

WESTERN AUSTRALIA

**ACTS AMENDMENT (EVIDENCE
OF CHILDREN AND OTHERS)
ACT 1992**

No. 36 of 1992

AN ACT to amend the

*Evidence Act 1906;
Justices Act 1902; and
Child Welfare Act 1947.*

[Assented to 22 September 1992.]

The Parliament of Western Australia enacts as follows:

PART 1 — PRELIMINARY

Short title

1. This Act may be cited as the *Acts Amendment (Evidence of Children and Others) Act 1992*.

Commencement

2. This Act comes into operation on such day as is fixed by proclamation but the proclamation is not to fix a day that is earlier than the day on which the *Acts Amendment (Sexual Offences) Act 1992* comes into operation.

PART 2 — EVIDENCE ACT 1906

Principal Act

3. In this Part the *Evidence Act 1906** is referred to as the principal Act.

[* *Reprinted as at 14 August 1986.*

For subsequent amendments see 1990 Index to Legislation of Western Australia p. 52 and Act No. 15 of 1991.]

Section 35 amended

4. Section 35 of the principal Act is amended by repealing subsection (2).

Section 50 amended

5. Section 50 of the principal Act is amended by repealing subsection (3).

Section 100A amended

6. Section 100A of the principal Act is amended by inserting after subsection (5) the following subsections —

“ (6) References in this section to —

- (a) a person who is tendered as a witness; or
- (b) a person who desires to lay a complaint or information,

extend to a child who is of or over the age of 12 years and who is tendered as a witness or who desires to lay

a complaint or information; and the provisions of this section have effect accordingly.

(7) Except as provided in subsection (6), this section does not apply to a child, as defined in section 106A.

”.

Section 101 repealed

7. Section 101 of the principal Act is repealed.

Heading and sections 106A to 106S inserted

8. After section 106 of the principal Act, the following heading and sections are inserted —

“ *Evidence of Children and Special Witnesses*

Interpretation

106A. In sections 106B to 106S and in Schedule 7, unless the contrary intention appears —

“**affected child**” means —

- (a) in relation to an application referred to in clause 2 of Part A of Schedule 7, the child in respect of whom the application is made;
- (b) in relation to any other Schedule 7 proceeding, the child upon or in respect of whom it is alleged that an offence was committed, attempted or proposed;

“**child**” means —

- (a) any boy or girl under the age of 18 years;

- (b) in the absence of positive evidence as to age, any boy or girl apparently under the age of 18 years; and
- (c) in any proceeding in the Children's Court, any boy or girl dealt with under section 19 (2) of the *Children's Court of Western Australia Act 1988*;

"counsel" includes a solicitor;

"defendant" —

- (a) in relation to an application referred to in clause 2 of Part A of Schedule 7 —
 - (i) means any party to the proceeding, other than the affected child and an applicant who is a police officer or an officer of the Department for Community Services;
 - (ii) in sections 106K (3) (e) and 106N as they apply to such an application means any such party specified by the Judge;
- (b) in relation to any other Schedule 7 proceeding, a person complained against for an offence;

"proceeding" means any civil or criminal proceeding or any examination in any Court or before any person acting judicially, and includes a preliminary hearing under the *Justices Act 1902* and a pre-trial hearing under section 106K;

“prosecutor”, in relation to an application referred to in clause 2 of Part A of Schedule 7, means the applicant in that application;

“Schedule 7 proceeding” means a proceeding that comes within the provisions of Schedule 7;

“trial”, in relation to an application referred to in clause 2 of Part A of Schedule 7, means the hearing of that application;

“video-taped recording” means any recording on any medium from which a moving image may be produced by any means, and includes the accompanying sound track.

Sworn evidence of children

106B. (1) A child who is under the age of 12 years may in any proceeding, if the child is competent under subsection (2), give evidence on oath under section 97 (3) or after making a solemn affirmation under section 97 (4).

(2) A child who is under the age of 12 years is competent to take an oath or make a solemn affirmation if in the opinion of the Court or person acting judicially the child understands that —

- (a) the giving of evidence is a serious matter; and
- (b) he or she in giving evidence has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

Unsworn evidence of children

106C. A child under the age of 12 years who is not competent to give evidence under section 106B may give evidence without taking any oath or making a solemn affirmation if the Court or person acting judicially forms the opinion, before the evidence is given, that the child is able to give an intelligible account of events which he or she has observed or experienced.

Particular form of corroboration warning not to be given

106D. In any proceeding on indictment for an offence in which evidence is given by a child, the Judge is not to warn the jury, or suggest to the jury in any way, that it is unsafe to convict on the uncorroborated evidence of that child because children are classified by the law as unreliable witnesses.

