

# LEGISLATIVE COUNCIL

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Read 1° 29 February 1984

(*Brought in by the Honourable J. H. Kennan*)

## A BILL

To amend the *Evidence Act 1958*, and for other purposes.

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and the Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say):

1. This Act may be cited as the *Evidence (Amendment) Act 1984*.

Short title.

2. The several provisions of this Act shall come into operation on the day or the respective days to be fixed by proclamation or successive proclamations of the Governor in Council published in the *Government Gazette*.

Commencement.

3. In this Act the *Evidence Act 1958* is called the Principal Act.

Principal Act No. 6246.

Reprinted to No. 9230.

Subsequently amended by Nos. 9407, 9427, 9509, 9554, 9576, 9698, 9699, 9713, 9902 and 9945

Amendment of  
No. 6246, Part I.  
New Division 6.

4. (1) After Division 5 of Part I. of the Principal Act there shall be inserted the following Division:

‘DIVISION 6—DISCLOSURE OF INFORMATION RELATING TO  
APPLICATIONS FOR LEGAL AID.

Interpretation.

21D. In this Division, unless inconsistent with the context or subject-matter—

“Applicant.”

“Applicant” means a person—

(a) who proposes to apply—

(i) to a legal aid body for legal aid; or

(ii) to the Legal Aid Commission for legal assistance under the *Legal Aid Commission Act 1978*; or

(b) who applies to a legal aid body for legal aid.

“Legal aid.”

“Legal aid” means—

(a) the provision of legal services without charge or upon condition that a person makes a payment or payments towards the cost of providing those services, including any out-of-pocket expenses incurred or to be incurred in providing those services;

(b) the provision in respect of legal services provided or to be provided by a private practitioner of the whole or part of the cost of providing those services, including any out-of-pocket expenses incurred or to be incurred in providing those services; or

(c) both (a) and (b).

“Legal aid body.”

“Legal aid body” means a body of persons whether corporate or unincorporate the sole or principal function of which is the provision of legal aid, but does not include a private practitioner or the Legal Aid Commission.

“Legal Aid Commission.”

“Legal Aid Commission” means the Legal Aid Commission established under the *Legal Aid Commission Act 1978*.

“Member of a legal aid body.”

“Member of a legal aid body” means any member of a legal aid body, any employee of a legal aid body and any person working with or for a legal aid body (whether or not for fee or reward).

“Private practitioner.”

“Private practitioner” means a person who is practising as a barrister, as a solicitor or as a barrister and solicitor whether—

(a) on the person’s own account;

(b) in partnership; or

(c) as the employee of a person referred to in paragraph (a) or (b).

21E. (1) Any person or any member of a legal aid body who advises an applicant in relation to or assists an applicant in the preparation of a proposed application for legal aid shall not without the consent of the applicant—

Disclosure of information, &c., relating to proposed applications.

- 5 (a) produce in a court any document received by the person body or member in relation to the proposed application for legal aid; or
- 10 (b) communicate or permit to be communicated except to a private practitioner acting for the applicant or give in evidence in a court any information received by the person body or member in relation to the proposed application for legal aid.

(2) A court shall not have power to compel any such person or member to produce any such document or communicate or give in evidence any such information unless the applicant has consented to that production or communication or to the giving of that evidence.

(3) In this section, “proposed application for legal aid” means an application proposed to be made—

- 20 (a) to a legal aid body for legal aid; or
- (b) to the Legal Aid Commission for legal assistance under the *Legal Aid Commission Act 1978*.

21F. (1) A member of a legal aid body shall not without the consent of the applicant—

Disclosure of information, &c., relating to applications.

- 25 (a) produce in a court any document received by the body or member in relation to an application made to the body for legal aid; or
- 30 (b) communicate or permit to be communicated except to a private practitioner acting for the applicant or give in evidence in a court any information received by the body or member in relation to an application made to the body for legal aid.

(2) A court shall not have power to compel any member of a legal aid body to produce any such document or communicate or give in evidence any such information unless the applicant has consented to that production or communication or to the giving of that evidence.

21G. (1) Where an applicant has died, a consent for the purposes of this Division may be given by the legal personal representative or spouse of the deceased applicant or a child of the deceased applicant.

Disclosure of information, &c., where applicant has died.

40 (2) This Division shall cease to have any application at and from the time at which there is no legal personal representative spouse or child of the deceased applicant.

Application of this Division.

21H. (1) This Division applies whether or not—

- (a) an application proposed to be made to a legal aid body or the Legal Aid Commission is made; or
- (b) a legal aid body, to which an application is made provides legal aid.

