

TASMANIA

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

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**EVIDENCE (CHILDREN AND SPECIAL  
WITNESSES) AMENDMENT BILL 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 the day on which this  
Act receives the Royal Assent.

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**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 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 7I;

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

***specified offence*** means an offence committed against –

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\*No. 79 of 2001

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- (a) sections 105A, 124, 125, 125A, 125B, 125C, 125D, 126, 127, 129, 130, 130A, 133, 185 of the *Criminal Code*; or
  - (b) chapter XVII of the *Criminal Code*; or
  - (c) sections 298, 299 or 300 of the *Criminal Code* in respect of an offence referred to in paragraph (a) or (b); or
  - (d) section 35(3) of the *Police Offences Act 1935*;

***specified proceeding*** means a proceeding (including a preliminary proceeding) in which a person has been charged with a specified offence;

**5. 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”;
- (b) by inserting “or prescribed witness” after “the child”.

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**6. 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 inserting “or a prescribed witness” after “an affected child”;
- (b) by inserting in paragraph (c) “or the prescribed witness” after “child”.

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

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

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

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

Section 7(2) of the Principal Act is amended by inserting “or prescribed witness” after “child”.

**9. Part 2A inserted**

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

**PART 2A – INTERMEDIARY SCHEME**

**7E. Interpretation**

(1) 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 needs;

*ground rules hearing* means a hearing for a witness in a specified proceeding, where the court –

(a) considers the communication, support or other needs of the witness; and

(b) decides how the proceeding must be

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conducted to meet those  
needs fairly and  
effectively;

***intermediaries panel*** means the panel  
established and maintained under  
section 7F;

***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;

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

- (2) For the purposes of this Part, a witness is  
not to be taken as having a  
communication need merely because the  
witness does not have a knowledge of the  
English language that is sufficient to

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enable the person to understand questioning.

**7F. 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 7G.
- (3) If a judge makes an order under section 7H or 7I, the Secretary is to allocate a person from the intermediaries panel to perform the relevant functions of a witness intermediary.

**7G. Functions of witness intermediary**

- (1) The functions of a witness intermediary are to –

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- (a) assess a witness’s communication needs and to prepare and provide an assessment report about those communication needs as required under section 7H; and
  - (b) provide advice before and during a proceeding to the judge, and any lawyer appearing in the proceeding, as to adjustments to be made in the proceeding to enable the best communication with a witness; and
  - (c) otherwise provide assistance before and during a proceeding to the judge, and any lawyer appearing in the proceeding, in relation to communication with a witness; and
  - (d) perform any other function that a judge in a proceeding considers is in the interests of justice.
- (2) A witness intermediary must act impartially in performing the intermediary’s functions under this Part.

**7H. Assessment report**

- (1) This section applies to –
  - (a) a proceeding in the Supreme Court for a specified offence at the first appearance before the

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Court after any plea, other than a plea of guilty; and

- (b) a proceeding in the Magistrates Court for a specified offence at the first appearance before the court after any plea, other than a plea of guilty.

- (2) The judge is to make an order that an assessment report be prepared and provided by a witness intermediary in respect of a witness in the specified proceeding if that witness is –

- (a) a child upon or in respect of whom the offence is alleged to have been committed; or

- (b) a child who is to give evidence in respect of the offence; or

- (c) an adult –

- (i) upon or in respect of whom the 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 with a communication need.

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- (3) A judge is not to make an order under subsection (2) if the judge is satisfied that –
  - (a) it is unnecessary or inappropriate to make the order; or
  - (b) the making of the order would be contrary to the interests of justice.
- (4) The court is to give a copy of any assessment report provided in respect of a witness in the specified proceeding to the prosecutor and any party to the proceeding.
- (5) For the avoidance of doubt, a reference to *first appearance* in subsection (1) does not include –
  - (a) an appearance before a justice of the peace; or
  - (b) an appearance in the Magistrates Court regarding bail.

**7I. 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 by a witness intermediary in respect of that witness, the judge is satisfied as follows:

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- (a) in the case of a witness who is a child, that the use of a witness intermediary in respect of the witness will assist the proceeding;
  - (b) in the case of a witness who is an adult, that –
    - (i) the witness has a communication need; and
    - (ii) 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.

**7J. Ground rules hearing**

- (1) A judge may, at any time, if satisfied that it is in the interests of justice, direct that a ground rules hearing be held for a witness in a specified proceeding.
- (2) A judge must direct that a ground rules hearing be held if a witness intermediary order has been made in respect of a witness in the proceedings.
- (3) The following persons must attend a ground rules hearing for a specified proceeding:

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- (a) the prosecutor;
  - (b) the legal practitioner representing the defendant or, if the defendant is unrepresented, the defendant;
  - (c) if a witness intermediary order has been made in respect of a witness in the proceedings, a witness intermediary.
- (4) A witness is not required to attend a ground rules hearing.
- (5) The judge may make an order that a witness not attend the ground rules hearing.
- (6) At a ground rules hearing for a witness, a judge may make any direction that the judge considers is in the interests of justice, including any of the following:
- (a) a direction about how a witness may be questioned;
  - (b) a direction about how long a witness may be questioned;
  - (c) a direction about the questions that may or may not be asked of a witness;
  - (d) if there is more than one defendant, a direction about the allocation among the defendants

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of the topics about which a witness may be asked;

(e) a direction about the use of models, plans, body maps or other aids to help communicate a question or an answer.

(7) If an assessment report has been made in respect of the witness, in making a direction under this section the judge is to consider any matters mentioned in that report.

**7K. 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 the judge thinks fit.

**7L. Status of directions and orders if new trial**

If a direction is given, or an order made, under this Part in relation to a witness in a proceeding for a specified offence and a new trial of the specified offence is held, whether before the same or a different judge, the direction or order has the same status for the purposes of the new trial as if it had been given or made during that new trial.

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**10. 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”;
- (b) by inserting in subsection (5) “or a prescribed witness” after “child”.

**11. 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**”.

**12. 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 an offence, a defendant is not to be permitted to cross-examine a witness if a judge has made an order under section 7I that a witness intermediary be used in respect of the witness, unless the

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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 inserting in subsection (4) “or a specified proceeding” after “proceeding”.

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Part 3 – Criminal Code Act 1924 Amended

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**PART 3 – CRIMINAL CODE ACT 1924 AMENDED**

**13. Principal Act**

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

**14. 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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\*No. 69 of 1924

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

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Part 4 – Legal Aid Commission Act 1990 Amended

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

**15. Principal Act**

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

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

Section 19(1) of the Principal Act is amended by omitting paragraph (ab) and substituting the following paragraph:

- (ab) the person is an unrepresented accused seeking legal assistance for the purposes of cross-examining, in accordance with section 8A of the *Evidence (Children and Special Witnesses) Act 2001* –
  - (i) the alleged victim of an offence in a prescribed proceeding, within the meaning of that Act; or
  - (ii) a prescribed witness, within the meaning of that Act; or

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\*No. 42 of 1990

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Part 5 – Repeal of Act

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**PART 5 – REPEAL OF ACT**

**17. Repeal of Act**

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