

## HUNTER STREET CHAMBERS CLE SERIES 2017

### CHILD SEXUAL ASSAULT EVIDENCE PILOT TIPS IN PREPARING YOUR CASE

In 2015 the *Criminal Procedure Act* was amended by the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 No 46*. The amendment inserts Part 29 into Schedule 2 of the *Criminal Procedure Act*.

The pilot scheme is in place from 31 March 2016 to 31 March 2019 (or such later date as is prescribed by the Regulations) and commenced on the 4 April 2016.

The aim of the Pilot is to provide greater support to child complainant's and witnesses in sexual assault trial matters. The Pilot aims to reduce the trauma experienced by child witnesses and while preserving the rights of an accused. It is essentially a protective provision for vulnerable witnesses.

This paper is not a paper considering the merits or otherwise of the Pilot program. Neither is it a paper looking at other states in Australia or other countries experiences with pre-recorded evidence.

This paper is a practical look at the impact of the Pilot program on defence practitioners. It will hopefully highlight issues you need to be aware of and focus your mind on the preparation now required for the pre-recording of evidence. The pre-recording of evidence does in my view necessitate changes to the way we as defence practitioners traditionally prepare for a child sexual assault matter.

The paper will be broken down into topics

1. Brief overview of the relevant legislation
2. The timetable set for Pilot matters
3. What flows from the timetable
4. Brief Conclusions

#### **1. Relevant Legislation**

##### s82 Definitions

- "witness" - in relation to proceedings to which this Part applies, means a child who is a *complainant or prosecution witness* in the proceedings.

##### s83 Application of the Part

- The Pilot applies only to a prescribed sexual offence, whenever it was committed. If the proceedings relate to more than one offence, at least one of those matters must be a prescribed sexual offence.
- It applies to matters:

- commenced after the commencement of the Part, or
- before the commencement of this Part but only if the matter:
  - (i) was not listed for trial before that commencement, or
  - (ii) was listed for trial before that commencement, but was or is re-listed for trial after that commencement.

s84 Pre-recorded Evidence

- If the witness is under 16 years of age when the evidence is given then the evidence must be pre-recorded.
- If a witness is over 16 but under 18 years of age the Court has the discretion to order that that witness give pre-recorded evidence. Application for such can be made by either party to the proceeding or by the Court on its own motion.
- The Court can only make such an order if it is in the interests of justice to do so.
- A witness who was a child at the time of the making of the order for evidence to be pre-recorded is entitled to give evidence in accordance with the order for pre recording even if they attain the age of 18 before the conclusion of the proceedings concerned

s85 Timing of the pre-recording of evidence

- The pre-recorded evidence hearing is to be held as soon as practicable after the date listed for the accused person's first appearance in the Court in the proceedings, but not before the prosecution has made the pre-trial disclosure required by section 141.

S87 Further evidence only with leave

- A witness whose evidence is pre-recorded cannot give further evidence without the leave of the Court.
- Leave must not be given unless the Court is satisfied that:
  - the witness or other party is seeking leave because of becoming aware of a matter of which the party could not reasonably have been aware at the time of the recording, or
  - it is otherwise in the interests of justice to give leave.
  - the further evidence is, so far as practicable, to be given by pre-recording at a hearing in the same way as the original pre-recorded evidence (unless the Court otherwise directs)
  - an application for leave can be made by either party to the proceedings

s86 Access to recordings and transcripts

- You are not entitled to a copy of the pre-recording
- You are entitled to go and watch it at the DPP on more than one occasion if you require it
- You do receive a transcript of the pre-recorded evidence

s88 Children's Champion's

- A person appointed as a "children's champion" for a witness is to

communicate to the witness;

- questions put to the witness
- the answers given by the witness in replying to them
- to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.
- A children's champion for a witness is an officer of the Court and has a duty to impartially facilitate the communication so the witness can provide the witness's best evidence.
- The Part also allows for the "children's champion" to also be called a "witness intermediary".
- My own personal practice is to use the term witness intermediary.

