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K Woodward
Acting Chief Parliamentary Counsel
Dated 27 April 2023



TASMANIA

EVIDENCE (CHILDREN AND SPECIAL WITNESSES) ACT 2001

No. 79 of 2001

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EVIDENCE (CHILDREN AND SPECIAL WITNESSES) ACT 2001

No. 79 of 2001

**An Act to provide for the taking of evidence from children
and special witnesses**

[Royal Assent 17 December 2001]

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) Act 2001*.

2. Commencement

This Act commences on a day to be proclaimed.

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3. Interpretation

In this Act –

affected child means a child –

- (a) in respect of whom an application under section 42 of the *Children, Young Persons and Their Families Act 1997* is made; or
- (ab) who is giving, or is to give, evidence in respect of family violence, within the meaning of the *Family Violence Act 2004*, or a crime under section 158 or 159 of the *Criminal Code*; or
- (b) upon or in respect of whom any of the following crimes is alleged to have been committed:
 - (i) a crime under section 122, 124, 124A, 125, 125A, 125B, 125C, 125D, 126, 127, 127A, 128, 129, 130, 133, 137, 170, 172, 178, 178A, 183, 185, 186, 191A, 240 or 240A of the *Criminal Code* or a crime under section 9 of the *Sex Industry Offences Act 2005*;
 - (ii) a crime under section 298, 299 or 300 of the *Criminal Code* in relation

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to a crime specified in a section referred to in subparagraph (i); or

(ba)

(c) upon or in respect of whom an offence under section 8(1A)(a) or 35(3) of the *Police Offences Act 1935* is alleged to have been committed; or

(ca) who has witnessed the following:

(i) a crime referred to in paragraph (b)(i);

(ii) a crime under section 158 or 159 of the *Criminal Code*; or

(cb) who is giving, or is to give, evidence in respect of a child sexual offence;

(d) upon or in respect of whom an offence under section 73 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995* is alleged to have been committed;

affected person means the following:

(a) an affected child;

(b) a person who has attained the age of 18 years upon, or in respect of

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whom, a child sexual offence was committed, or is alleged to have been committed, when the person was a child;

(c) a prescribed witness;

audio visual link means facilities (including closed-circuit television) that enable audio and visual communication between persons at different places;

child means a person who is under the age of 18 years;

child sexual offence means an offence, committed in relation to a child, against section 124, 124A, 125, 125A, 125B, 125C, 125D, 126, 127, 129, 130, 130A, 133 or 185 of the *Criminal Code*;

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;

defendant means –

(a) in respect of an application under section 42 of the *Children, Young Persons and Their Families Act 1997*, the respondent; or

(ab) in respect of an application to a court under Part 3 of the *Family Violence Act 2004* to vary, extend

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or revoke a police family violence order, the person to whom the relevant police family violence order is issued; or

(ac) in respect of an application to a court under Part 4 of the *Family Violence Act 2004* for a family violence order, an interim family violence order or a variation, extension or revocation of a family violence order, the person against whom the family violence order is made or is sought to be made; or

(ad) in respect of an order, admitting a person to bail, varying or adding a condition of an order for bail or revoking an order for bail, under the *Bail Act 1994*, *Criminal Code Act 1924* or *Justices Act 1959*, made in relation to a proceeding in which a person has been charged with a family violence offence, the person in respect of whom the order is made; or

(b) in respect of any other prescribed proceeding or specified proceeding, a person charged with the crime or offence;

family violence offence has the same meaning as in the *Family Violence Act 2004*;

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judge means –

- (a) a judge of the Supreme Court;
and
- (b) a magistrate; and
- (c) any justice sitting in court;

prescribed proceeding means –

- (a) an application under section 42 of the *Children, Young Persons and Their Families Act 1997*; or
- (ab) a proceeding in which a person has been charged with a family violence offence; or
- (ac) an application to a court under Part 3 or 4 of the *Family Violence Act 2004*; or
- (ad) an application in respect of an order, admitting a person to bail, varying or adding a condition of an order for bail or revoking an order for bail, under the *Bail Act 1994*, *Criminal Code Act 1924* or *Justices Act 1959*, in which the person in respect of whom the order is made has been charged with a family violence offence; or
- (b) a proceeding in which a person has been charged with a crime under section 122, 124, 124A,

