

TASMANIA

**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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Act No. of 2020

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 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 –

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

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

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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s. 9

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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s. 10 Part 2 – Evidence (Children and Special Witnesses) Act 2001 Amended

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

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*;

*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

**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

*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.