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Vulnerable Witnesses: Legislative Measures to Facilitate the Giving of Evidence A New South Wales Experience

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I. INTRODUCTION

In the State of New South Wales, Australia, there are specific legislative measures to facilitate the giving of evidence by two specific classes of vulnerable witnesses in criminal proceedings, namely, child witnesses in any criminal proceeding and complainants in sexual offence proceedings. This paper will provide an overview of these measures under the Evidence (Children) Act 1977, and the Criminal Procedure Act 1986, which are designed to make the legal process more accessible to these classes of witnesses, to ensure that the most accurate evidence is made available to the court and to protect them from the emotional trauma that can result from giving evidence, without intruding into an accused's rights to a fair trial.

II. CHILD WITNESSES

The Evidence (Children) Act 1997[1] was introduced in recognition that children's ability to give their best evidence can be affected by their age, and their physical, emotional or linguistic development. To ensure the presentation of the best

[1] Commenced on 1/8/99

evidence from children in criminal proceedings, the Act makes provision for its initial collection and subsequent admission into evidence as part of their evidence, and, for three alternative ways in which children can choose to give evidence.

a. Pre-recording of children's evidence

Part 2 of the Act[2] which deals with the pre-recording of children's interviews specifically requires an investigating official/police officer to electronically record investigative interviews[3] with children under the age of 16 years, concerning the commission or possible commission of an offence by the child or any other person, (s 7).

b. Joint Investigation Response Team

The joint team (referred to as JIRT),[4] which investigates all sexual assaults and serious physical assaults of children under 16 years, is responsible for the electronic recording of interviews with children. JIRT officers are specially trained to deal with children in a way which is comfortable and age appropriate. They are suitably equipped to conduct investigative interviews with children under 16 years of age in accordance with specific guidelines, which deal with the procedures for the conduct of the electronic interviews, their storage and disposal and access and viewing of the electronic recordings of children's evidence. The primary focus of the joint team is to meet the best interests and welfare of the child so that the best possible outcome is achieved. This includes ensuring the minimum number of investigative interviews and interviewers to best meet the needs of the child and reducing systems based trauma.

The electronically recorded interview may be an audio recording, video recording or both (s3).

[2] Pt 2 is yet to commence; police however are already pre-recording children's interviews
[3] referred to as 'out-of-court statements' or 'previous representations'
[4] police and officers of the Department of Community Services (DoCS) share responsibility for joint investigation of all sexual assaults and serious physical assaults of children under 16 years

c. Benefits of pre-recorded interviews

The audio or videotaping of children's interviews :

- provides an accurate and prompt account by a child at a time closer to the events before the memory becomes faded;
- reduces the number of times a child is required to particularise the nature of the events and therefore avoids testing of different versions; by giving the story only once the child is not required to re-live the experience by describing it on many occasions;
- reduces trauma for a child giving evidence in the formality and oppressive atmosphere of the court environment; a child is therefore unlikely to be intimidated and overawed by the court environment, but more likely to accurately recall and comfortably recite events;
- provides a record of the manner in which the child was being questioned and reduces opportunity for the child's evidence to be embellished and is free from subsequent influences of others; it minimises a child's exposure to allegations of contamination of evidence;
- assists the child in refreshing his/or memory prior to giving evidence; and
- enables an accused person to observe first hand how the evidence from the child was obtained and be in a better position to prepare a defence in relation to the allegations raised against him or her.

d. Giving evidence of children's out-of-court statements

The Evidence (Children) Act 1997 provides a child witness with choices as to the manner in which evidence is to be given in criminal proceedings. It creates a presumption that a child is entitled to give evidence in the form of a recording regardless of whether the child is the accused person in the proceeding or is giving evidence as a witness (s11).