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125, 125A, 125B, 125C, 125D, 126, 127, 127A, 128, 129, 130, 133, 137, 158, 159, 170, 170A, 172, 178, 178A, 183, 185, 186, 191A, 192 or 240 of the *Criminal Code*; or

- (c) a proceeding in which a person has been charged with a crime under section 298, 299 or 300 of the *Criminal Code* in relation to a crime specified in a section referred to in paragraph (b); or
- (d) a proceeding in which a person has been charged with an offence under section 8(1A)(a) or 35(3) of the *Police Offences Act 1935*; or;
- (e) a proceeding in which a person has been charged with a crime under section 4, 7 or 9 of the *Sex Industry Offences Act 2005* or an offence under section 8(2) of that Act; or
- (f) a proceeding in which a person has been charged with an offence under section 73 of the *Classification (Publications, Films and Computer Games) Enforcement Act 1995*;

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

prosecutor, in relation to an application under section 42 of the *Children, Young Persons and Their Families Act 1997*, means the applicant;

special witness is a person declared to be a special witness under section 8;

specified offence means an offence committed against –

- (a) section 105A, 122, 124, 124A, 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

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(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 a person has been charged with a specified offence;

trial includes the hearing of an application under section 42 of the *Children, Young Persons and Their Families Act 1997*;

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.

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Part 1A – Principles in Relation to Child Witnesses

**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 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 or specified proceedings in which a child is a witness are to be resolved as quickly as possible.

**PART 2 – EVIDENCE OF AFFECTED PERSONS AND
SPECIAL WITNESSES**

4. Support person for child or prescribed witness

- (1) In giving evidence in any proceeding, a child or a prescribed witness is entitled to have near him or her a person approved by the judge who may provide the child or prescribed witness with support.
- (2) A judge may only approve a person for the purpose if that person is not, or is not likely to be, a witness in or a party to the proceeding.

5. Admission of prior statement of affected child or prescribed witness

- (1) In a prescribed proceeding (including a special hearing ordered under section 6A) or a specified proceeding, the judge may admit into evidence a statement made by an affected child or a prescribed witness and recorded by any means if –
 - (a) the statement relates to a matter in issue in the proceeding; and
 - (b) the defendant has been given a copy of the record of the statement; and
 - (c) the defendant is given the opportunity to cross-examine the affected child or the prescribed witness.

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Part 2 – Evidence of affected persons and special witnesses

- (2) Subsection (1) does not affect the operation of section 61 of the *Justices Act 1959*.

5A. Audio visual statement of certain witnesses admissible as evidence in chief

- (1) In this section –

audio visual statement means a statement made by a witness and recorded by any means;

investigating official has the same meaning as in the *Evidence Act 2001*;

sexual offence has the same meaning as in the *Evidence Act 2001*.

- (2) This section applies in respect of a witness in a criminal proceeding if the witness is –
- (a) a child, other than the defendant, who is to give evidence in respect of an offence; or
 - (b) the alleged victim of a sexual offence; or
 - (c) the alleged victim of a family violence offence; or
 - (d) a special witness.
- (3) An audio visual statement taken by an investigating official in respect of an offence may be tendered or treated as all or part of the evidence in chief of the witness that made the statement in a proceeding for that offence.

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-
- (4) Subsection (3) does not apply if a judge of the court hearing the proceeding considers that the tendering or treating of the audio visual statement as evidence in chief would be contrary to the interests of justice.
 - (5) Nothing in this section prevents a defendant from being given the opportunity to cross-examine a witness in a proceeding.
 - (6) This section does not affect the operation of section 61 of the *Justices Act 1959*.

6. Application for order for special hearing

- (1) In a prescribed proceeding or a specified proceeding, the prosecutor may apply to a judge for an order directing –
 - (a) that the whole of an affected person'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 person 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).