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(2) Nothing in this Division applies to or in relation to any investigation of or legal proceeding brought in respect of the giving of false information in or in connexion with an application to a legal aid body for legal aid or to the Legal Aid Commission for legal assistance under the *Legal Aid Commission Act 1978*.

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Consequential amendment of No. 6246 s. 1.

(2) In the table of Parts and Divisions in section 1 of the Principal Act after the expression “Division 5.—Boards appointed and Commissions issued by the Governor in Council ss. 14–21c.” there shall be inserted the expression “Division 6.—Disclosure of Information Relating to Applications for Legal Aid ss. 21D–21H.”.

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Amendment of No. 6246, s. 23.

5. After sub-section (4) of section 23 of the Principal Act there shall be inserted the following sub-section:

“(5) Nothing in this section shall limit or affect the operation of section 102 of this Act.”.

Evidence of children may be given on affirmation.

Amendment of No. 6246, s. 28.

Evidence of physicians and surgeons.

6. In section 28 of the Principal Act—

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- (a) in sub-section (2) the expression “(unless the sanity or testamentary capacity of the patient is the matter in dispute)” shall be repealed; and
- (b) for sub-section (3) there shall be substituted the following sub-sections:

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“(3) Where a patient has died, no physician or surgeon shall without the consent of the legal personal representative or spouse of the deceased patient or a child of the deceased patient divulge in any civil suit action or proceeding any information which the physician or surgeon has acquired in attending the patient and which was necessary to enable the physician or surgeon to prescribe or act for the patient.

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(4) Sub-section (3) shall cease to have any application to or in relation to any civil suit action or proceeding at and from the time at which there is no legal personal representative spouse or child of the deceased patient.

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(5) Sub-sections (2) and (3) do not apply to or in relation to—

- (a) an action brought under Part III. of the *Wrongs Act 1958* to recover damages for the death of the patient;
- (b) proceedings brought under the *Workers Compensation Act 1958* to recover compensation for the death of the patient; or

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(c) any civil suit action or proceeding in which the sanity or testamentary capacity of the patient is the matter in dispute.”

7. In section 53A of the Principal Act—

Amendment of  
No. 6246, s. 53A.

5 (a) for sub-section (1) there shall be substituted the following sub-section:

Certified  
reproductions of  
certain public  
documents  
admissible  
without further  
proof.

10 “(1) A reproduction of any document that is or at any time was in the custody or under the control of the holder of an office, declared by Order of the Governor in Council published in the *Government Gazette* to be an office to which this section applies, shall, if the reproduction bears a certificate purporting to be signed by the holder of that office or by a person declared by such an order to be entitled to certify documents of that kind that it is a reproduction of that document, be admissible in evidence without further proof as if it were the document of which it is certified to be a reproduction.”; and

15 (b) in sub-section (3) for the expression “the Registrar-General, the Registrar of Titles, Commissioner for Corporate Affairs Registrar of Incorporated Associations, the Government Statist,” there shall be substituted the words “the holder of an office declared by Order of the Governor in Council published in the *Government Gazette* to be an office to which this section applies”.

25 8. In section 67 of the Principal Act—

Amendment of  
No. 6246 s. 67.

(a) for the expression “67. Whenever” there shall be substituted the expression “67. (1) Whenever”;

Certification of  
copies of  
documents of  
public nature.

30 (b) for the expression commencing “upon payment of a sum for the same” and ending at the end of the section there shall be substituted the words “upon payment of the prescribed fee”; and

(c) after the end of the section there shall be inserted the following sub-section:

New ss. (2).

35 “(2) The Governor in Council may make regulations prescribing fees for the purposes of sub-section (1).”.

9. For section 79 of the Principal Act there shall be substituted the following section:

Amendment of  
No. 6246, new  
s. 79.

“79. (1) All courts and persons acting judicially within Victoria shall take judicial and official notice of—

Certain  
signatures, &c. to  
be judicially  
noticed.

40 (a) the signature of any person who is for the time being or has at any time been the holder of any office to which this section applies; and

(b) the seal of such a person or of any body or court to which this section applies—

where that signature or seal purports to be attached or appended to any decree order certificate affidavit writ warrant summons or other judicial or official document, and shall also take judicial and official notice of the fact that that person holds or has held that office. 5

(2) The Governor in Council may by Order published in the *Government Gazette* declare any office, court or body (including any office, court or body in any Australasian State) to be an office, court or body to which this section applies. 10

(3) The Governor in Council may by Order published in the *Government Gazette* amend or revoke any order under sub-section (2).”.

Amendment of No. 6246. New s. 102.