Section 10 provides that a person must not call a child to give evidence of a previous representation made by means other than a recording unless the child's wishes have been taken into account. In practice as part of the pre-trial conference with the child,

the prosecution consults the child about his/her preferred method of testifying. The use of the audio recording or videotape recording in court is discussed with the child, and the support person, parent or guardian.

e. Application of the Evidence (Children) Act 1977

Under the Act, the entitlement of a child to use electronically recorded statements as evidence-in-chief was limited to children under the age of 16 years. This entitlement was later extended to a child witness, who is less than 16 years of age when the recorded statement was made, as long as the child concerned is under 18 years of age at the time of giving evidence in the proceedings (s11 (1A)).

f. Admissibility of pre-recorded interview and rights of accused

A recording of out-of-court statements by a child under the age of 16 years will only be admissible if the accused person and his/her legal representative were given a reasonable opportunity to listen to or view the recording (s12(2)).

Copies of the electronic recordings of children's interviews will not be provided to the accused person and/or their legal representative. In practice, a working copy of the recording which forms part of the brief of evidence is served on the Office of the Director of Public Prosecutions (ODPP). Where the prosecution seeks to adduce evidence by way of a recording, the prosecution must give written notice to the accused or his/her legal representative at least 14 days before the evidence is given in the proceedings of its intention to do so. Where the accused and his/her legal representative seek access to view or listen to the recording is required., access must be made available within 7 days of receiving the written request by the person responsible for arranging access on behalf of the prosecution.

These measures provide an accused with an early opportunity to have access to the recorded evidence at any early stage of the proceedings rather than having to wait for the child to give evidence at the proceedings. In practice, access can be arranged with the prosecution solicitor with carriage of the matter to enable counsel to view or listen to a copy of the recording in the prosecution's custody. The recording will not

be copied under any circumstances, nor is it permitted to leave the custody of the police or the prosecution.

To enable an accused to have access to the recording, this can be arranged with the joint team leader with carriage of the matter to view or listen to the recording at the relevant police station.

g. Warnings to jury

The admission of an audiotape or video recording of an out-of-court statement represents a departure from the standard practice in court proceedings where witnesses are expected to give their evidence in the presence of each other. This may be seen to create a special class of witness and may highlight his/her testimony. It may result in less weight being given to the testimony of other witnesses, or, a jury may infer that the circumstances of the particular proceedings require the use of such practices and, thus, be more likely to conclude that the accused is guilty.

To prevent any possible prejudice to an accused person that may arise from the admission of a recording, the court must warn the jury not to draw any adverse inference against the accused or to give the evidence any greater or lesser weight because it is given in the form of a recording (s14).

As an additional safeguard to the accused, a court may only order that a child not be permitted to give evidence in the form of a recording if it is satisfied that it is not in the interests of justice (s15). This provision enables an accused person to make application, prior to trial, that this alternative means of giving evidence would cause undue prejudice to the accused that could not be adequately addressed by warnings to the jury.

h. Child to be available for cross-examination and re-examination

Where a recording of a child's out-of-court statement is to be relied upon, the recording may comprise either the whole or part of the child's evidence-in-chief. In practice, in the majority of cases, the tape will form part of the evidence-in-chief of

the witness, and the child will be asked additional questions, at least to allow the child to become comfortable with the court room environment prior to being cross-examined. Where the evidence-in-chief of the child witness is accepted in the form of a recording, the child will still be required to be available for cross-examination and re-examination (s 11(2)).

III. GIVING OF CHILDREN'S EVIDENCE BY CLOSED CIRCUIT TELEVISION AND ALTERNATIVE ARRANGEMENTS

Section 9 sets out the three alternative ways in which a child may give evidence (wholly or partly) in any criminal proceeding: in the form of a recording, or orally, or, if the evidence is given in a specified proceeding to which Part 4 of the Act applies, by way of closed-circuit television facilities (CCTV) or other alternative arrangements. Part 4 applies to criminal proceedings involving a personal assault offence', which is defined widely to include the commission of sexual assault offences and any serious offences against the person, including sexual servitude and child prostitution (s 3).