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

- (1) A judge who hears an application under section 6(1)(a), or on the judge's own motion, may make such orders in relation to the affected person's evidence as the judge thinks fit.
- (2) A judge may, in a prescribed proceeding or a specified proceeding, make an order for the holding of a special hearing to take and record a witness's evidence in full if –
 - (a) the judge is satisfied that it is in the interests of justice to hold a special hearing; and
 - (b) both parties consent to the special hearing.

6B. Evidence of affected child or prescribed witness by audio visual link

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

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s. 7

- (b) one person employed at the court in which the proceedings are being conducted;
- (c) in the case of a prescribed witness, a witness intermediary.

7. Affected child or prescribed witness may give oral evidence in court

- (1) In a prescribed proceeding or a specified proceeding, the prosecutor may apply to a judge of the court hearing the proceeding for an order that section 6B does not apply to the proceeding.
- (2) On receipt of an application, the judge may make an order declaring that section 6B does not apply to the proceeding if satisfied that the affected child or prescribed witness is able and wishes to give evidence in the presence of the defendant in the courtroom.
- (3) A judge of the court hearing a prescribed proceeding or a specified proceeding may, on the application of the prosecutor or on his or her own motion, vary or revoke an order made under subsection (2).

7A. Audio visual record of evidence given at trial

- (1) If an affected person or a special witness is to give evidence at trial in any prescribed proceeding or specified proceeding, and facilities are available for making an audio visual record of the evidence, an audio visual record is to be

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made of the affected person's or special witness's evidence.

- (2) An audio visual record is to be made under this section whether or not the affected person 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) A judge is to admit an audio visual record made under this Part into evidence in a later civil or criminal proceedings if the judge is satisfied that –
 - (a) the audio visual record is relevant to the later proceeding; and
 - (b) admission of the evidence would not be contrary to the interests of justice.
- (2) Before the judge admits such an audio visual record into evidence, the judge may have the record edited to exclude 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.

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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 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

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- (iii) any resulting proceeding by way of appeal; or
- (ab) in the case of a police officer, or any other person as authorised by the Commissioner of Police, for a purpose connected with the training and evaluation of a police officer who was involved in the making of the audio visual recording; 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.

7D. Viewing of video-taped evidence by law reform body

(1) In this section –

law reform body means a body or organisation prescribed for the purposes of this definition.

(2) The Attorney General may, on application by a law reform body, approve the viewing of an

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audio visual recording of evidence by members of that body for the purposes of a review into the laws of evidence by that body.

- (3) An approval under subsection (2) may be subject to such conditions as the Attorney-General considers appropriate.
- (4) If a person has authority to possess and use an audio visual recording of evidence under section 7C, that person also has authority to play that recording to a member of a law reform body if –
 - (a) the playing of the audio visual recording of evidence is in accordance with an approval under subsection (2); and
 - (b) all legal proceedings in relation to the evidence given in the audio visual recording have been concluded; and
 - (c) the witness giving evidence in the audio visual recording has –
 - (i) been de-identified in the audio visual recording; or
 - (ii) in the case of a witness who has attained the age of 18 years, consented to the use of the recording by the law reform body.

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s. 7E

Part 2A – Intermediary Scheme

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 –

- (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;

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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

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language that is sufficient to enable the person to understand questioning.

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.
- (3) Subject to subsection (4), a person must take an oath, or make an affirmation, in accordance with Schedule 1 before acting as a witness intermediary in a proceeding.

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- (4) A witness intermediary is not required to take an oath, or make an affirmation, before –
 - (a) preparing and providing an assessment report about a witness’s communication and other related needs; or
 - (b) attending a ground rules hearing.

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
 - (d) an adult, other than the defendant –

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- (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)
 - (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 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 –
 - (a) the provision of materials relevant to the preparation of an assessment report; and

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- (b) 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.
- (1A) A judge may, at any time, make an order that a witness intermediary be used in respect of a witness in a specified proceeding if –
 - (a) that witness is a witness referred to in section 7I(1)(a), (b), (c) or (d); and
 - (b) the judge is satisfied that it is in the interests of justice.
- (1B) Without limiting the matters that may be taken into account in determining the interests of justice under subsection (1A), the judge is to take into account whether the witness does or does not wish the order to be made.

