings, appoint a witness intermediary for a witness who is 16 or more years of age if satisfied the witness has difficulty communicating.
- (4) Despite subsection (3)(a), the Court is not required to appoint a witness intermediary if the Court is satisfied—
  - (a) there is no person on the panel available to meet the needs of the witness, or

- (b) it is otherwise not practical to appoint a witness intermediary, or
  - (c) it is unnecessary or inappropriate to appoint a witness intermediary, or
  - (d) it is not otherwise in the interests of justice to appoint a witness intermediary.
- (5) A person must not be appointed as a witness intermediary 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, other than as a witness intermediary, or
  - (c) is a party to or a potential witness in the proceedings.
- (6) Subsection (5)(b) does not prevent the person from being appointed as a witness intermediary for the witness—
- (a) if the Court, in the interests of justice and on its own motion or on the application of a party, appoints the person as a witness intermediary for the witness, or
  - (b) merely because the person carries out the functions of a witness intermediary for the witness during a criminal investigation that takes place before or after the commencement of proceedings.
- (7) The witness intermediary appointed for a witness must, if asked by the Court, give the Court a written report about the communication needs of the witness.
- (8) A copy of the report must be given to the parties to the proceedings before the witness gives evidence in the proceedings.

**294N Giving of evidence of witness in presence of witness intermediary**

- (1) Subject to the rules of court and any practice direction, in a proceeding to which this division applies, the evidence of a witness for whom a witness intermediary has been appointed may be given only if—
- (a) the witness intermediary is at the place from which the witness is giving evidence, or
  - (b) the witness intermediary is in the courtroom, or
  - (c) the witness intermediary is at a different place and appearing by audio visual link and the witness, the Court and an Australian legal practitioner acting in the proceedings are able to see and hear the witness intermediary.
- (2) The evidence must be given in circumstances in which—
- (a) the Court and an Australian legal practitioner acting in the proceedings are able to—
    - (i) see and hear the giving of the evidence, and
    - (ii) communicate with the witness intermediary, including by audio visual link if the witness intermediary is appearing by audio visual link, and
  - (b) except for evidence given under Chapter 6, Part 6 or this division by a recording—the jury are able to see and hear the giving of the evidence.
- (3) During a part of the proceedings to which this division applies in which a witness intermediary for a witness is present, the witness intermediary is exempt from a requirement or direction under this Act that requires the proceedings or part of the proceedings to be heard in camera.



- (4) The *Evidence Act 1995* applies to and in relation to a person who acts as a witness intermediary for a witness in the same way as that Act applies to and in relation to an interpreter.  
**Example—** The *Evidence Act 1995*, section 22 requires an interpreter to take an oath, or make an affirmation, before acting as an interpreter.
- (5) The regulations may prescribe the form of the oath to be taken or affirmation to be made by the witness intermediary for subsection (4).

#### **Subdivision 4 General**

##### **294O Warnings**

If, in proceedings to which this division applies, the evidence of a witness is given by a pre-recording or a witness intermediary is used, the Court must—

- (a) inform the jury it is standard procedure to give evidence by a pre-recording or to use a witness intermediary in the proceedings, and
- (b) warn the jury not to draw an inference adverse to the accused person or to give the evidence greater or lesser weight because the evidence was given by a pre-recording or a witness intermediary was used.

##### **294P Relationship to other provisions of this Act**

- (1) Except as provided by this division, the regulations or rules of court, this division does not affect the application of this Act to proceedings for offences to which this division applies.
- (2) Without limiting subsection (1), this division is in addition to, and does not affect, the following under Chapter 6, Parts 5 and 6—
  - (a) the entitlement of a witness to give, and the giving of, evidence,
  - (b) the rights of the accused person,
  - (c) the powers of the Court.
- (3) To avoid doubt, section 20 applies to an indictment presented at a pre-recorded evidence hearing.

##### **294Q Regulations and rules of court**

- (1) The regulations may make provision about the following—
  - (a) the giving, taking and recording of, and access to, evidence of witnesses under this division,
  - (b) witness intermediaries.
- (2) Rules of court may, subject to the regulations, be made about a matter referred to in subsection (1).

##### **294R Practice directions**

The Chief Judge may give directions the Chief Judge considers appropriate in relation to the following—

- (a) the taking and giving of evidence of witnesses under this division, including by audio visual link,
- (b) witness intermediaries.