The use of CCTV or similar technology to give evidence was initially limited to a child witness who is under 16 years at the time of giving evidence in the proceeding. This entitlement was extended to a child witness of 16 years or more, but less than 18 years of age when giving evidence, if the child was under 16 years when the charge for the personal assault offence was laid. (s18(1A)).[5]

The main provisions relating to the giving of evidence via CCTV are:

1. A child (other than a child defendant in the Children's Court) is entitled to give evidence by CCTV or by means of similar technology (s18(1) unless the child chooses not to do so (ss 18 (1), (2)) either from a location within or external to the court (s 20) if they so wish.

[5] Criminal Legislation (Amendment) Act No. 117 of 2001 which commenced on 18 December 2001

2. The court can order that evidence not be given in this way, but only if it is satisfied that there are special reasons in the interests of justice for the child's evidence not to be given by such means or if the urgency of the matter makes it inappropriate (ss 18(3), (4)).

3. A court may permit a child, who is an accused person in any proceeding in the Children's Court, to give evidence by means of closed-circuit television facilities or any other similar technology, if the court is satisfied that the child would suffer mental or emotional harm if required to give evidence in the ordinary way or that the facts would be better ascertained if the child's evidence is given by CCTV (s 19).

4. Where CCTV facilities or similar technology are not available, or where the child does wish to use this medium, or where the court orders that it should not be used, then the court must make alternative arrangements for the giving of evidence by the child in order to restrict contact (including visual contact) between the child and any other person or persons. These arrangements may include the use of screens, planned seating arrangements for people who have an interest in the proceeding, including the level at which they are seated and the people in the child's line of vision, or, adjourning the proceeding or any part of the proceeding to other premises where CCTV facilities are available (s 24).

5. Where a child chooses not to use any such alternative arrangements, a court must direct that the child be permitted to give evidence orally in the courtroom(s 24 (4)).

6. A child cannot give identification evidence by CCTV or similar technology until after the completion of the child's other evidence (including evidence-in-chief, cross-examination and re-examination) (s 21). The rationale for this provision is to ensure that the child is not in the presence of the accused for any longer than is necessary for the child to give identification evidence.

7. Where evidence is given by CCTV, or by similar technology, persons who have an interest in the proceedings must be able to see the child and any person present with the child on the same or another TV monitor (s 23).

8. A child (as a witness or accused person) is entitled to choose a person whom the child would like to have present near him or her when giving evidence. That person may be a parent, guardian, relative, friend or support person of the child. That person may be with the child as an interpreter, for the purpose of assisting the child with any difficulty in giving evidence associated with a disability, or for the purpose of providing the child with other support. The court may permit more than one support person to be present with the child if the court thinks that it is in the interests of justice to do so(s 27).

9. Where CCTV or alternative arrangements are used, or a child has a support person when giving evidence, a similar warning for the use of pre-recorded evidence by children under 16 years is required to be given, along with an explanation to the jury that it is standard procedure for children's evidence in such cases to be given by those means and for the presence of the support person when giving evidence (s 25).

IV. ARRANGEMENT FOR CHILD GIVING EVIDENCE WHERE ACCUSED IS UNREPRESENTED

In any proceeding where a child is giving evidence by whatever means and where an accused person is not represented by a lawyer, a child is to be examined-in-chief, cross-examined or re-examined by a person appointed by the court instead of by the accused. The appointed person's task is limited to asking the child only the questions that the accused requests the person to put to the child. That person is not permitted to independently give the accused legal or other advice. The court may choose not to appoint such a person if it considers that it is not in the interests of justice to do so.(s 28).

V. COMPLAINANTS IN SEXUAL OFFENCE PROCEEDINGS

a. Alternative arrangements for giving evidence

A new s 294B was inserted[6] in the Criminal Procedure Act 1986 to extend the availability of alternative arrangements to sexual assault complainants with similar protection to those already accorded to certain child witnesses under Part 4 of the Evidence (Children) Act 1977. This section creates a presumption that a complainant who gives evidence in proceedings for a sexual offence (as defined) is entitled (but may choose not to) to give evidence from a place external to the courtroom via closed -circuit television facilities or similar technology. If such technology is unavailable, a complainant may give evidence by use of alternative arrangements similar to those already made available to child witnesses i.e. the use of screens or planned seating arrangements to restrict visual contact.