## **2. The Timetable Set For Pilot Matters**

- Once the Indictment is found the timetable will be set.
- Practice Note 11 for the Downing Centre Pilot indicates that the Court expects the Prosecution to present an indictment in accordance with s129 *Criminal Procedure Act* (ie within 4 weeks).
- The timetable will not be set until the indictment is found and filed.
- Once filed your client will be arraigned.
- The timetable sets the following dates:
  - Service of the Witness Intermediary report
  - Ground Rules Hearing
  - Pre-recording of the evidence
  - Case Management
  - Call Over
  - Trial Date
- Counsel should be available for each timetabled appearance at Court.
- Specialist Judges have been appointed for the Pilot and accordingly they undertake the pre-recording and most often the Ground Rules Hearings.
- The case management and call over dates will be before His Honour Judge Ellis on most occasions.

### The Witness Intermediary Report

- The Court appoints the witness intermediary either on its own application or the application of one of the parties.
- s89 of the Part sets out the rules for the appointment.

### Ground Rules Hearings

- You will receive a copy of the witness intermediary report. This report contains the recommendations of the witness intermediary. It contains information regarding; communication abilities of the witness, time required for breaks, language issues, comprehension abilities and other relevant information.

- At the ground rules hearing the witness intermediary will give evidence.
- They are sworn in and then questioned regarding their report.
- Questions can come from the Judge, Crown or defence counsel.
- You or your counsel are able to speak to the witness intermediary.
- Counsel can go so far as to prepare the cross examination and run it by the witness intermediary
- The report can be a useful tool for counsel in the preparation of their cross examination.
- The ground rules hearing in my experience is of short duration. Minutes not hours.

### The Pre-Recording of the Evidence

- The pre-recording of the child complainant is generally speaking the most important evidence in the case.
- The pre-recording is essentially the first day of the trial.
- If it is a child complainant it is highly likely that it will be the first evidence that the jury will hear.
- The witnesses recorded JIRT interview is not played at the time of pre-recording.
- The witness has watched their recorded JIRT interview in the days prior to the pre-recording of their evidence.
- There may be some short additional evidence adduced by the Crown, but often there is not.
- Have your exhibits ready. An envelope with each exhibit inside marked with a sequential number works well.

### **3. What Flows from the Timetable**

- A fundamental shift in preparation and the timing of that preparation
- A likely increase in the estimate of your fees in a private matter.
- It may mean for less experienced solicitors early briefing of counsel at the committal stage. If not at committal stage as soon as possible after committal.
- You need to have the instructions you ordinarily have on the first day of trial on the day of the pre-recording.
- Are you calling a positive defence case – such as calling your client - remember *Brown v Dunn*.
- You must have conferenced all relevant witnesses who may impact on the cross examination of the witness.
- All relevant subpoenas should be issued, returned and provided in your brief to counsel as far as possible.
- Edits to records of interviews should be attended to prior to pre-recording.
- Your client needs to watch the recorded JIRT interview with the witness.
- How you are going to accomplish that?

- You need to have watched the recorded JIRT interview and check the transcript - make edits or additions as required and settle them with the Crown before pre-recording.

#### **4. Brief Conclusions**

- The pre recording of evidence means the defence case is available to the Crown months before the trial proper starts.
- It means the Crown is aware of the case even before it opens to the jury. That can allow for shifts in how the crown case is eventually presented.
- The pre recording also provides defence advantages as well. It may allow further investigation into evidence given at pre-recording, it allows for preparation of the cross examination of other witnesses with the aid of a transcript of your cross examination, it may provide a shift in your own case focus.
- The pre-recording of evidences now sits alongside the pre-recorded JIRT interview.
- The pre-recording is to assist in obtaining the best evidence from a vulnerable witness. The best evidence not just from the perspective of the Crown case but also from the defence case.

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