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- (2) If a judge makes an order under subsection (1) or (1A), a witness intermediary is to be present when the witness gives evidence in the specified proceeding.
- (3) For the avoidance of doubt, a judge may make an order under subsection (1A) in respect of a witness regardless of whether or not an assessment report has been provided to the judge in respect of that witness.
- (4) An order made under this section is not subject to review or appeal.

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

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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;
 - (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.

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s. 7L

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.

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PART 3 – DECLARATION OF SPECIAL WITNESS

8. Special witness

- (1) A judge may make an order declaring that a person who is giving, or is to give, evidence in a proceeding is a special witness if satisfied that –
 - (a) by reason of intellectual, mental or physical disability, the person is, or is likely to be, unable to give evidence satisfactorily in the ordinary manner; or
 - (b) by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject matter of the evidence or any other factor the court considers relevant, the person is likely –
 - (i) to suffer severe emotional trauma; or
 - (ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily.
- (2) An order made under subsection (1) may –
 - (a) be made on the application of a party to the proceeding or the prosecutor or on the motion of the judge; and
 - (b) include any one or more of the following orders:

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- (i) an order that the special witness have near him or her a person approved by the judge who may provide him or her with support;
 - (ii) an order that the evidence of the special witness be given by audio visual link;
 - (iia) an order admitting into evidence a prior statement of the special witness as if the special witness were an affected child or prescribed witness 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 person 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;
 - (iii) an order that, while the special witness is giving evidence, all persons other than those specified in the order be excluded from the courtroom.
- (2A) If a person, who is an alleged victim of a family violence offence, is giving or is to give evidence in a proceeding in which a person has been

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charged with a family violence offence, a judge –

- (a) must consider whether or not he or she should make an order under paragraph (b); and
 - (b) may make an order declaring that the person, who is the alleged victim of the family violence offence, is a special witness.
- (2B) An order made under subsection (2A) may include any one or more of the orders referred to in subsection (2)(b).
- (3) The judge may only approve a person for the purpose of subsection (2)(b)(i) if that person is not, or is not likely to be, a witness in or a party to the proceeding.
- (4) A judge may revoke or vary an order made under this section.
- (5) A judge is not to make an order under this section in respect of an affected child or a prescribed witness.
- (6) While a special witness is giving evidence by audio visual link, only the following persons may be present in the room with the special witness:
- (a) a person approved by the judge for the purpose of subsection (2)(b)(i);

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(b) one person employed at the court in which the proceedings are being conducted.

(7)

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Part 4 – Cross-examination of certain victims and witnesses

**PART 4 – CROSS-EXAMINATION OF CERTAIN
VICTIMS AND WITNESSES**

8A. Cross-examination of certain victims and witnesses

- (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.
- (1A) In an application referred to in paragraph (ac) or (ad) of the definition of *prescribed proceeding* in section 3, a defendant referred to in paragraph (ab), (ac) or (ad) of the definition of *defendant* in section 3 is not to be permitted to cross-examine a person who is the alleged victim of any family violence offence to which the application relates unless the cross-examination is undertaken by counsel.
- (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.
- (2) If a defendant is not legally represented in a prescribed proceeding or a specified proceeding that will involve the taking of evidence from a witness who is referred to in subsection (1) or (1B), or a person who is referred to in subsection (1A), the judge must ensure that the defendant –

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- (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) 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.

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- (3C) The counsel assisting an unrepresented defendant as a 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.
- (4) If, in a prescribed proceeding or a specified 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.
- (5) In this section –

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Legal Aid Commission of Tasmania means
the commission constituted under
section 4 of the *Legal Aid Commission*
Act 1990.