A sexual offence is defined broadly to ensure that complainants in sexual offence proceedings are afforded the protections provided by the legislation wherever possible (s 294B(11)).

The rationale for automatically allowing complainants in sexual offence proceedings to use alternative facilities for giving evidence is to help reduce the potential for intimidation of the complainant, by shielding them from direct contact with the accused, and, thus, reduce the level of distress complainants experience in relating the circumstances surrounding an alleged assault and the embarrassment experienced by many complainants in having to be questioned about sexual matters in a public forum. Minimising the trauma for complainants in sexual offence proceedings will assist in ensuring that they are able to give evidence more confidently and more effectively, thereby allowing courts to hear the best possible evidence available.

The court retains a discretion to order that alternative arrangements such as CCTV not be used in a particular case (s 294B (5)). The court can only make such an order when it is satisfied that there are special reasons in the interests of justice why the complainant should not have access to CCTV facilities (s 294B(6)). This limitation

[6] into Part 5 (Evidence in Sexual Offence Proceedings) of Chapter 6 of the Criminal Procedure Act 1986

on the court's discretion will ensure that a defence argument of disadvantage to the accused will not generally be sufficient to overturn the presumption that the complainant is entitled to choose to use alternative means to give evidence.

By section 294B a presumption is created whereby a complainant is entitled to have a support person present near the complainant while he or she is giving evidence for the purpose of providing emotional support to the complainant. The support person is to be available regardless of whether the complainant chooses to give evidence by closed-circuit television or by use of other alternative arrangements. This approach is consistent with that already accorded to child witnesses giving evidence with a support person nearby.

a. Warnings to jury

The court is required to given an appropriate warning to the jury about the use of CCTV or other alternative arrangements to give evidence and the presence of the support person near the complainant when giving evidence. This warning is in similar terms to the warning required to be given to juries where such arrangements are used by child witnesses, namely, that the jury must not draw any adverse inference against the accused or to give the evidence any greater or lesser weight because of the use of these arrangements, together with an explanation that it is standard procedure in such cases for evidence to be given in this way (s 294B (7)).

VI. ARRANGEMENTS FOR COMPLAINANTS GIVING EVIDENCE WHEN ACCUSED IS UNREPRESENTED

To protect complainants at the time of giving evidence in sexual offence proceedings from being questioned directly by an unrepresented accused, a new s 294A was inserted which amends the Criminal Procedure Act 1986.[7] The new provisions are similar to those already available to a child witness under the Evidence (Children) Act 1997, shielding a child witness from being questioned by an unrepresented

[7] by Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003 No. 42 effective 3 September 2003

accused in any criminal proceeding arising from the commission of a personal assault offence. This provision is designed to minimise the trauma for complainants in sexual offence proceedings and to promote the accuracy and coherency of the complainant's evidence.

The section provides that a complainant cannot be examined-in-chief, cross-examined or re-examined by the accused person, but may be so examined instead by a person appointed by the court. This is to prevent the purpose of the section being subverted by the accused endeavouring to recall the complainant in his case.

The provision prevents a self-represented accused on trial for charges of sexual assault from personally cross-examining the complainant. The complainant may instead be questioned by a person appointed by the court. It is for the court to appoint a suitable person, whose role is simply to repeat the questions (in admissible form) sought to be put by the accused to the complainant. The court-appointed intermediary need not be a legal practitioner and must not give the accused any legal or other advice (s 294A (3)(4)).

Sexual offence is broadly defined to include all sexual assault offences, sexual offences against children and sexual servitude offences. This is to ensure that all complainants (whether a child or an adult) in sexual offence proceedings are afforded the protection provided in the legislation. It applies to hearings before magistrates, committal proceedings, judge alone and jury trials.

The provisions of s 294A do not give the court a discretion to decline to appoint an intermediary. By contrast, the Evidence (Children) Act 1997, which applies to a broad range of child witnesses, not just complainants, in all criminal proceedings (and in certain civil proceedings), gives the court a discretion to appoint an intermediary. The section applies whether or not closed-circuit television facilities or other similar technology (or alternative arrangements) are used by the complainant to give evidence.

