

TASMANIA

EVIDENCE (CHILDREN AND SPECIAL WITNESSES) AMENDMENT BILL 2013

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EVIDENCE (CHILDREN AND SPECIAL WITNESSES) AMENDMENT BILL 2013

This Public Bill originated in the House of Assembly, and, having this day passed, is now ready for presentation to the Legislative Council for its concurrence.

P. R. ALCOCK, *Clerk of the House*
26 September 2013

(Brought in by the Minister for Justice, the Honourable Brian Neal Wightman)

A BILL FOR

An Act to amend the *Evidence (Children and Special Witnesses) Act 2001*, the *Criminal Code Act 1924* and the *Legal Aid Commission Act 1990*

Be it enacted by His Excellency the Governor of Tasmania, by and with the advice and consent of the Legislative Council and House of Assembly, in Parliament assembled, as follows:

PART 1 – PRELIMINARY

1. Short title

This Act may be cited as the *Evidence (Children and Special Witnesses) Amendment Act 2013*.

2. Commencement

The provisions of this Act commence on a day or days to be proclaimed.

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Part 2 – Evidence (Children and Special Witnesses) Act 2001 Amended

**PART 2 – EVIDENCE (CHILDREN AND SPECIAL
WITNESSES) ACT 2001 AMENDED**

3. Principal Act

In this Part, the *Evidence (Children and Special Witnesses) Act 2001** is referred to as the Principal Act.

4. Section 3 amended (Interpretation)

Section 3 of the Principal Act is amended as follows:

- (a) by inserting “, or a crime under section 158 or 159 of the *Criminal Code*” after “*Family Violence Act 2004*” in paragraph (ab) of the definition of *affected child*;
- (b) by omitting “178, 185 or 186” from paragraph (b)(i) of the definition of *affected child* and substituting “170, 172, 178, 185, 186, 191A or 240(4)”;
- (c) by inserting “or a crime under section 9 of the *Sex Industry Offences Act 2005*” after “*Criminal Code*” in paragraph (b)(i) of the definition of *affected child*;
- (d) by inserting the following paragraph after paragraph (b) in the definition of *affected child*:

*No. 79 of 2001

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Part 2 – Evidence (Children and Special Witnesses) Act 2001 Amended

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- (ba) who has witnessed a crime referred to in paragraph (b)(i) or a crime under section 158 or 159 of the *Criminal Code*; or
- (e) by omitting “17” from the definition of *child* and substituting “18”;
- (f) by inserting the following definition after the definition of *child*:

Crown Law Officer means the Attorney-General or Solicitor-General, or any person appointed by the Governor to institute or prosecute criminal proceedings in the Supreme Court;

- (g) by omitting “178, 185 or 186” from paragraph (b) of the definition of *prescribed proceeding* and substituting “158, 159, 170, 172, 178, 185, 186, 191A or 240(4)”.

5. Part 1A inserted

After section 3 of the Principal Act, the following Part is inserted:

PART 1A – PRINCIPLES IN RELATION TO CHILD WITNESSES

3A. Principles in relation to child witnesses

- (1) It is the intention of Parliament that, as children tend to be vulnerable in dealings

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with persons in authority, child witnesses be given the benefit of special measures.

(2) The following principles apply where a child is a witness in any proceeding:

- (a) measures are to be taken to limit, to the greatest extent practicable, the distress or trauma suffered (or likely to be suffered) by the child when giving evidence;
- (b) the child is to be treated with dignity, respect and compassion;
- (c) the child should not be intimidated when giving evidence;
- (d) prescribed proceedings in which a child is a witness are to be resolved as quickly as possible.

6. Section 5 amended (Admission of prior statement of affected child)

Section 5(1) of the Principal Act is amended by inserting “including a special hearing ordered under section 6A,” after “proceeding,”.

7. Section 6 substituted

Section 6 of the Principal Act is repealed and the following sections are substituted:

6. Application for order for special hearing

(1) In a prescribed proceeding, the prosecutor may apply to a judge for an order directing –

(a) that the whole of an affected child's evidence (including cross-examination and re-examination) be –

(i) taken at a special hearing and audio visually recorded; and

(ii) presented to the court in the form of that audio visual recording; and

(b) that the affected child not be present at the trial.

(2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).

6A. Special hearing to take and record child's evidence in full

A judge who hears an application under section 6(1)(a) may make such orders as the judge thinks fit, including ordering a special hearing to take and record a child's evidence in full.

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6B. Evidence of affected child by audio visual link

- (1) Except where an order under section 7 is in force, the evidence of an affected child in a prescribed proceeding, including evidence given at a special hearing, is to be given by audio visual link.
- (2) While an affected child is giving evidence by audio visual link, only the following persons may be present in the room with the child:
 - (a) a person approved under section 4;
 - (b) one person employed at the court in which the proceedings are being conducted.

8. Section 7 amended (Affected child may give oral evidence in court)

Section 7 of the Principal Act is amended as follows:

- (a) by omitting from subsection (1) “section 6” and substituting “section 6B”;
- (b) by omitting from subsection (2) “section 6” and substituting “section 6B”.

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9. Sections 7A, 7B and 7C inserted

After section 7 of the Principal Act, the following sections are inserted in Part 2:

7A. Audio visual record of evidence given at trial

- (1) If an affected child or a special witness is to give evidence at trial in any prescribed proceeding, and facilities are available for making an audio visual record of the evidence, an audio visual record is to be made of the affected child's or special witness's evidence.
- (2) An audio visual record is to be made under this section whether or not the affected child or special witness is giving evidence by audio visual link.
- (3) An audio visual record made under this section forms part of the records of the court.