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Part 5 – Miscellaneous

PART 5 – MISCELLANEOUS

9. Preliminary hearing

- (1) In any prescribed proceeding or any specified proceeding in which a matter affecting a person as a witness is likely to require the giving of an approval under section 4 or the making of an order under section 6A or 8, the prosecutor or the party who is to call that person as a witness is to apply for a preliminary hearing to deal with those matters before the hearing of the proceeding is commenced.
- (2) A preliminary hearing in relation to a prescribed proceeding or a specified proceeding may be provided for by the rules of the court in which that proceeding is being brought.

9A. Special hearing in proceedings for child sexual offence

- (1) In a proceeding for a child sexual offence, a judge may make any one or more of the following orders in relation to a witness if the judge is satisfied that it is in the interests of justice to do so:
 - (a) an order that a special hearing be held to take and record evidence as if the witness were an affected person in respect of whom section 6 applies;

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- (b) if an order is made under paragraph (a), an order that the witness not be present at the trial.
- (2) Without limiting the matters that may be taken into account in determining the interests of justice under subsection (1), the following matters are to be taken into account for that purpose:
- (a) whether the unavailability of the witness to give evidence in the ordinary manner would cause undue delay in prosecution;
 - (b) whether the giving of evidence in the ordinary manner by a witness might, because of the relationship between that witness and another witness, cause that witness or the other witness emotional trauma or distress.
- (3) An order made under subsection (1) may be made on the application of the prosecutor.
- (4) The defendant is to be served with a copy of, and is entitled to be heard on, an application for an order under subsection (1).

10. Regulations

- (1) The Governor may make regulations for the purposes of this Act.
- (2) Regulations may be made so as to apply differently according to matters, limitations or

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restrictions, whether as to time, circumstance or otherwise, specified in the regulations.

- (3) The regulations may –
- (a) provide that a contravention of, or a failure to comply with, any of the regulations is an offence; and
 - (b) in respect of such an offence, provide for the imposition of a fine not exceeding 50 penalty units and, in the case of a continuing offence, a further fine not exceeding 20 penalty units for each day during which the offence continues.
- (4) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act.

11. Administration of Act

Until provision is made in relation to this Act by order under section 4 of the *Administrative Arrangements Act 1990* –

- (a) the administration of this Act is assigned to the Minister for Justice and Industrial Relations; and
- (b) the department responsible to the Minister for Justice and Industrial Relations in relation to the administration of this Act is the Department of Justice and Industrial Relations.

**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?

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?

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NOTES

The foregoing text of the *Evidence (Children and Special Witnesses) Act 2001* comprises those instruments as indicated in the following table. Any reprint changes made under any Act, in force before the commencement of the *Legislation Publication Act 1996*, authorising the reprint of Acts and statutory rules or permitted under the *Legislation Publication Act 1996* and made before 20 April 2023 are not specifically referred to in the following table of amendments.

Act	Number and year	Date of commencement
<i>Evidence (Children and Special Witnesses) Act 2001</i>	No. 79 of 2001	1.7.2002
<i>Justice (Miscellaneous Amendments) Act 2003</i>	No. 69 of 2003	15.12.2003
<i>Justice and Related Legislation (Miscellaneous Amendments) Act 2004</i>	No. 44 of 2004	16.11.2004
<i>Family Violence Act 2004</i>	No. 67 of 2004	30.3.2005
<i>Sex Industry Offences Act 2005</i>	No. 42 of 2005	1.1.2006
<i>Justice and Related Legislation (Miscellaneous Amendments) Act 2006</i>	No. 16 of 2006	1.11.2006
<i>Justice and Related Legislation (Further Miscellaneous Amendments) Act 2006</i>	No. 43 of 2006	18.12.2006
<i>Justices Amendment Act 2007</i>	No. 22 of 2007	1.2.2008
<i>Evidence (Children and Special Witnesses) Amendment Act 2013</i>	No. 63 of 2013	1.3.2014
<i>Family Violence Reforms Act 2017</i>	No. 6 of 2017	28.4.2017
<i>Family Violence Reforms Act 2018</i>	No. 26 of 2018	10.12.2018
<i>Criminal Code and Related Legislation Amendment (Child Abuse) Act 2019</i>	No. 29 of 2019	2.10.2019
<i>Evidence (Children and Special Witnesses) Amendment Act 2020</i>	No. 26 of 2020	1.3.2021
<i>Justice and Related Legislation (Miscellaneous Amendments) Act 2022</i>	No. 2 of 2022	18.3.2022
<i>Family Violence Reforms Act 2022</i>	No. 21 of 2022	22.12.2022
<i>Justice Miscellaneous (Royal Commission Amendments) Act 2023</i>	No. 2 of 2023	20.4.2023