Support for child witness

106E. (1) A child who is under the age of 16 years is entitled, while he or she is giving evidence in any proceeding in a Court, to have near to him or her a person who may provide the child with support.

(2) The person referred to in subsection (1) is to be approved by the Court and is not to be a person who is a witness in or a party to the proceeding.

Assistance in communicating questions and evidence

106F. (1) Where a child under the age of 16 years is to give evidence in any proceeding in a Court, the Court may appoint a person that it considers suitable and competent to act as a communicator for the child.

(2) The function of a person appointed under this section is, if requested by the Judge, to communicate and explain —

- (a) to the child questions put to the child; and
- (b) to the Court, the evidence given by the child.

(3) A person appointed under this section is to take an oath or make a declaration, in such form as the Court thinks fit, that he or she will faithfully perform his or her function under subsection (2).

(4) A person appointed under this section who, while performing or purportedly performing his or her function under subsection (2), wilfully makes any false or misleading statement to the child or to the Court commits an indictable offence and is liable on conviction to imprisonment for 5 years.

Cross-examination by unrepresented defendant

106G. Where in any proceeding for an offence a defendant who is not represented by counsel wishes to cross-examine a child who is under 16 years of age, the defendant —

- (a) is not entitled to do so directly; but
- (b) may put any question to the child by stating the question to the Judge or a person approved by the Court,

and that person is to repeat the question accurately to the child.

Admission of child's statement in proceeding for sexual offences, etc.

106H. (1) In any Schedule 7 proceeding, a relevant statement may, at the discretion of the Judge, be admitted in evidence if —

- (a) there has been given to the defendant —
 - (i) a copy of the statement; or
 - (ii) if the statement is not recorded in writing or electronically, details of the statement; and
- (b) the defendant is given the opportunity to cross-examine the affected child.

(2) Subsection (1) does not affect the operation of —

- (a) section 106G; or
- (b) section 69 of the *Justices Act 1902*, other than subsection (1) of that section.

(3) In subsection (1) “**relevant statement**” means a statement that —

- (a) relates to any matter in issue in the proceeding; and
- (b) was made by the affected child to another person before the proceeding was commenced,

whether the statement is recorded in writing or electronically or not.

**Video-taping of child's evidence,
application for directions**

106I. (1) Where any Schedule 7 proceeding has been commenced in a Court, the prosecutor may apply to a Judge of that Court for an order directing —

- (a) that the affected child's evidence in chief be taken, in whole or in part, and presented to the Court in the form of a video-taped recording of oral evidence given by the affected child; or
- (b) that the affected child's evidence be taken at a pre-trial hearing.

(2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).

Giving of evidence by video-tape

106J. (1) A Judge who hears an application under section 106I (1) (a) may make such order as the Judge thinks fit which may include directions as to —

- (a) the procedure to be followed in the taking of the evidence, the presentation of the recording and the excision of matters from it; and
- (b) the manner in which any cross-examination or re-examination of the affected child is to be conducted at the trial.

(2) An order under subsection (1) may be varied or revoked.

Giving of evidence at pre-trial hearing

106K. (1) A Judge who hears an application under section 106I (1) (b) may make such order as the Judge thinks fit which is to include directions as to the persons who may be present at the pre-trial hearing.

(2) An order under subsection (1) may be varied or revoked.

(3) At a pre-trial hearing ordered under subsection (1) —

- (a) no person other than a person authorized by the Judge under subsection (1) is to be present at the hearing;
- (b) subject to the control of the presiding Judge, the affected child is to give his or her evidence and be examined and cross-examined;
- (c) except as provided by this section, the usual rules of evidence apply;
- (d) the proceedings are to be recorded on videotape;
- (e) the defendant is to be in a room separate from the room in which the hearing is held but is to be capable of observing the proceedings by means of a closed circuit television system.

(4) The affected child's evidence at the trial is to be given by the presentation to the Court of the recording made under subsection (3), and the affected child need not be present at the trial.

(5) Where circumstances so require, more than one pre-trial hearing may be held under this section for the purpose of taking the evidence of the affected child, and section 106I and this section are to be read with all changes necessary to give effect to any such requirement.

Status of video-taped evidence

106L. A presentation to a Court of video-taped evidence under section 106H, 106J or 106K is admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of that Court.

Recording not to be altered without approval

106M. (1) The original recording of video-taped evidence made at a pre-trial hearing under section 106K for the purposes of a trial is not to be edited or altered in any way without the approval of a Judge before it is presented to the Court at the trial.

(2) A video-taped recording that is edited or altered contrary to subsection (1) is inadmissible in evidence at the trial for which it was made.

(3) In subsection (1) "**Judge**" means the Judge who presided at the pre-trial hearing or a Judge who has jurisdiction co-extensive with that Judge.