10. (1) For section 102 of the Principal Act there shall be substituted the following section: 15

When affirmations may be made instead of oath.

“102. Where—

(a) a person objects to being sworn; or

(b) it is not in the circumstances reasonably practicable without inconvenience or delay to administer an oath to a person in the manner appropriate to the religious belief of the person— 20

the person shall be permitted to make a solemn affirmation instead of taking an oath in all places and for all purposes where an oath is required by law, and that affirmation shall be of the same force and effect as if the person had taken the oath.”.

Amendment of s. 103.

(2) After sub-section (2) of section 103 of the Principal Act there shall be inserted the following sub-section: 25

Alternative form of affirmation in the case of two or more persons.

“(3) An oral affirmation may be administered to and made by two or more persons at the same time in the following form and manner:

The Officer administering the affirmation shall say—

“You and each of you do solemnly, sincerely, and truly declare and affirm . . .” followed (with any necessary modifications) by the words of the oath prescribed or allowed by law, omitting any words of adjuration imprecation or calling to witness, and forthwith after the officer has said the words referred to, each of the persons making the affirmation shall say—“I do so declare and affirm.”. 30 35

Consequential amendment of s. 100 (6).

(3) In section 100 (6) of the Principal Act after the words “this section” there shall be inserted the expression “and in section 103”.

11. (1) For Divisions 7, 8 and 9 of Part IV of the Principal Act there shall be substituted the following Divisions:

Amendment of No. 6246. New Divisions 7, 8 and 9 of Part IV.

DIVISION 7—COMMISSIONERS FOR TAKING AFFIDAVITS

5 113. In this Division and in Divisions 8, 9, 10 and 11 of this Part, "commissioner" means a commissioner for taking affidavits.

Interpretation.

114. (1) The Governor in Council may from time to time by Order published in the *Government Gazette* appoint such persons as are thought fit to be commissioners for taking affidavits.

Commissioners.

10 (2) The Governor in Council may in the like manner revoke any appointment made under sub-section (1).

(3) The Governor in Council may in the like manner accept the resignation of a commissioner appointed under sub-section (1).

15 (4) Every member for the time being of either the Legislative Council or the Legislative Assembly (not being a member of the Executive Council) shall, by virtue of that office and without any further or other authority than this section, be a commissioner for taking affidavits.

20 115. (1) All affidavits to be used for any purpose whatever may be sworn and taken before a commissioner, who is hereby authorized to take and receive those affidavits.

Power of commissioner to take affidavits.

(2) This section applies notwithstanding that by or under any Act it is provided that an affidavit shall or may be sworn and taken by or before any named specified or indicated officer or other person.

25 116. (1) Where, by or under any Act, any person is required authorized or permitted to make or subscribe a declaration before a justice, that person may make or subscribe the declaration before a commissioner, who is hereby authorized to take and receive the declaration as fully and effectually as a justice is by law empowered to take and receive the declaration.

Declarations may be made before commissioner.

30 (2) Every declaration made or subscribed before a commissioner pursuant to sub-section (1) shall be in or to the effect of the same form and have the same force and effect as if it had been made or subscribed before a justice.

35 117. (1) All courts and persons acting judicially shall take judicial and official notice of the signature of every commissioner on any declaration affidavit or other document.

Judicial notice of signature of commissioner.

(2) After signing any declaration, affidavit or other document, a commissioner shall legibly write type or stamp the commissioner's name below the signature.

Registration of  
commissioners.

118. (1) Every commissioner appointed pursuant to section 114 (1) shall upon that appointment apply to the Secretary to the Law Department for registration.

(2) An application for registration shall be in the prescribed form and shall contain the prescribed particulars with respect to the applicant. 5

(3) The Secretary to the Law Department shall cause a Register of Commissioners to be kept and shall cause to be entered in the Register the name address and particulars of every commissioner who applies for registration.

(4) Upon registering a commissioner under this section the Secretary to the Law Department shall cause a certificate of registration to be issued to the commissioner. 10

Renewal of  
registration.

119. (1) Not less than one month before the expiration of the registration or renewal of registration of a commissioner the Secretary to the Law Department shall cause notice in writing of the expiry to be sent by post to the commissioner. 15

(2) A commissioner may within one month before or at any time after the expiry of registration or renewal of registration apply for renewal of registration as a commissioner.

(3) Every application for renewal of the registration of a commissioner shall be in the prescribed form and shall contain the prescribed particulars with respect to the commissioner. 20

(4) Upon receiving an application for renewal of the registration of a commissioner the Secretary to the Law Department shall cause the renewal of registration to be noted in the Register in relation to that commissioner and shall cause a certificate of renewal of registration to be issued to that commissioner. 25

Duration of  
registration.

