

PART ONE: VICTIMS AND WITNESSES - CURRENT TRENDS IN SOUTH AUSTRALIA

Current Provisions

1. The protection of witnesses required to give evidence in criminal trials South Australia is governed by section 13 of the *Evidence Act 1929*.
2. Section 13 provides as follows:
 - (1) If it is practicable and desirable to make special arrangements for taking evidence from a witness in order to protect the witness from embarrassment or distress, to protect the witness from being intimidated by the atmosphere of a courtroom, or for any other proper reason, the court should, subject to subsections (3) and (4), order that special arrangements be made for taking the evidence of that witness.
 - (2) The Court may, for example, make orders of the following kinds:
 - (a) an order that the evidence be given outside the courtroom and transmitted to the courtroom by means of closed circuit television;
 - (b) an order that a screen, partition or one-way glass be placed to obscure the witness's view of a party to whom the evidence relates or some other person;
 - (c) an order that the witness be accompanied by a relative or friend for the purpose of providing emotional support.
3. An order must not be made pursuant to Section 13 if the order would prejudice any party to the proceedings. If an order is made the judge must warn the jury not to draw an inference adverse to the defendant.
4. If the witness is a “vulnerable witness” the court should consider whether such an order should be made.

5. A “vulnerable witness” is defined as follows:
 - (a) a witness who is under 16 years of age; or
 - (b) a witness who suffers from an intellectual disability; or
 - (c) a witness who is the alleged victim of a sexual offence to which the proceedings relate; or
 - (d) a witness who is, in the opinion of the court, at some special disadvantage because of the circumstances of the case, or the circumstances of the witness.

6. A request for special arrangements for taking evidence from a vulnerable witness will be granted if, having regard to the circumstances under which the evidence will be given, the nature of the evidence, the reason for the request and any other matter that the court considers to be relevant, the court considers that the reason for the request is plausible and is a sufficient reason to make special arrangements.

Question of Law Reserved (No 2 of 1997) (1998) 196 LSJS 195

Current Practices of the Office of the Director of Public Prosecutions

7. There are currently 3 court rooms with closed circuit television facilities available for evidence to be given in Supreme and District Court trials in South Australia.

8. Solicitors, Prosecutors and Witness Assistance Officers (WAOs) employed by the Office of the Director of Public Prosecutions are involved in providing information and assistance to victims and witnesses, including those who fall within the definition of a “vulnerable witness”.

9. The WAOs provide the following services to victims and witnesses;

- information about the criminal justice process and DPP procedures to victims/witnesses by telephone and in person
 - conduct court preparation sessions
 - provide support during meetings with legal staff
 - attend court with witnesses whilst they give evidence or observe proceedings
 - assist in the preparation of victim impact statements for use in sentencing and refer to appropriate services in the community.
10. Over recent years there has been an increase in awareness in relation to issues relevant to victims and witnesses. The ODPP has had a Witness Assistance Service (WAS) since 1995 and has steadily increased its complement of social work staff during this time (now employing 10 full time WAOs). The demand for the WAS has dramatically increased with numbers of victims/witnesses referred for an information and support service increasing from 497 (2000-2001) to approximately 900 (2004-2005).
11. The WAS regularly provides education sessions and presentations to external stakeholder agencies (ie. SA Police, TAFE, Universities, Community Health agencies) to raise awareness of the service and issues relevant to victims and witnesses.

Proposed Changes - The draft *Evidence (Vulnerable Witnesses) Amendment Bill* 2005

12. The draft Bill seeks to broaden the definition of “vulnerable witness” to include:
- a witness who is the victim of an offence involving violence, cruelty, abduction or a serious risk to life or health, or, involving menaces, threats or intimidation;
 - a witness who has been subjected to violence or threats of violence by another party to the proceedings or an associate of another party;

- a witness who is, in the opinion of the court, at risk of emotional trauma, or some other special disadvantage, because of the circumstances of the case, or the circumstances of the witness.

13. The draft Bill also seeks to implement the following changes:

- that court may order that evidence be taken and pre-recorded outside of the court and then replayed at trial.
- that the court may order the audio visual recording of the evidence of a vulnerable witness in case the matter goes to a retrial or is likely to be dealt with in any related proceeding. The court could then allow the audio visual record of a vulnerable witness' evidence to be admitted as the witness' evidence in any retrial of that case or in any related proceeding.
- If a vulnerable witness suffers from a physical or mental disability that may affect the way his or her evidence is understood, the court could hear expert evidence explaining the disability and its physical or behavioural characteristics in so far as they are relevant to the way the evidence is to be assessed.

PART TWO: EXPERT EVIDENCE IN CRIMINAL TRIALS - THE KAPUNDA ROAD ROYAL COMMISSION (“THE COMMISSION”)

Background

In November 2003 Eugene McGee was the driver of a vehicle which was involved in a collision on the Kapunda Road. A cyclist was killed in the collision. Mr McGee failed to stop and render any assistance. At the trial, defence called evidence from a psychiatrist whose field of expertise was post traumatic stress disorder. He gave evidence that it was likely that Mr McGee had been suffering from a post traumatic stress disorder which was triggered by the collision. He said that Mr McGee's behaviour in failing to stop at the scene was consistent with that diagnosis.

There is no duty of disclosure upon defence in relation to expert evidence in South Australia. The prosecution did not become aware that such evidence was to be presented until shortly before the psychiatrist was called as a witness. The prosecution did not have an opportunity to rebut the evidence.

The Commission

The Commission was established to consider certain issues surrounding the investigation of offences committed by Mr McGee and the subsequent trial. The issue of disclosure of expert evidence was considered by the Commission.

Submissions of the Office of the Director of Public Prosecutions

In summary, the ODPP submitted to the Commission that:

- It would have served the interests of justice for the prosecution to have had a greater opportunity to explore what evidence might have been available to lead in rebuttal of the psychiatric evidence presented by the defence.
- Consideration should be given to recommending that the defence be required to disclose prior to trial the nature and substance of any expert evidence to be relied upon at trial.

Recommendation of the Commission

It was a recommendation of the Commission that those who wish to use psychiatric evidence in criminal trials should be required to give adequate notice of that evidence and should be liable to be required to submit to independent psychiatric examination and report.