##### **294S Review of division**

- (1) The Minister must review this division to determine whether—

- (a) the policy objectives of the Act remain valid, and
  - (b) the terms of the Act remain appropriate for securing the objectives.
- (2) The review must be undertaken as soon as possible after the period of 3 years after the commencement of the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023*.
- (3) A report on the outcome of the review must be tabled in each House of Parliament within 12 months after the end of the period of 3 years.

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

Omit Part 29.

**[4] Schedule 2, Part 44**

Insert after clause 118—

**Part 44 Provisions consequent on enactment of Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023**

**119 Definitions**

In this part—

*commencement* means the commencement of this part.

*Court* means the District Court.

*prescribed place* means a prescribed place within the meaning of Part 29 immediately before the commencement.

**Note—** Newcastle and Downing Centre, Sydney were prescribed places within the meaning of Part 29 immediately before the commencement.

*prescribed proceedings* means proceedings—

- (a) before the Court sitting at a prescribed place, and
- (b) that relate to a prescribed sexual offence whenever committed or, if the proceedings relate to more than 1 offence, at least 1 prescribed sexual offence whenever committed.

*previous provisions* means Part 29 as in force immediately before the commencement.

*relevant place* means a place that was not a prescribed place immediately before the commencement.

*relevant proceedings* means proceedings—

- (a) before the Court sitting at a relevant place, and
- (b) that relate to a prescribed sexual offence whenever committed or, if the proceedings relate to more than 1 offence, at least 1 prescribed sexual offence whenever committed.

**120 Application of previous provisions to prescribed proceedings commenced before commencement**

- (1) This clause applies if prescribed proceedings were commenced in either of the following ways—
- (a) a court attendance notice filed before the commencement,
  - (b) an indictment presented before the commencement.
- (2) The previous provisions continue to apply to the prescribed proceedings.

**121 Application of Chapter 6, Part 5, Division 1A to prescribed proceedings commenced on or after commencement**

- (1) This clause applies to prescribed proceedings commenced in either of the following ways—
  - (a) a court attendance notice filed on or after the commencement,
  - (b) an indictment presented on or after the commencement.
- (2) Chapter 6, Part 5, Division 1A applies to the prescribed proceedings.

**122 Application of Chapter 6, Part 5, Division 1A to relevant proceedings**

- (1) This clause applies to relevant proceedings commenced in either of the following ways—
  - (a) by a court attendance notice filed, or an indictment presented, on or after the commencement,
  - (b) by a court attendance notice filed, or an indictment presented, before the commencement but only if the matter was not committed for trial before the commencement.
- (2) Chapter 6, Part 5, Division 1A applies to the relevant proceedings.

## **Schedule 2      Amendment of Criminal Procedure Regulation 2017**

**[1] Part 10, heading**

Omit “Child sexual offence evidence pilot scheme”.

Insert instead “Evidence in child sexual offence proceedings”.

**[2] Clause 108A Extension of pilot scheme**

Omit the clause.

**[3] Clauses 109—111, headings**

Omit “children’s champions”. Insert instead “witness intermediaries”.

**[4] Clause 109**

Omit “clause 89 (2) of Schedule 2 to the Act”. Insert instead “the Act, section 294M(2)(b)”.

**[5] Clause 110**

Omit “The Department (or, if the Attorney General has nominated another agency under clause 89 (1) of Schedule 2 to the Act, that agency)”.

Insert instead “The Secretary of the Department in which the Act is administered”.

**[6] Clause 110(a)**

Omit “clause 89 of Schedule 2 to the Act”. Insert instead “the Act, section 294M”.

**[7] Clause 111**

Omit “children’s champion for the purposes of clause 90 (4) of Schedule 2 to the Act”.

Insert instead “witness intermediary for the Act, section 294N(5)”.

**[8] Clause 111, note**

Omit “children’s champion in proceedings to which Part 29 of Schedule 2 to the Act”.

Insert instead “witness intermediary in proceedings to which the Act, Chapter 6, Part 5, Division 1A”.

**[9] Clause 112 Fees payable to a children’s champion**

Omit the clause.

[Second reading speech made in—

Legislative Assembly on 20 September 2023

Legislative Council on 12 October 2023]