120. Registration under section 118 and renewal of registration under section 119 shall remain in force—

(a) until the expiration of seven years from the date of registration or renewal of registration; 30

(b) until the commissioner dies;

(c) until the resignation of a commissioner is accepted in accordance with section 114 (3); or

(d) until the appointment of the commissioner is revoked in accordance with section 114 (2)— 35

whichever first occurs.

Commissioner to  
notify change of  
name. &c.

121. Where there is a change in the name or address of a commissioner who is registered for the time being, the commissioner



shall in writing notify the Secretary to the Law Department of the change and the Secretary shall cause the Register to be amended accordingly.

5 122. (1) A commissioner appointed pursuant to section 114 (1) shall not act as a commissioner unless the commissioner holds a certificate of registration or of renewal of registration which is in force for the time being. Unregistered commissioners not to act, &c.

10 (2) Contravention of sub-section (1) or failure to comply with section 121 shall be a ground upon which the Governor in Council may under section 114 (2) revoke an appointment made under section 114 (1).

123. Every person not being a commissioner who assumes or pretends to act as such shall be guilty of an indictable offence and liable to imprisonment for a term of not more than two years. Pretending, &c., to be a commissioner.

15 123A. The Governor in Council may make regulations prescribing forms for the purposes of this Division, and regulating the making of applications under this Division for registration as a commissioner or for renewal of registration. Regulations.

#### DIVISION 8—AUTHORIZED PERSONS FOR TAKING DECLARATIONS

20 123B. (1) Where, by or under any Act proclamation order regulation rule or by-law relating to public revenues of Victoria or to any of the public offices departments or public statutory corporations or by or under any official regulation rule or practice in any such office department or corporation, a statutory solemn or voluntary declaration is required to be made by any person for the purpose of verifying any document instrument book entry statement or return or for any other purpose whatsoever, then in addition to all other persons who may by law take and receive such declarations, it shall be lawful for any of the following persons to take and receive any such declaration: Power to take and receive certain declarations, &c., extended to certain classes of persons.

- 30 (a) Any barrister and solicitor of the Supreme Court;
- (b) Any clerk to a barrister and-solicitor of the Supreme Court;
- (c) The registrar of the county court;
- (d) The clerk of any magistrates' court;
- (e) Any member of the Parliament of the Commonwealth;
- 35 (f) Any legally qualified medical practitioner;
- (g) Any councillor of any municipality;
- (h) Any town clerk or shire secretary;
- (i) Any postmaster or person in charge of a post office;
- (j) Any teacher or principal in the teaching service;
- 40 (k) The manager or accountant of any bank;

- (l) The secretary of any building society;
- (m) Any minister of religion authorized to celebrate marriages;
- (n) Any member of the police force;
- (o) The stationmaster or person acting as stationmaster of any railway station. 5

(2) Notwithstanding anything to the contrary in any Act, a person referred to in paragraph (a) or (b) of sub-section (1) shall not be debarred from taking and receiving any declaration referred to in that sub-section by reason only that the person is—

- (a) the barrister and solicitor or barrister or solicitor for any of the parties to the proceeding matter or instrument in respect of which the declaration is made; or 10
- (b) the clerk to such a barrister and solicitor or barrister or solicitor.

(3) Where any declaration referred to in sub-section (1) purports to have been taken and received by any person referred to in that sub-section, all persons to whom that declaration comes shall take official notice of that declaration and of the qualifications of the person referred to in sub-section (1) to take and receive that declaration. 15

(4) No fees shall be demanded or taken for taking and receiving any declaration under this section by a commissioner or by any person who is empowered to take and receive such a declaration by virtue only of this section. 20

Penalty: 1 penalty unit.

#### DIVISION 9—AFFIDAVITS IN VICTORIA 25

Affidavits in  
Victoria how  
sworn and taken.

123C. (1) Affidavits for use in any court or for any purpose or in any way whatsoever authorized by law whether by or under any Act of Parliament or by custom or otherwise may be sworn and taken within Victoria before—

- (a) any judge; 30
- (b) a master of the Supreme Court;
- (c) any justice;
- (d) the clerk of any magistrates' court;
- (e) a commissioner;
- (f) a notary public; 35
- (g) any solicitor who holds a current practising certificate under the *Legal Profession Practice Act 1958*;
- (h) any officer or person empowered authorized or permitted by or under any Act of Parliament to take affidavits in

relation to the matter in question or in the particular part of Victoria in which the affidavit is sworn and taken.

5 (2) All courts and persons acting judicially shall take judicial and official notice of the seal or signature of any of the persons referred to in sub-section (1) attached or appended to any affidavit within the meaning of that sub-section.

