

House of Assembly—No 87

As laid on the table and read a first time, 23 September 2020

South Australia

**Evidence (Vulnerable Witnesses) Amendment
Bill 2020**

A BILL FOR

An Act to amend the *Evidence Act 1929*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Evidence (Vulnerable Witnesses) Amendment Act 2020*.

5 2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

10 Part 2—Amendment of *Evidence Act 1929*

4—Amendment of section 4—Interpretation

Section 4(1)—before the definition of *child* insert:

canine court companion means a dog accredited by—

- (a) the Guide Dogs Association of SA and NT Inc.; or
- (b) a person or body prescribed by the regulations,

as a canine court companion;

5—Amendment of section 12AB—Pre-trial special hearings

(1) Section 12AB(2)—after paragraph (c) insert:

(ca) may specify that the hearing include an initial hearing for the purpose of taking any evidence (if required), hearing submissions and making rulings as to the admissibility of any evidence and a subsequent hearing (or hearings) for the examination, cross-examination or re-examination of the witness to whom this section applies (if required) and any other matters; and

(2) Section 12AB(2)(b)—after "other person" insert:

, or by a canine court companion,

(3) Section 12AB(3)—delete "for a pre-trial special hearing must not be made" and substitute:

must not be made for, or in, a pre-trial special hearing

(4) Section 12AB(3)(a) and (b)—delete paragraphs (a) and (b) and substitute:

(a) to relieve a witness from the obligation to give sworn or unsworn evidence or to submit to cross-examination (except where recorded evidence is admitted under section 13BA and permission of the court for further examination, cross-examination or re-examination of the witness is not granted); or

(5) Section 12AB—after subsection (6) insert:

(6a) If a witness to whom this section applies is accompanied by a canine court companion for the purpose of providing emotional support—

(a) the witness may also be accompanied by a person who will act as a handler for the dog and subsection (4) applies to the handler as if they were an accompanying person providing emotional support to the witness; and

(b) if practicable, the dog should not be visible in the audio visual record of the evidence.

(6) Section 12AB(7)—delete "order"

(7) Section 12AB(10)—delete "a pre-trial special hearing order" and substitute:

an order for a pre-trial special hearing

(8) Section 12AB(11)—delete "A pre-trial special hearing order may be made," and substitute:

An order for a pre-trial special hearing may be

(9) Section 12AB(12) and (13)—delete subsections (12) and (13) and substitute:

(12) Subject to this section, a pre-trial special hearing will be conducted as the court thinks fit.

(13) At a pre-trial special hearing the court may do any of the following:

(a) make orders under section 13BA as to the admission of any recorded evidence of the witness made pursuant to Part 17 Division 3 of the *Summary Offences Act 1953*;

(b) if any such recorded evidence is to be admitted—hear and determine any application for further examination, cross-examination or re-examination of the witness made pursuant to section 13BA;

5 (c) if no such recorded evidence exists or is to be admitted or if an application referred to in paragraph (b) is granted—permit examination, cross-examination or re-examination of the witness at the pre-trial special hearing;

10 (d) make orders under section 13BA as to the admission of the audio visual record of any examination, cross-examination or re-examination of the witness at the pre-trial special hearing;

15 (e) make orders (on the court's own initiative, or on the application of a party to the proceedings) as to any other matter that the court thinks fit (including, without limitation, any orders of a kind referred to in section 13A(2)).

20 (13a) The court may only permit examination, cross-examination or re-examination of the witness at the pre-trial special hearing if the court is satisfied as to the witness's capacity to give sworn or unsworn evidence at the time of the pre-trial special hearing.

6—Insertion of section 12AC

After section 12AB insert:

12AC—Effect of orders made at pre-trial special hearing

25 (1) An order made by the court at the pre-trial special hearing as to the admission of a recording of evidence of a witness (being an order under section 13BA) is taken to have been made for the purposes of the trial and, subject to subsection (2), is binding on the trial court provided that, during the course of the trial, the witness is available, if required, for further examination, cross-examination or

30 re-examination.

(2) An order referred to in subsection (1) is not, however, binding on the trial court if the trial court is satisfied, on application by a party to proceedings and based only on matters that have arisen or become known after the making of the order at the pre-trial special hearing, that the order should not be binding (either in respect of all or part of

35 the evidence to which the order relates, as the court considers appropriate).

