

## CLAUSE NOTES

### *Evidence (Children and Special Witnesses) Amendment Bill 2020*

#### PART 1 – Preliminary

##### Clause 1. Short title

Specifies the name of the proposed Act.

##### Clause 2. Commencement

Provides for the commencement of the proposed Act on 1 March 2021

#### PART 2 – *Evidence (Children and Special Witnesses) Act 2001* Amended

##### Clause 3. Principal Act

Provides that the Principal Act being amended in this Part is the *Evidence (Children and Special Witnesses) Act 2001*.

##### Clause 4. Section 3 amended

Amends section 3 of the Principal Act to extend the definition of *affected person* to include ‘a prescribed witness’.

By inserting ‘or specified proceeding’ in the definition of *defendant*.

By inserting a definition of *prescribed witness* as a witness in respect of whom a witness intermediary order has been made under section 7J. This ensures that a *prescribed witness* has the same rights as an *affected person* under the Principal Act.

By inserting definitions for *specified offence*, *specified proceeding*, *witness intermediary* and *witness intermediary order*.

##### Clause 5. Section 3A amended

Amends section 3A(2)(d) of the Principal Act to include *specified proceeding*. This ensures that the principles in relation to a child witness reflect children in specified proceedings.

##### Clause 6. Section 4 amended

Amends section 4 of the Principal Act to include *prescribed witness* as persons who are entitled to a support person.

##### Clause 7. Section 5 amended

Amends section 5 of the Principal Act to include *prescribed witness* as persons for whom a prior statement may be admitted into evidence. This ensures that a *prescribed witness* has the same rights as an *affected child*.

#### **Clause 8. Section 6 amended**

Amends section 6 of the Principal Act to include *specified proceeding*. This amendment is a result of extending the definition of *affected person* to include *prescribed witness*. This ensures that a *prescribed witness* has the same rights as an *affected person* under the Principal Act.

#### **Clause 9. Section 6B amended**

Amends section 6B of the Principal Act to include *prescribed witness* as persons who are to give evidence by audio visual link, except where an order under section 7 is in force. This ensures that a *prescribed witness* has the same rights as an *affected child* under the Principal Act.

#### **Clause 10. Section 7 amended**

Amends section 7 of the Principal Act to include *prescribed witness* as persons whom the prosecutor may apply to a judge for an order that section 6B does not apply to the proceeding. The judge may make an order declaring that section 6B does not apply to the proceeding if satisfied that the prescribed witness is able and wishes to give evidence in the presence of the defendant in the courtroom.

#### **Clause 11. Section 7A amended**

Amends section 7A of the Principal Act to include *specified proceeding*. This amendment is a result of extending the definition of *affected person* to include *prescribed witness*. A *prescribed witness* has the same rights as an *affected person* under the Principal Act.

#### **Clause 12. PART 2A inserted**

After section 7D of the Principal Act, the following *Part 2A - Intermediary Scheme* is inserted. Part 2A comprises sections 7E-7M.

##### ***Section 7E. Interpretation***

Sets out a number of definitions used in the proposed Part 2A including – *adult*; *assessment report* which means a report prepared by a witness intermediary in relation to a witness's communication and other related needs; *communication need*; *ground rules hearing*; *intermediaries panel*; *Secretary*; and *witness intermediary* which means a person on the intermediaries panel; or on a panel (however described) in another State or a Territory, the powers, functions and duties of which substantially correspond with those of the intermediaries panel.

##### ***Section 7F. Meaning of communication need***

Sets out a definition of 'communication need' which applies to adult victims and witnesses (other than a defendant) under the Part. A witness who is to give evidence in specified proceeding will be taken to have a communication need if the quality or clarity of evidence

given by the witness may be significantly diminished by the witness's ability to understand, process or express information.

Provides that a witness has a communication need regardless of whether the witness's communication need is temporary, permanent or reoccurring; or the degree of severity of the witness's communication need changes over time or due to circumstances; or the witness's communication need is caused by disability, illness, injury, trauma or some other cause.

Provides that a communication need cannot not be solely due to a witness's knowledge of the English language.

### ***Section 7G. Intermediaries panel***

Provides the Secretary establish and maintain a panel of persons suitable to be witness intermediaries for the purposes of this Act.

Provides that a person may be included in the intermediaries panel only if the person has a tertiary qualification in psychology, social work, speech pathology or occupational therapy or the person has qualifications, training, experience or skills suitable for the performance of the functions under section 7H.

Provides that the Secretary will allocate a suitable person from the intermediaries panel to perform the relevant functions of a witness intermediary in respect of that witness if a judge makes an order under section 7I or 7J.

### ***Section 7H. Functions of witness intermediary***

Provides the functions of a witness intermediary.

To assess the witness's communication and other related needs and to prepare and provide an assessment report about those communication and other related needs as required under section 7I.

To provide recommendations to the judge, and any lawyer appearing, in specified proceedings as to adjustments to be made in the proceeding to enable the most effective communication with the witness.

To provide assistance to the judge, and any lawyer appearing in specified proceedings in relation to communication with the witness.

To perform any other function in a specified proceeding that the judge considers to be in the interests of justice.

Provides that a witness intermediary must act impartially in performing the witness intermediary's functions.

Requires a witness intermediary to take an oath or affirmation before participating in specified proceedings.

### ***Section 7I. Assessment Report***

Gives a judge the power to make an order that an assessment report be prepared and provided to the judge by a witness intermediary in respect of a witness in a specified proceeding if that witness is a child victim or child witness (other than a defendant) or an adult victim who may have a communication need or an adult witness (other than a defendant) who may have a communication need.