Use of closed circuit television or screening arrangements

106N. (1) This section —

- (a) applies only to a Schedule 7 proceeding, but subject to any order under section 106O;

- (b) is to operate only to the extent that the giving of evidence by the affected child is not provided for by an order under section 106K; and
- (c) has effect notwithstanding section 635 of *The Criminal Code*.

(2) Where the necessary facilities and equipment are available one of the following arrangements is to be made by the Judge for the giving of evidence by the affected child —

- (a) he or she is to give evidence outside the courtroom but within the court precincts, and the evidence is to be transmitted to the courtroom by means of closed circuit television; or
- (b) while he or she is giving evidence the defendant is to be held in a room apart from the courtroom and the evidence is to be transmitted to that room by means of closed circuit television.

(3) Where subsection (2) (b) applies the defendant is at all times to have the means of communicating with his or her counsel.

(4) Where the necessary facilities and equipment referred to in subsection (2) are not available, a screen, one-way glass or other device is to be so placed in relation to the affected child while he or she is giving evidence that —

- (a) the affected child cannot see the defendant; but

- (b) the Judge, the jury (in the case of proceedings on indictment), the defendant and his or her counsel can see the affected child.

Order that section 106N does not apply

106O. (1) Where any Schedule 7 proceeding has been commenced in a Court the prosecutor may apply to a Judge of that Court for an order that section 106N does not apply to those proceedings.

(2) A Judge who hears an application under subsection (1) may grant the application if it is shown to the Judge's satisfaction that the affected child is able and wishes to give evidence in the presence of the defendant in the courtroom or other room in which the proceedings are being held.

(3) An order under subsection (2) may be varied or revoked.

Instructions to be given to jury

106P. Where in any proceeding on indictment evidence of an affected child is given in a manner described in section 106N (2) or (4), the Judge is to instruct the jury that the procedure is a routine practice of the Court and that they should not draw any inference as to the defendant's guilt from the use of the procedure.

Identification of defendant

106Q. Where evidence of an affected child is given in a manner described in section 106N (2) or (4), and the identification of the defendant is an issue, the affected child is not to be required to be in the presence of the defendant for that purpose —

- (a) for any longer than is necessary for that purpose; and
- (b) before the affected child's evidence (including cross-examination and re-examination) is completed.

Persons may be declared special witnesses

106R. (1) A Judge of a Court may make an order —

- (a) declaring that a person who is giving, or is to give, evidence in any proceeding in that Court is a special witness;
- (b) directing that one or more of the arrangements referred to in subsection (4) are to be made for the giving of that evidence; and
- (c) providing for any incidental or related matter.

(2) An order may be made under subsection (1) on application by a party to a proceeding, on notice to the other parties, or of the Court's own motion.

(3) The grounds on which an order may be made are that if the person is not treated as a special witness he or she would, in the Court's opinion —

- (a) by reason of mental or physical disability, be unlikely to be able to give evidence, or to give evidence satisfactorily; or
- (b) be 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,

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 that the Court considers relevant.

(4) The arrangements that may be made under this section are —

- (a) that the person have near to him or her a person, approved by the Court, who may provide him or her with support;
- (b) in any proceeding for an offence —
 - (i) that an arrangement of the kind described in section 106N (2) or (4) is to be made; and
 - (ii) that the evidence be given at a pre-trial hearing in the manner provided for by section 106K.

(5) The Court may at any time vary or revoke an order in force under this section.

(6) This section does not apply to an affected child.

**Pre-trial hearings to consider
what orders should be made**

106S. (1) In any proceeding in which —

- (a) the giving of evidence by a person; or
- (b) a matter affecting a person as a witness,

is likely to require the making of an order or the giving of directions under sections 106E (2), 106F (1), 106J, 106K, 106O, or 106R, the party who is to call that person as a witness is to apply for a pre-trial hearing for the purpose of having all such matters dealt with before the trial.

(2) In subsection (1) “pre-trial hearing” in relation to a Court means a hearing provided for by rules of that Court for the purposes of this section. ”.

Section 119 amended

9. Section 119 (2) of the principal Act is amended —

- (a) by deleting the full stop at the end of the subsection and substituting the following —

“ ; and ”; and

- (b) by inserting after paragraph (b) the following —

“ (c) persons appointed under section 106F. ”.