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TABLE OF AMENDMENTS

Provision affected	How affected
Section 3	Amended by No. 69 of 2003, Sched. 1, No. 44 of 2004, s. 28, No. 67 of 2004, Sched. 1, No. 42 of 2005, s. 26, No. 43 of 2006, s. 19, No. 63 of 2013, s. 4, No. 26 of 2018, s. 6, No. 29 of 2019, s. 9, No. 26 of 2020, s. 4, No. 2 of 2022, Sched. 1, No. 21 of 2022, s. 26 and No. 2 of 2023, s. 27
Section 3A	Inserted by No. 63 of 2013, s. 5 Amended by No. 26 of 2020, s. 5
Part 2	Heading amended by No. 29 of 2019, s. 10
Section 4	Amended by No. 16 of 2006, s. 19 and No. 26 of 2020, s. 6
Section 5	Amended by No. 22 of 2007, s. 28, No. 63 of 2013, s. 6 and No. 26 of 2020, s. 7
Section 5A	Inserted by No. 2 of 2023, s. 28
Section 6	Substituted by No. 63 of 2013, s. 7 Amended by No. 29 of 2019, s. 11 and No. 26 of 2020, s. 8
Section 6A	Inserted by No. 63 of 2013, s. 7 Amended by No. 29 of 2019, s. 12 Substituted by No. 2 of 2023, s. 29
Section 6B	Inserted by No. 63 of 2013, s. 7 Amended by No. 26 of 2020, s. 9
Section 7	Amended by No. 63 of 2013, s. 8 and No. 26 of 2020, s. 10
Section 7A	Inserted by No. 63 of 2013, s. 9 Amended by No. 29 of 2019, s. 13 and No. 26 of 2020, s. 11
Section 7B	Inserted by No. 63 of 2013, s. 9 Amended by No. 29 of 2019, s. 14
Section 7C	Inserted by No. 63 of 2013, s. 9 Amended by No. 29 of 2019, s. 15
Section 7D	Inserted by No. 29 of 2019, s. 16
Section 7E	Inserted by No. 26 of 2020, s. 12
Section 7F	Inserted by No. 26 of 2020, s. 12
Section 7G	Inserted by No. 26 of 2020, s. 12
Section 7H	Inserted by No. 26 of 2020, s. 12 Amended by No. 2 of 2023, s. 30
Section 7I	Inserted by No. 26 of 2020, s. 12 Amended by No. 2 of 2023, s. 31
Section 7J	Inserted by No. 26 of 2020, s. 12 Amended by No. 2 of 2023, s. 32
Section 7K	Inserted by No. 26 of 2020, s. 12
Section 7L	Inserted by No. 26 of 2020, s. 12
Section 7M	Inserted by No. 26 of 2020, s. 12
Part 3	Heading inserted by No. 63 of 2013, s. 10
Section 8	Amended by No. 16 of 2006, s. 20, No. 63 of 2013, s. 11, No. 6 of 2017, s. 6, No. 26 of 2018, s. 7, No. 29 of 2019, s. 17 and No. 26 of 2020, s. 13

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Provision affected	How affected
Part 4	Heading amended by No. 26 of 2018, s. 8 and No. 26 of 2020, s. 14
Section 8A	Inserted by No. 63 of 2013, s. 12 Amended by No. 26 of 2018, s. 9 and No. 26 of 2020, s. 15
Part 5	Heading inserted by No. 63 of 2013, s. 13
Section 9	Amended by No. 63 of 2013, s. 14 and No. 26 of 2020, s. 16
Section 9A	Inserted by No. 29 of 2019, s. 18
Schedule 1	Inserted by No. 26 of 2020, s. 17