Provides that an order for assessment report is to be made by the judge as early as practicable before the witness may be required to give evidence unless it is in the interests of justice to make an order at a later stage in the proceeding.

Provides that a judge is not to make an order for assessment report if it is unnecessary or inappropriate, the witness does not wish the order to be made or the making of the order is contrary to the interests of justice.

Provides that when an assessment report has been prepared by a witness intermediary and provided to the judge, the judge is to provide a copy of an assessment report to the prosecutor and defendant.

Provides that the judge may make such orders as the judge considers necessary or appropriate regarding the distribution and security of all or part of an assessment report and such orders are not subject to review or appeal.

#### ***Section 7J. Use of witness intermediary***

Provides that a judge is to make an order that a witness intermediary be used in respect of a witness in a specified proceeding, if having considered an assessment report, the judge is satisfied that the use of a witness intermediary will assist the proceeding.

Provides that a witness intermediary is to be present when the witness gives evidence in the specified proceeding if the order is made.

#### ***Section 7K. Ground rules hearing***

Provides that a judge must direct that a ground rules hearing be held for a prescribed witness in a specified proceeding.

*Prescribed witness* is defined in section 3 as a witness in respect of whom a witness intermediary order has been made under section 7J.

*Ground rules hearing* is defined in section 7E as a hearing in a specified proceeding where a judge considers the communication and other related needs of a prescribed witness who is to give evidence in the proceeding that have been identified by a witness intermediary and gives directions on how the proceedings must be conducted to meet those needs fairly and effectively.

Provides that at the ground rules hearing for a prescribed witness, a judge may make any directions that the judge considers appropriate.

Provides that a judge is to consider any matters in any assessment report in making any directions under this section including, but not limited to, directions about the length of time a witness may be questioned, the questions that may or may not be asked, the provision of

proposed questions to the witness intermediary, the allocation of topics if a witness is being questioned by different counsel for multiple defendants, and the use of models, plans, body maps or aids to help communicate a question or answer.

#### ***Section 7L. Evidence***

Provides that in making a decision under this Part, the judge is not bound by the rules of evidence and may inform himself, or herself, on any matter in any manner the judge thinks fit.

#### ***Section 7M. Status of directions and orders if subsequent hearing or trial***

Provides that an order or direction given under this Part has the same status for the purposes of any hearing or trial (including re-trial) of the same specified proceeding, whether before the same or a different judge.

Provides that a direction or order may be varied, revoked or a further direction may be made if the judge is satisfied that it is necessary or appropriate.

#### **Clause 13. Section 8 amended**

Amends section 8 of the Principal Act to include 'prescribed witness' as persons for whom a judge is not to make a special witness order under section 8. A 'prescribed witness' has the same rights as an 'affected child' under the Act.

#### **Clause 14. PART 4: Heading amended**

Part 4 heading of the Principal Act is amended

#### **Clause 15. Section 8A amended**

Amends section 8A of the Principal Act to prevent a defendant directly cross-examining a witness for whom a witness intermediary order has been made unless the cross-examination is undertaken by counsel.

Amends section 8A(3) to clarify that the judge may make an order directing that an unrepresented defendant be given assistance under the *Legal Aid Commission Act 1990* for cross-examination only.

Inserts new subsection (3A) to provide the Legal Aid Commission of Tasmania 14 days' notice of an order under subsection (3) or such lesser period as the Director of the Legal Aid Commission of Tasmania agrees.

Inserts a new subsection (3B) to require the Legal Aid Commission of Tasmania to provide legal aid for the purpose of cross-examining the witness or person, without applying any income, assets or other merits test.

Inserts a new subsection (3C) to clarify that counsel assisting an unrepresented defendant as a consequence of subsection (3) order is to ask the witness only the allowable questions about matters that the defendant requests counsel put to the witness and must not independently give the defendant legal advice.

Inserts a new subsection (3D) to give a judge the power to make such directions (if any) as the judge considers necessary or appropriate in relation to the provision of material and instructions to counsel if a subsection (3) order has been made.

#### **Clause 16. Section 9 amended**

Amends section 9 of the Principal Act to include 'specified proceeding'. This ensures that a prescribed witness, who is likely to require the giving of an approval under section 4 and 6A, is included in the requirement to apply for a preliminary hearing.

#### **Clause 17. Schedule 1 inserted**

Inserts new Schedule 1 to insert the oath and affirmation to be administered to a witness intermediary.

### **PART 3 – *Criminal Code Act 1924* Amended**

#### **Clause 18. Principal Act**

Provides that the Principal Act being amended in this Part is the *Criminal Code Act 1924*.

#### **Clause 19. Schedule 1 amended (*Criminal Code*)**

Amends section 331B of the Principal Act to extend the definition of 'affected person' to include 'a prescribed witness within the meaning of the *Evidence (Children and Special Witnesses) Act 2001*'. A preliminary proceeding order may only be made if, in the case of an affected person, the Court is satisfied that exceptional circumstances require the witness to give evidence at preliminary proceedings.

### **PART 4 – *Legal Aid Commission Act 1990* Amended**

#### **Clause 20. Principal Act**

Provides that the Principal Act being amended in this Part is the *Legal Aid Commission Act 1990*.

#### **Clause 21. Section 19 amended**

Amends section 19 of the Principal Act to clarify when the the Legal Aid Commission of Tasmania is to provide legal aid to a person as required by section 8A of the *Evidence (Children and Special Witnesses) Act 2001*.

### **PART 5 – Repeal of Act**

#### **Clause 22. Repeal of Act**

Provides that this Act is to be repealed one year after the day on which is commenced.