

TASMANIA

**EVIDENCE (CHILDREN AND SPECIAL
WITNESSES) AMENDMENT BILL 2020**

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EVIDENCE (CHILDREN AND SPECIAL WITNESSES) AMENDMENT BILL 2020

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.

SHANE DONNELLY, *Clerk of the House*
15 September 2020

(Brought in by the Minister for Justice, the Honourable Elise Nicole Archer)

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 Her 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 2020*.

2. Commencement

This Act commences on 1 March 2021.

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s. 3 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 the following paragraph after paragraph (b) in the definition of *affected person*:

(c) a prescribed witness;

(b) by inserting “or specified proceeding” after “proceeding” in paragraph (b) of the definition of *defendant*;

(c) by inserting the following definition after the definition of *prescribed proceeding*:

prescribed witness means a witness in respect of whom a witness intermediary order has been made under section 7J;

(d) by inserting the following after the definition of *special witness*:

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specified offence means an offence committed against –

- (a) section 105A, 122, 124, 125, 125A, 125B, 125C, 125D, 126, 127, 127A, 129, 130, 130A, 133, 137, 178A or 185 of the *Criminal Code*; or
- (b) chapter XVII of the *Criminal Code*; or
- (c) section 298, 299 or 300 of the *Criminal Code* in respect of an offence referred to in paragraph (a) or (b); or
- (d) section 73 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*; or
- (e) section 8(1A)(a) or 35(3) of the *Police Offences Act 1935*; or
- (f) section 4, 7, 8(2) or 9 of the *Sex Industry Offences Act 2005*;

specified proceeding means a proceeding (including a preliminary proceeding) in which

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a person has been charged with a specified offence;

(e) by omitting “*Children, Young Persons and Their Families Act 1997.*” from the definition of *trial* and substituting “*Children, Young Persons and Their Families Act 1997;*”;

(f) by inserting the following definitions after the definition of *trial*:

witness intermediary – see section 7E;

witness intermediary order means an order under section 7J that a witness intermediary be used in respect of a witness.

5. Section 3A amended (Principles in relation to child witnesses)

Section 3A(2)(d) of the Principal Act is amended by inserting “or specified proceedings” after “proceedings”.

6. Section 4 amended (Support person for child or prescribed witness)

Section 4(1) of the Principal Act is amended as follows:

(a) by inserting “or a prescribed witness” after “a child”;

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- (b) by inserting “or prescribed witness” after “the child”.

7. Section 5 amended (Admission of prior statement of affected child or prescribed witness)

Section 5(1) of the Principal Act is amended as follows:

- (a) by omitting “proceeding, including a special hearing ordered under section 6A,” and substituting “proceeding (including a special hearing ordered under section 6A) or a specified proceeding”;
- (b) by inserting “or a prescribed witness” after “an affected child”;
- (c) by inserting in paragraph (c) “or the prescribed witness” after “child”.

8. Section 6 amended (Application for order for special hearing)

Section 6(1) of the Principal Act is amended by inserting “or a specified proceeding” after “proceeding”.

9. Section 6B amended (Evidence of affected child or prescribed witness by audio visual link)

Section 6B of the Principal Act is amended as follows:

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- (a) by inserting in subsection (1) “or a prescribed witness” after “child”;
- (b) by inserting in subsection (1) “or a specified proceeding” after “proceeding”;
- (c) by inserting in subsection (2) “or a prescribed witness” after “affected child”;
- (d) by inserting in subsection (2) “or witness” after “the child”;
- (e) by omitting from subsection (2)(b) “conducted.” and substituting “conducted;”;
- (f) by inserting the following paragraph after paragraph (b) in subsection (2):
 - (c) in the case of a prescribed witness, a witness intermediary.

10. Section 7 amended (Affected child or prescribed witness may give oral evidence in court)

Section 7 of the Principal Act is amended as follows:

- (a) by inserting in subsection (1) “or a specified proceeding” after “prescribed proceeding”;
- (b) by inserting in subsection (2) “or prescribed witness” after “child”;

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(c) by inserting in subsection (3) “or a specified proceeding” after “proceeding”.