Schedule 7 added

10. After Schedule 6 to the principal Act, the following Schedule is added —

“

SCHEDULE 7

(section 106A)

PART A

1. A proceeding comes within the provisions of this Schedule if —

- (a) it is a proceeding in which a person stands charged with an offence under a section or Chapter of *The Criminal Code* mentioned in Part B or C —
 - (i) whether as a single offence or together with any other offence as an additional or alternative count; and
 - (ii) whether or not the person is liable on the charge to be found guilty of any other offence; and
- (b) the affected child was under the age of 16 years on the day on which the complaint of the offence was made or, in the case of an indictment under section 579 of *The Criminal Code*, on the day on which the indictment was presented; and
- (c) in the case of a proceeding for an offence mentioned in Part C, the defendant is a person to whom this paragraph applies.

2. A proceeding also comes within the provisions of this Schedule if it is an application under section 30 of the *Child Welfare Act 1947* for a declaration that a child is in need of care and protection.

3. A proceeding also comes within the provisions of this Schedule if it is a proceeding by way of appeal from a decision made, or a penalty imposed, in any proceeding that comes within clause 1 or 2.

4. Paragraph (c) of clause 1 applies to —
- (a) a parent, step-parent, grandparent, step-grandparent, brother, sister, step-brother, step-sister, uncle, aunt, nephew or niece of the complainant and a child of any uncle or aunt of the complainant;
 - (b) a person who is or was, at the time when the offence was committed, living in the same household as the complainant; or
 - (c) a person who at any time had the care of, or exercised authority over, the child in the household on a regular basis,

and it is immaterial whether a relationship referred to in paragraph (a) is of the whole blood or of the half blood.

PART B

| Chapter or Section | Matter to which Chapter or section relates |
|--------------------|--|
| 181 | Carnal knowledge of animal |
| 184 | Indecent practices between males in public |
| 186 | Occupier or owner allowing certain persons to be on premises for unlawful carnal knowledge |
| 191 | Procuration |
| 192 | Procuring person to have unlawful carnal knowledge by threats, fraud, or administering drugs |
| 195 | Permitting boys to resort to brothels |
| XXXI | Sexual offences |

PART C

| Chapter or section | Matter to which Chapter or section relates |
|--------------------|---|
| XXVIII | Homicide; suicide; concealment of birth |
| 292 | Disabling in order to commit indictable offence |
| 293 | Stupefying in order to commit indictable offence |
| 294 | Acts intended to cause grievous bodily harm or prevent arrest |
| 294A | Dangerous goods on aircraft |
| 297 | Grievous bodily harm |
| 298 | Causing explosion likely to endanger life |
| 299 | Attempting to cause explosion likely to endanger life |
| 300 | Maliciously administering poison with intent to harm |
| 301 | Wounding and similar acts |
| 302 | Failure to supply necessaries |
| 304 | Endangering life of children by exposure |
| 306 | Negligent acts causing harm |
| 313 | Common assaults |
| 317 | Assaults occasioning bodily harm |

Part C — continued

| Chapter or section | Matter to which Chapter or section relates | |
|--------------------|--|----|
| 318 | Serious assaults | |
| 332 | Kidnapping | |
| 333 | Deprivation of liberty | |
| 347 | Child stealing | ”. |

PART 3 — JUSTICES ACT 1902**Justices Act amended**

11. The *Justices Act 1902** is amended in section 69 by inserting after subsection (2) the following subsection —

“ (2a) On a preliminary hearing that is within the definition of “**Schedule 7 proceeding**” in section 106A of the *Evidence Act 1906*, this section has effect subject to the following —

- (a) subsection (3) (d) of this section does not apply to a statement by the affected child (as defined in section 106A referred to);
- (b) the affected child is not to be called as a witness unless the justices are satisfied that there are special circumstances that justify the complainant being so called; and
- (c) references to a written statement are to be read as including references to a statement recorded electronically.

”.

[* *Reprinted as approved 9 November 1984.*

*For subsequent amendments see 1990 Index to
Legislation of Western Australia p. 82.]*

PART 4 — CHILD WELFARE ACT 1947

Child Welfare Act amended

12. The *Child Welfare Act 1947** is amended by repealing sections 23A, 23B and 23C.

[* *Reprinted as at 23 May 1990.*

*For subsequent amendments see 1990 Index to
Legislation of Western Australia p. 23 and Act No. 15
of 1991.]*

PART 5 — TRANSITIONAL

Transitional provisions

13. (1) The following proceedings are to be determined as if this Act had not come into operation —

- (a) a proceeding on an existing complaint and an indictment arising therefrom and any appeal in respect of any such proceeding;
- (b) a proceeding on an existing indictment under section 579 of *The Criminal Code* and any appeal in respect of any such proceeding;
- (c) any other proceeding within the meaning in section 106A of the principal Act that is an existing proceeding.

(2) In subsection (1) “**existing**” in relation to a complaint or indictment means made or presented before the day on which this Act comes into operation, and in relation to any other proceeding means commenced before that day.