10 (3) Sub-section (1) (e) applies notwithstanding that by or under any Act it is provided that an affidavit shall or may be sworn and taken by or before a justice or any named specified or indicated officer or other person.

15 (4) Notwithstanding anything to the contrary in any Act, a solicitor shall not be debarred from taking and receiving any affidavit referred to in sub-section (1) by reason only that the solicitor is the solicitor for any of the parties to the proceedings matter or instrument in respect of which the affidavit is sworn and taken.

(5) No fees shall be demanded or taken for taking and receiving any affidavit under this section by a commissioner or by any person who is empowered to take and receive such an affidavit by virtue only of this section.

20 Penalty: 1 penalty unit.’

(2) In section 124 of the Principal Act—

(a) for paragraph (a) of sub-section (1) there shall be substituted the following paragraph:

“(a) before a commissioner;” and

25 (b) after sub-section (5) there shall be inserted the following:

“(6) No fee shall be demanded or taken by a commissioner for taking and receiving any affidavit under this section.

Penalty: 1 penalty unit.”.

30 (3) The Principal Act shall be amended as follows:

(a) In the table of Parts and Divisions in section 1 for the expression—

“Division 7—Commissioners of the Supreme Court for taking Affidavits ss. 113–117.

35 Division 8—Commissioners for taking Declarations and Affidavits and Authorized Persons for taking Declarations ss. 118–122j.

Division 9—Affidavits in Victoria s. 123.”

Amendment of s. 124. Affidavits in places out of Victoria.

Consequential amendments.

there shall be substituted the expression—

“Division 7—Commissioners for Taking Affidavits ss.  
113–123A.

Division 8—Authorized Persons for taking Declarations s.  
123B. 5

Division 9—Affidavits in Victoria s. 123C.”;

(b) In section 128 (1) for the words “or within Victoria by or before a commissioner for taking declarations and affidavits or in any place in Victoria or elsewhere by or before a Commissioner of the Supreme Court for taking Affidavits in that place” there shall be substituted the words “or within Victoria or in any place out of Victoria by or before a commissioner for taking affidavits”; and 10

(c) Section 129 shall be repealed.

Savings.

(4) On and from the commencement of this section— 15

(a) any person appointed to be a commissioner of the Supreme Court for taking affidavits by commission under section 113 (1) of the Principal Act as in force immediately before that commencement shall be deemed to have been appointed a commissioner for taking affidavits under section 114 (1) of the Principal Act as amended by this section; 20

(b) any person appointed to be a commissioner of the Supreme Court for taking affidavits by commission under section 113 (1) of the Principal Act as in force immediately before that commencement may notwithstanding that the person was empowered and authorized to act only in a particular place or places in or out of Victoria act as a commissioner for taking affidavits under the Principal Act as amended by this section in any place in or out of Victoria; 25

(c) any person appointed to be a commissioner for taking declarations and affidavits under section 118 of the Principal Act as in force immediately before that commencement shall be deemed to have been appointed a commissioner for taking affidavits under section 114 (1) of the Principal Act as amended by this section; 30 35

(d) any registration or renewal of registration of a commissioner under section 122B or 122D (as the case requires) of the Principal Act as in force immediately before that commencement shall remain in force for the period specified in the Principal Act as so in force in respect of that registration; and 40

(e) a reference in any Act or in any order in council regulation rule or by-law under any Act to a commissioner of the Supreme Court for taking affidavits or a commissioner for taking declarations and affidavits shall be deemed and taken 45

to refer to a commissioner for taking affidavits under the Principal Act as amended by this section.

(5) Any person deemed by sub-section (4) (a) to be a commissioner for taking affidavits—

Registration of  
Supreme Court  
Commissioners.

5 (a) may—

- (i) without being registered as required by section 118 of the Principal Act as amended by this section, act as such a commissioner for six months after the commencement of this section; and
- 10 (ii) within six months after the commencement of this section, apply for registration under section 118 of the Principal Act as amended by this section in all respects as if the person had been appointed a commissioner for taking affidavits under section 114 (1) of the Principal Act as amended by this section; and
- 15 (b) subject to sub-section (6), shall not act as such a commissioner after the expiration of six months after the commencement of this section without being registered under section 118 of the Principal Act as amended by this section.
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(6) A commissioner of the Supreme Court for taking affidavits empowered and authorized under the Principal Act as in force immediately before the commencement of this section to act only in a place out of Victoria may continue to act only in that place as a

25 commissioner for taking affidavits without being registered under section 118 of the Principal Act as amended by this section.