The validity of this new provision was challenged in **R v MSK and MAK [2004] NSWCCA 308**[8]**.**

In that case the appellants were on trial for five counts of aggravated sexual assault in company of two schoolgirls aged 16 and 17. At trial in the Supreme Court the appellants had the opportunity of being represented by State-funded counsel as the court-appointed questioner, but they chose not to avail themselves of this opportunity. They proceeded unrepresented at trial. As a result, the appellants were not permitted to personally cross-examine the complainants because of the operation of s 294A of the Criminal Procedure Act 1986.

On appeal they essentially argued that the trial was unfair in that s 294A abrogated the common law right of a self-represented person to cross-examine and test evidence, and that the trial miscarried because of the application of the section.

In dismissing the appeal unanimously, the Court of Criminal Appeal held that s 294A is constitutionally valid and is general in its application. "It is modelled on legislation previously enacted in this State with respect to children, and enacted in other jurisdictions including overseas jurisdictions. Principles of international law cannot abrogate the force of clearly expressed and constitutionally valid statutes operative within Australia."

Wood CJ at CL in agreeing with the Mason P, added that

"Section 294A embodies an appropriate policy in light of the nature of sexual assault and the experience of courts relevant to the traumatic experience of complainants when giving evidence. The right to cross-examine is not removed. The section does not in itself create an unfair trial.
…

In truth, the provision was one which was designed to strike an important balance between the conflicting but legitimate rights that arise in this context, and it preserved an opportunity for an accused person to test the prosecution case in a way that in my view was compatible with the interests of justice. The position no doubt would be otherwise if the section had created an absolute prohibition against the cross-examination of a complainant. It has not done so."

[8] Special leave application to the High Court filed on 27/9/04 was dismissed on 4/2/05

The policy behind the provision is to strike an appropriate balance between, on the one hand, the accused's entitlement to test all relevant evidence by questioning a complainant and, on the other hand, the need to reduce the potential distress and humiliation to complainants from being personally cross-examined by an unrepresented accused.

The section ensures that the rights of the accused to a fair trial in respect of a self-represented accused are preserved as far as possible by requiring the court to warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the use of the court-appoint intermediary. The court is required to explain to the jury that it is standard practice in such cases to appoint the person to put the questions to the complainant (s 294A (7)).

VII. ARRANGEMENTS FOR GIVING EVIDENCE BY COMPLAINANTS FOLLOWING APPEAL

In May this year, a new Division 3 - headed 'Special Provisions Relating to Retrials of Sexual Offence Proceeding' was inserted into the Criminal Procedure Act 1986[9]. Section 306B under this division permits the admission of a record of evidence given by a complainant in a prescribed sexual offence proceeding as evidence in any new trial that is ordered following an appeal.

The catalyst that triggered the introduction of this new division was the much publicised case of **Regina v Bilal Skaf and Mohammed Skaf [2004] NSWCCA 37.**

In that case, the two appellants were convicted of aggravated sexual assault without consent. Identification and the adequacy of lighting in the park enabling the complainant to see her assailants were relevant issues in the trial. They succeeded in their appeal against conviction on the basis that the trial miscarried by reason of juror misconduct. Although the jury had been sent out to consider their verdict, two jurors attended the park at night where they checked out the lighting and conducted

[9] Criminal Procedure Amendment (Evidence) Act 2005 (No. 15) – commenced 12 May 2005

experiments with each other at different places in the park to see whether they could see each other at all times. The Court of Criminal Appeal held that the experiments could not be considered part of the jury's deliberations and evidence as to what occurred at the park was inadmissible. In that event, the evidence was obtained in circumstances amounting to procedural unfairness (denial of natural justice) as the accused were unable to test the material in any way. A new trial was ordered as the Court could not be satisfied that the jurors' conduct has not affected the verdict and the jury would have returned the same verdict if the jurors' had not visited the park.