7B. Audio visual record may be admitted into evidence

- (1) If, in a later civil or criminal proceeding, a judge is satisfied that evidence of which an audio visual record has been made under this Part is relevant to the later proceeding, the judge may admit the audio visual record into evidence.
- (2) Before the judge admits such an audio visual record into evidence, the judge may have the record edited to exclude

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irrelevant material or material that is otherwise inadmissible in the later proceeding.

- (3) If a judge admits an audio visual record into evidence under this section, the judge may relieve the witness wholly or in part from an obligation to give evidence in the later proceeding.

7C. Unauthorised possession or dealing in video-taped evidence

- (1) A person must not, without authority –
- (a) have an audio visual recording of evidence in his or her possession; or
 - (b) supply, or offer to supply, an audio visual recording of evidence to any person.

Penalty: Fine not exceeding 50 penalty units.

- (2) A person must not, without authority, play, copy or erase, or permit a person to copy or erase, an audio visual recording of evidence.

Penalty: Fine not exceeding 50 penalty units.

- (3) A person has authority for the purposes of subsection (1) or (2) only if he or she has possession of an audio visual

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recording of evidence or does anything mentioned in subsection (1) or (2), as the case may be –

- (a) in the case of a public official, for a purpose connected with –
 - (i) the proceeding for which the recording was made; or
 - (ii) any proceeding where the audio visual recording has been admitted into evidence pursuant to section 7B; or
 - (iii) any resulting proceeding by way of appeal; or
- (b) in any other case, as authorised by a Crown Law Officer for a purpose connected with –
 - (i) the proceeding for which the recording was made; or
 - (ii) any proceeding where the audio visual recording has been admitted into evidence pursuant to section 7B; or
 - (iii) any proceeding resulting by way of appeal.

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10. Part 3: Heading inserted

The Principal Act is amended by inserting the following heading before section 8:

PART 3 – DECLARATION OF SPECIAL WITNESS

11. Section 8 amended (Special witness)

Section 8(2)(b) of the Principal Act is amended by inserting after subparagraph (ii) the following subparagraphs:

- (iia) an order admitting into evidence a prior statement of the special witness as if the special witness were an affected child in respect of whom section 5 applies;
- (iib) an order that a special hearing be held to take and record evidence as if the special witness were an affected child in respect of whom section 6 applies;
- (iic) if an order is made under subparagraph (iib), an order that the special witness not be present at the trial;

12. Part 4 inserted

After section 8 of the Principal Act, the following Part is inserted:

**PART 4 – CROSS-EXAMINATION OF VICTIMS OF
CERTAIN OFFENCES**

8A. Cross-examination of victims of certain offences

- (1) In any prescribed proceeding for an offence, a defendant is not to be permitted to cross-examine a witness who is the alleged victim of the offence unless the cross-examination is undertaken by counsel.
- (2) If a defendant is not legally represented in a prescribed proceeding that will involve the taking of evidence from any such witness, the judge must ensure that the defendant –
 - (a) has been warned of the limitation on the right of cross-examination imposed by this section; and
 - (b) has been informed that he or she may be entitled to legal assistance under the *Legal Aid Commission Act 1990*; and
 - (c) has had a reasonable opportunity to obtain the assistance of counsel before the evidence is taken.
- (3) If it appears to be in the interests of justice that a person should have legal aid in connection with this Part and that the person has insufficient means to enable

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him or her to obtain that aid, the judge may make an order directing that the person be given assistance under the approved scheme for the time being in force under the *Legal Aid Commission Act 1990*.

- (4) If, in a prescribed proceeding, an unrepresented defendant obtains the assistance of counsel for the purpose of cross-examining such a witness, the judge must –
- (a) explain to the jury the limitation imposed by this section on the defendant's right to personally cross-examine the witness; and
 - (b) warn the jury that no adverse inference may be drawn against the defendant from the requirement for the unrepresented defendant to obtain the assistance of counsel to cross-examine the witness.

13. Part 5: Heading inserted

The Principal Act is amended by inserting the following heading before section 9:

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PART 5 – MISCELLANEOUS

14. Section 9 amended (Preliminary hearing)

Section 9(1) of the Principal Act is amended by omitting “section 8” and substituting “section 6A or 8”.

15. Part 3: Heading repealed

The Principal Act is amended by omitting the heading “**PART 3 — MISCELLANEOUS**”.

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Part 3 – Criminal Code Act 1924 Amended

PART 3 – CRIMINAL CODE ACT 1924 AMENDED

16. Principal Act

In this Part, the *Criminal Code Act 1924** is referred to as the Principal Act.

17. Schedule 1 amended (*Criminal Code*)

Schedule 1 to the Principal Act is amended by omitting section 178(2).

*No. 69 of 1924

**PART 4 – LEGAL AID COMMISSION ACT 1990
AMENDED**

18. Principal Act

In this Part, the *Legal Aid Commission Act 1990** is referred to as the Principal Act.

19. Section 19 amended (Circumstances in which legal aid may be provided)

Section 19 of the Principal Act is amended as follows:

- (a) by inserting the following paragraph after paragraph (a) in subsection (1):
 - (ab) the person is an unrepresented accused seeking legal assistance for the purposes of cross-examining the alleged victim of an offence in a prescribed proceeding, within the meaning of the *Evidence (Children and Special Witnesses) Act 2001*, in accordance with section 8A of that Act; or
- (b) by omitting from subsection (2)(i) “person.” and substituting “person; and”;
- (c) by inserting the following paragraph after paragraph (i) in subsection (2):

*No. 42 of 1990

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Part 4 – Legal Aid Commission Act 1990 Amended

- (j) section 8A of the *Evidence (Children and Special Witnesses) Act 2001*.

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PART 5 – REPEAL OF ACT

20. Repeal of Act

This Act is repealed on the three hundred and sixty fifth day from the day on which all of the provisions of this Act commence.