11. Section 7A amended (Audio visual record of evidence given at trial)

Section 7A(1) of the Principal Act is amended by inserting “or specified proceeding” after “proceeding”.

12. Part 2A inserted

After section 7D of the Principal Act, the following Part is inserted:

PART 2A – INTERMEDIARY SCHEME

7E. Interpretation

In this Part –

adult means a person who has attained the age of 18 years;

assessment report means a report prepared by a witness intermediary in relation to a witness’s communication and other related needs;

communication need – see section 7F;

ground rules hearing means a hearing in a specified proceeding where a judge –

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- (a) considers the communication or other related needs of a prescribed witness who is to give evidence in the proceeding that have been identified by a witness intermediary; and
- (b) gives directions on how the proceeding must be conducted to meet those needs fairly and effectively;

intermediaries panel means the panel established and maintained under section 7G;

Secretary means the Secretary of the Department;

witness intermediary means a person –

- (a) on the intermediaries panel; or
- (b) 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.

7F. Meaning of communication need

- (1) For the purposes of this Part, a witness who is to give evidence in a 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.
- (2) Subsection (1) applies regardless of whether –
 - (a) the witness's communication need is temporary, permanent or reoccurring; or
 - (b) the degree of severity of the witness's communication need changes over time or due to circumstances; or
 - (c) the witness's communication need is caused by disability, illness, injury, trauma or some other cause.
- (3) A witness is not to be taken as having a communication need solely because the witness does not have a knowledge of the English language that is sufficient to enable the person to understand questioning.

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7G. Intermediaries panel

- (1) The Secretary is to establish and maintain a panel of persons who the Secretary considers are suitable to be witness intermediaries for the purposes of this Act.
- (2) A person may be included in the panel under this section only if –
 - (a) the person has a tertiary qualification in psychology, social work, speech pathology or occupational therapy; or
 - (b) the person has qualifications, training, experience or skills suitable for the performance of the functions mentioned in section 7H.
- (3) If a judge makes an order in respect of a witness under section 7I or 7J, the Secretary is to allocate a person from the intermediaries panel to perform the relevant functions of a witness intermediary in respect of that witness.
- (4) The Secretary may only allocate a person from the intermediaries panel under subsection (3) if satisfied that the witness intermediary has the training, experience or skills suitable for the witness in respect of whom the order has been made.

7H. Functions of witness intermediary

- (1) The functions of a witness intermediary, in respect of a witness, are to –
 - (a) 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; and
 - (b) provide recommendations during a specified proceeding to the judge, and any lawyer appearing in the proceeding, as to adjustments to be made in the proceeding to enable the most effective communication with the witness; and
 - (c) otherwise provide assistance during a specified proceeding to the judge, and any lawyer appearing in the proceeding, in relation to communication with the witness; and
 - (d) perform any other function that a judge in a specified proceeding considers is in the interests of justice.
- (2) A witness intermediary must act impartially in performing the witness intermediary's functions under this Part.

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- (3) A person must not act as a witness intermediary in a specified proceeding unless the person has taken an oath or made an affirmation in accordance with Schedule 1.

7I. Assessment report

- (1) A judge is 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) a child upon or in respect of whom the specified offence is alleged to have been committed; or
 - (b) a child, other than the defendant, who is to give evidence in respect of the specified offence; or
 - (c) an adult –
 - (i) upon or in respect of whom the specified offence is alleged to have been committed; and
 - (ii) who has been identified by the judge, or any lawyer appearing in the specified proceeding, as a person who may have a communication need; or

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- (d) an adult, other than the defendant –
- (i) who is to give evidence in respect of the specified offence; and
 - (ii) who has been identified by the judge, or any lawyer appearing in the specified proceeding, as a person who may have a communication need.
- (2) An order under subsection (1) is to be made by the judge as early as practicable before the witness may be required to give evidence.
- (3) A judge is not to make an order under subsection (1) if the judge is satisfied that –
- (a) it is unnecessary or inappropriate to make the order; or
 - (b) the witness does not wish the order to be made; or
 - (c) the making of the order would be contrary to the interests of justice.
- (4) Subject to subsection (5), the judge is to provide a copy of an assessment report provided in respect of a prescribed witness in a specified proceeding to the

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prosecutor and defendant in the proceeding.