The events occurred on 12 August 2000. The jury returned verdicts of guilty on 11 July 2002. Some 18 months later in February 2004, a solicitor, unconnected with the parties, had brought to the attention of the proper authorities about a conversation with a juror involved in the park experiments. On 2 May 2004 a new trial was ordered; it was to commence on 28 February 2005.

The complainant had decided not to give evidence in the retrial and subject herself to further questioning about the events which occurred some five years earlier. Following assessment of the situation, on 3 February 2005 the ODPP announced that there was a real risk that the complainant would suffer significant emotional and psychological harm if compelled to give evidence again. Consequently, the ODPP decided not to proceed with the charges.

In a case of retrial following appeal, complainants under the new provisions will have the choice as to whether they give no further evidence, give further limited evidence or give all their evidence afresh.

The record of the original evidence will be admissible only if the prosecution gives the court and the accused notice in the prescribed form of the prosecution's intention to tender the record (s 306B (3)). The hearsay rule under the Evidence Act will not prevent the admission or use of the record as evidence (s 306B(4)). The court does not have a discretion to decline to admit the record where proper notice has been given by the prosecution (s 306B (5)).

To be admissible as evidence in the new trial, the record of the original evidence of the complainant must be properly authenticated by the court before which the evidence concerned was given or by the registrar or other proper officer of that court in accordance with any directions of the court, or, by the person or body responsible for producing the record (s 306E).

The court may direct the record of original evidence to be edited to remove inadmissible statements. Editing may also occur on the basis of agreement between the prosecution and the accused or his/her legal representative.

The best available record must be tendered. A recording will be tendered where one is available, and where a recording is not available a transcript may be tendered (s 306E).

If a record of the evidence of a complainant is admitted in the new trial proceedings, the complainant cannot be compelled to provide any further evidence, but may elect to do so with the leave of the court hearing the new trial proceedings (s 306C, s 306D). A complainant who chooses to give further evidence will not be exposed to further questioning 'at large' on all matters. The court is to ensure that only questions that are necessary to clarify the record of the original proceedings or to canvas new material that has become available since the original proceedings, or are necessary in the interest of justice are asked of the complainant (s 306D(3)). A complainant who commences to give further evidence is compelled to remain to answer such limited further questions as the court allows from both the prosecution and the defence (s 306D (4)).

Where the record of the original evidence is in the form of an electronic recording, the accused or his /her legal representative are not entitled to be given possession of an audio visual recording or audio recording tendered or proposed to be tendered in the retrial (s 306F). Reasonable access to the recording is to be given to the accused and his or her legal representative to enable them to listen to it and, if the record is an audio visual recording, view it.

VIII. FURTHER REFORMS TO ASSIST COMPLAINANTS GIVING EVIDENCE

Further legislative measures have been introduced to extend to all sexual assault complainants, irrespective of their age and irrespective of the court in which they give evidence, the same protections, to assist them to give their evidence free from additional stress, trauma and humiliation.[10]. These new measures will-

- give a court the power to close the court when a sexual assault complainant gives evidence, whether or not the complainant gives evidence by means of CCTV or alternative arrangements;
- entitle the complainant to give evidence by use of alternative arrangements such as screens whether or not closed-circuit technology is available;
- require the court to disallow improper questions that are asked of the complainant in cross-examination; and
- will provide a new comprehensive definition of prescribed sexual offence to cover all offences of a sexual nature, including repealed offences under the Crimes Act 1900 and various related offences, to apply uniformly to all complainants in all sexual offence proceedings.

IX. CONCLUSION

In the State of New South Wales a number of legislative measures have been introduced as part of the ongoing process of expanding the protection to child witnesses in any criminal proceeding and complainants in sexual offence proceedings to assist them to give the best evidence they can and to ensure that the court process does not 'revictimise' them. The measures attempt to strike a balance between the desire to protect them as vulnerable witnesses from the distress and psychological ordeal experienced by them when giving evidence in court proceedings and the

[10] Criminal Procedure Further Amendment (Evidence) Act 2005 but are yet to commence

considerations of the right of an accused to face his or her accuser and the paramount need to ensure that the rights of the accused to a fair trial are not sacrificed.