

I certify that this is a copy of the authorised version of this Act as at 2 October 2019, and that it incorporates all amendments, if any, made before and in force as at that date and 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 2 October 2019.

Robyn Webb
Chief Parliamentary Counsel
Dated 7 October 2019



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, 125, 125A, 125B, 125C, 125D, 126, 127, 127A, 128, 129, 130, 133, 137, 170, 172, 178, 178A, 183, 185, 186, 191A or 240 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 to a crime specified in a

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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
whom, a child sexual offence was

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

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, 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 or revoke a police family violence order, the person to

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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, a person charged with the crime or offence;

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

judge means –

- (a) a judge of the Supreme Court; and

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

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- (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*;

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;

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

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Part 1A – Principles in Relation to Child Witnesses

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

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Part 2 – Evidence of affected persons and special witnesses

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

4. Support person for child

- (1) In giving evidence in any proceeding, a child is entitled to have near him or her a person approved by the judge who may provide the child 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

- (1) In a prescribed proceeding, including a special hearing ordered under section 6A, the judge may admit into evidence a statement made by an affected child 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.
- (2) Subsection (1) does not affect the operation of section 61 of the *Justices Act 1959*.

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6. Application for order for special hearing

- (1) In a prescribed 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).

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

A judge who hears an application under section 6(1)(a), or on his or her own motion, may make such orders as the judge thinks fit, including ordering a special hearing to take and record an affected person’s evidence in full.

6B. Evidence of affected child by audio visual link

- (1) Except where an order under section 7 is in force, the evidence of an affected child in a

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prescribed proceeding, including evidence given at a special hearing, is to be given by audio visual link.

- (2) While an affected child is giving evidence by audio visual link, only the following persons may be present in the room with the child:
 - (a) a person approved under section 4;
 - (b) one person employed at the court in which the proceedings are being conducted.

7. Affected child may give oral evidence in court

- (1) In a prescribed 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 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 may, on the application of the prosecutor or on his or her own motion, vary or revoke an order made under subsection (2).

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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, and facilities are available for making an audio visual record of the evidence, an audio visual record is to be 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.

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- (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.

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

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- (ii) any proceeding where the audio visual recording has been admitted into evidence pursuant to section 7B; or
 - (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 –

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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 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

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recording by the law reform
body.

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Part 3 – Declaration of Special Witness

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 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 charged with a family violence offence, a judge –

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- (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.
- (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);
 - (b) one person employed at the court in which the proceedings are being conducted.
- (7)

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**PART 4 – CROSS-EXAMINATION OF VICTIMS OF
CERTAIN OFFENCES AND APPLICATIONS**

**8A. Cross-examination of victims of certain offences
and applications**

(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.

(2) If a defendant is not legally represented in a prescribed proceeding that will involve the taking of evidence from a witness who is referred to in subsection (1), or a person who is referred to in subsection (1A), the judge must ensure that the defendant –

(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

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- (c) has had a reasonable opportunity to obtain the assistance of counsel before the evidence is taken.

- (3) If it appears to be in the interests of justice that a person should have legal aid in connection with this Part and that the person has insufficient means to enable him or her to obtain that aid, the judge may make an order directing that the person be given assistance under the approved scheme for the time being in force under the *Legal Aid Commission Act 1990*.

- (4) If, in a prescribed 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.

PART 5 – MISCELLANEOUS

9. Preliminary hearing

- (1) In any prescribed 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 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;
 - (b) if an order is made under paragraph (a), an order that the witness not be present at the trial.

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- (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 restrictions, whether as to time, circumstance or otherwise, specified in the regulations.
- (3) The regulations may –

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- (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.

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Part 5 – Miscellaneous

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 2 October 2019 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

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 and No. 29 of 2019, s. 9

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Provision affected	How affected
Section 3A	Inserted by No. 63 of 2013, s. 5
Section 4	Amended by No. 16 of 2006, s. 19
Section 5	Amended by No. 22 of 2007, s. 28 and No. 63 of 2013, s. 6
Section 6	Substituted by No. 63 of 2013, s. 7 Amended by No. 29 of 2019, s. 11
Section 6A	Inserted by No. 63 of 2013, s. 7 Amended by No. 29 of 2019, s. 12
Section 6B	Inserted by No. 63 of 2013, s. 7
Section 7	Amended by No. 63 of 2013, s. 8
Section 7A	Inserted by No. 63 of 2013, s. 9 Amended by No. 29 of 2019, s. 13
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
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 and No. 29 of 2019, s. 17
Section 8A	Inserted by No. 63 of 2013, s. 12 Amended by No. 26 of 2018, s. 9
Part 5	Heading inserted by No. 63 of 2013, s. 13
Section 9	Amended by No. 63 of 2013, s. 14
Section 9A	Inserted by No. 29 of 2019, s. 18