(3) Despite subsection (1), the witness cannot be further examined, cross-examined or re-examined at the trial on the evidence admitted pursuant to an order made at the pre-trial special hearing without the permission of the trial court which may only be given—

5 (a) if the trial court is satisfied, on application by a party to proceedings, that a party to the proceedings has, since the pre-trial special hearing, become aware of a matter of which the party could not reasonably have been aware at the time of the pre-trial special hearing; or

10 (b) if the witness gives evidence in the trial apart from or in addition to evidence admitted pursuant to an order made at the pre-trial special hearing and the trial court is satisfied that it is in the interests of justice that the witness be further examined, cross-examined or re-examined at the trial; or

15 (c) if the trial court is satisfied that it is otherwise in the interests of justice to permit the witness to be further examined, cross-examined or re-examined.

20 (4) A reference in this section to the trial court includes any subsequent trial following a stay of proceedings, discontinuance of an earlier trial or an appeal.

7—Amendment of section 13—Special arrangements for protecting witnesses from embarrassment, distress etc when giving evidence

(1) Section 13(2)(e)—after "relative or friend" insert:

, or by a canine court companion,

25 (2) Section 13—after subsection (6) insert:

(6a) If a witness is accompanied by a canine court companion for the purpose of providing emotional support, the following provisions apply:

30 (a) the witness may also be accompanied by a person who will act as a handler for the dog and subsection (6) applies to the handler as if they were an accompanying person providing emotional support to the witness;

(b) in a criminal trial—

35 (i) if the witness is accompanied by the dog while giving evidence before a jury—if practicable, the dog should not be visible to the jury while the witness is giving the evidence; and

(ii) if practicable, the dog should not be visible in any audio visual record of the evidence.

8—Amendment of section 13A—Special arrangements for protecting vulnerable witnesses when giving evidence in criminal proceedings

(1) Section 13A(2)(e)(i)—after "other person" insert:

, or by a canine court companion,

(2) Section 13A—after subsection (5b) insert:

(5c) If a witness is accompanied by a canine court companion for the purpose of providing emotional support, the following provisions apply:

- (a) the witness may also be accompanied by a person who will act as a handler for the dog and subsection (5) applies to the handler as if they were an accompanying person providing emotional support to the witness;
- (b) if the witness is accompanied by the dog while giving evidence before a jury—if practicable, the dog should not be visible to the jury while the witness is giving the evidence;
- (c) if practicable, the dog should not be visible in any audio visual record of the evidence.

9—Amendment of section 13BA—Admissibility of recorded evidence by certain witnesses in certain criminal proceedings

(1) Section 13BA(1)—after "offence" insert:

, or in a pre-trial special hearing conducted in accordance with section 12AB,

(2) Section 13BA(2)—delete "An application" and substitute:

Subject to subsection (2a), an application

(3) Section 13BA(2)(a)—delete "in the trial" and substitute:

under this section

(4) Section 13BA(3)—delete subsection (3) and substitute:

- (2a) An application for an order to admit an audio visual record of the examination, cross-examination or re-examination of a witness at a pre-trial special hearing may be made orally at the pre-trial special hearing or in accordance with any directions of the court.
- (3) An audio visual record of the evidence of a witness may be admitted under this section if the recording—
 - (a) has been made in a pre-trial special hearing conducted in accordance with section 12AB; or
 - (b) has been made pursuant to Part 17 Division 3 of the *Summary Offences Act 1953* and—
 - (i) the court is satisfied as to the witness's capacity to give sworn or unsworn evidence at the time the recording was made; and

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- (ii) the court is satisfied that the respondent has been given a reasonable opportunity to view the recording; and
- (iii) the witness is available, if required, for further examination, cross-examination or re-examination during the course of the trial or, if the order for admission of the recording is being sought in a pre-trial special hearing under section 12AB, during the course of the pre-trial special hearing.
- 10 (5) Section 13BA(5)—delete "subsection (3)(d), the witness cannot be further examined, cross-examined or re-examined on the evidence admitted in the trial" and substitute:
- subsection (3)(b)(iii), the witness cannot be further examined, cross-examined or re-examined on the evidence admitted under this section
- (6) Section 13BA(5)(b)—after "in the trial" insert:
- 15 or, if the order for admission of the recording is being sought in a pre-trial special hearing under section 12AB, during the course of the pre-trial special hearing,

10—Amendment of section 67H—Meaning of sensitive material

Section 67H(1)(a)—delete paragraph (a) and substitute:

- 20 (a) the whole or part of an audiovisual record, or the transcript of any such record, of—
- (i) an interview of a witness to whom this paragraph applies made pursuant to Part 17 Division 3 of the *Summary Offences Act 1953*; or
- 25 (ii) evidence of a witness to whom this paragraph applies at a pre-trial special hearing conducted in accordance with section 12AB; and