- (5) The judge in a specified proceeding may make such orders as the judge considers necessary or appropriate regarding the distribution and security of all or part of an assessment report.
- (6) An order made under subsection (5) is not subject to review or appeal.
- (7) Despite subsection (2), a judge may make an order under subsection (1) at a later stage of the specified proceeding if the judge is satisfied it is in the interests of justice to do so.

7J. Use of witness intermediary

- (1) 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 provided in respect of that witness, the judge is satisfied that the use of a witness intermediary in respect of the witness will assist the proceeding.
- (2) If a judge makes an order under subsection (1), a witness intermediary is to be present when the witness gives evidence in the specified proceeding.

7K. Ground rules hearing

- (1) A judge must direct that a ground rules hearing be held for a prescribed witness in a specified proceeding.
- (2) The following persons must attend a ground rules hearing for a specified proceeding:
 - (a) the prosecutor;
 - (b) the legal practitioner representing the defendant or, if the defendant is unrepresented, the defendant;
 - (c) the witness intermediary.
- (3) A prescribed witness is not required to attend a ground rules hearing.
- (4) At a ground rules hearing for a prescribed witness, a judge may make any direction that the judge considers appropriate including any of the following:
 - (a) a direction about how the witness may be questioned;
 - (b) a direction about how long the witness may be questioned;
 - (c) a direction about the questions that may or may not be asked of the witness;

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- (d) a direction as to when the questions that are to be asked of the witness are to be provided to the witness intermediary;
 - (e) if there is more than one defendant, a direction about the allocation among the defendants of the topics about which the witness may be asked;
 - (f) a direction about the use of models, plans, body maps or other aids to help communicate a question or an answer.
- (5) If an assessment report has been made in respect of the prescribed witness, in making a direction under this section the judge is to consider any matters mentioned in that report.
- (6) Nothing in this section prevents a judge from directing that a subsequent ground rules hearing be held for a prescribed witness.

7L. Evidence

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 that the judge thinks fit.

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

- (1) If a direction is given, or an order made, under this Part, that direction or order 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.
- (2) Subsection (1) does not prevent a judge in a subsequent hearing from –
 - (a) varying or revoking a direction or an order made in relation to a prescribed witness under this Part if necessary or appropriate in regards to the use of a witness intermediary in respect of the witness; or
 - (b) making a further direction or order under this Part in relation to a prescribed witness if necessary or appropriate in regards to the use of a witness intermediary in respect of the witness.

13. Section 8 amended (Special witness)

Section 8 of the Principal Act is amended as follows:

- (a) by inserting in subsection (2)(b)(iia) “or prescribed witness” after “child”;

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- (b) by inserting in subsection (5) “or a prescribed witness” after “child”.

14. Part 4: Heading amended

Part 4 of the Principal Act is amended by omitting “**VICTIMS OF CERTAIN OFFENCES AND APPLICATIONS**” from the heading to that Part and substituting “**CERTAIN VICTIMS AND WITNESSES**”.

15. Section 8A amended (Cross-examination of certain victims and witnesses)

Section 8A of the Principal Act is amended as follows:

- (a) by inserting the following subsection after subsection (1A):
 - (1B) In any specified proceeding for a specified offence, a defendant is not to be permitted to cross-examine a prescribed witness unless the cross-examination is undertaken by counsel.
- (b) by inserting in subsection (2) “or a specified proceeding” after “proceeding”;
- (c) by omitting from subsection (2) “subsection (1)” and substituting “subsection (1) or (1B)”;
- (d) by omitting subsection (3) and substituting the following subsections:

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- (3) A judge may make an order directing that an unrepresented defendant be given assistance under the *Legal Aid Commission Act 1990* if it appears to be in the interests of justice that the defendant should have legal aid for the purposes of cross-examining a witness who is referred to in subsection (1) or (1B), or a person who is referred to in subsection (1A).
- (3A) A judge who has made an order under subsection (3) is to provide a copy of that order to the Director of the Legal Aid Commission of Tasmania at least 14 days before the day on which the witness is to give evidence or such lesser period as the Director may agree.
- (3B) If a judge makes an order under subsection (3), the Legal Aid Commission of Tasmania is to provide legal aid for the purpose of cross-examining the witness or person despite any income, assets or other merits test under section 19 of the *Legal Aid Commission Act 1990* or any guidelines issued under section 27 of that Act.
- (3C) The counsel assisting an unrepresented defendant as a

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consequence of an order under subsection (3) –

- (a) is to ask the witness only the allowable questions about matters that the defendant requests the counsel assisting to put to the witness; and
- (b) must not independently give the defendant legal advice.

(3D) If a judge makes an order under subsection (3), the judge may give such directions (if any) as the judge considers necessary or appropriate with respect to the provision of materials and instructions to the counsel assisting the unrepresented defendant.

- (e) by inserting in subsection (4) “or a specified proceeding” after “proceeding”;
- (f) by inserting the following subsection after subsection (4):

(5) In this section –

Legal Aid Commission of Tasmania means the commission constituted under section 4 of the

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Legal Aid Commission
Act 1990.

16. Section 9 amended (Preliminary hearing)

Section 9 of the Principal Act is amended as follows:

- (a) by inserting in subsection (1) “or any specified proceeding” after “prescribed proceeding”;
- (b) by inserting in subsection (2) “or a specified proceeding” after “prescribed proceeding”.

17. Schedule 1 inserted

After section 11 of the Principal Act, the following Schedule is inserted:

**SCHEDULE 1 – OATH OR AFFIRMATION FOR
WITNESS INTERMEDIARIES**

Section 7H(3)

1. Oath

Do you swear by Almighty God (*or by a god recognised by your religion*) that you will well and truly carry out the functions of a witness intermediary and do all other matters and things that are required of you by the court in this case to the best of your ability?

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2. Affirmation

Do you solemnly and sincerely declare and affirm that you will well and truly carry out the functions of a witness intermediary and do all other matters and things that are required of you by the court in this case to the best of your ability?

PART 3 – CRIMINAL CODE ACT 1924 AMENDED

18. Principal Act

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

19. Schedule 1 amended (*Criminal Code*)

Section 331B of Schedule 1 to the Principal Act is amended as follows:

- (a) by omitting from subsection (3)(b) “within the meaning of the *Justices Act 1959*”;
- (b) by omitting from subsection (4)(a) “within the meaning of the *Justices Act 1959*”;
- (c) by omitting from subsection (4)(b) “within the meaning of the *Justices Act 1959*”;
- (d) by inserting the following subsection after subsection (5):

(6) In this section –

affected person means the following:

- (a) an affected person within the meaning of the *Justices Act 1959*;

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Part 3 – Criminal Code Act 1924 Amended

- (b) a prescribed witness within the meaning of the *Evidence (Children and Special Witnesses) Act 2001*.

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

20. Principal Act

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

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

Section 19 of the Principal Act is amended as follows:

- (a) by omitting from subsection (1) “The” and substituting “Subject to subsection (2A), the”;
- (b) by omitting paragraph (ab) from subsection (1);
- (c) by omitting from subsection (2)(j) “section 8A” and substituting “limitations on the person’s right to cross-examine a witness or person under section 8A”;
- (d) by inserting the following subsection after subsection (2):
 - (2A) The Commission is to provide legal aid to a person in accordance with section 8A of the *Evidence (Children and Special*

*No. 42 of 1990

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Part 4 – Legal Aid Commission Act 1990 Amended

Witnesses) Act 2001 if a judge makes an order under that section directing that an unrepresented defendant be given assistance under this Act.

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Part 5 – Repeal of Act

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PART 5 – REPEAL OF ACT

22. Repeal of Act

This Act is repealed on the first anniversary of the day on which it commenced.