

SECOND READING SPEECH

Evidence (Children and Special Witnesses) Amendment Bill **2013**

The *Evidence (Children and Special Witnesses) Act 2001* sets out protections which apply to the giving of evidence by children and any other person the court deems to be a “special witness”.

The protections apply automatically only to an “affected child”, which is currently a child who is the victim of a sexual offence, a child exploitation offence, ill-treatment or abduction, or a child who is involved in child protection or family violence matters.

The only exception to this limited scope is the right of any child in any proceeding to have a support person near when giving evidence.

The Act also provides that a court may make a declaration that a person is a “special witness” and specified orders if satisfied that because of intellectual, mental or physical disability a person is unable to give evidence satisfactorily in the ordinary manner or because of the age, cultural background, relationship to any party, the nature of the subject matter or any other factor it is likely the person may suffer severe emotional trauma or be so intimidated or distressed as to be unable to give evidence satisfactorily.

This Bill arises from an assessment of the Act by my Department in the light of the implementation of greater protections for children and special witnesses in other Australian jurisdictions.

The Bill will greatly enhance the protections available to children and other vulnerable people who are unfortunately obliged to give evidence in a criminal trial

I will now address the specific amendments contained in the Bill.

The Bill expands the definitions of “affected child” and “prescribed proceeding” to include serious violence offences as well as sexual offences.

I think it is obvious that a child who is the victim of, or a witness to, a serious crime of violence such as wounding, causing grievous bodily harm or kidnapping may also be traumatised by giving evidence in open court, so the automatic application of protections to such children affected by such crimes makes sense.

This change will bring Tasmania into line with other jurisdictions where to protections apply to offences of serious violence as well as sexual offences.

The Bill also inserts in the Act a set of general principles to be applied to child witnesses.

One of the main traumas for child witnesses is cross-examination.

Research conducted at a time when only Western Australia had introduced comprehensive protections for child witnesses has revealed that children who had been involved in the criminal justice process were dissatisfied with it.

The study asked child victims if they would ever report sexual abuse again following their experiences in the criminal justice system. 44% of children in Queensland, 33% in New South Wales but 64% in Western Australia indicated that they would.

At the time of the survey only Western Australia had introduced greater protections for child witnesses.

The study also examined the attitude of legal participants (Crown prosecutors, defence counsel and the judiciary) where only 33% indicated that they would want their own child in the justice system if the child was a victim of serious sexual abuse. No defence lawyer said he or she would want their child in the court system.

Recent amendments to the *Evidence Act 2001* have strengthened a court's discretion to rule questions as improper, if they are misleading or confusing, taking into account the age and level of maturity of the witness. In addition, that Act now provides for the Court to direct that evidence be given in narrative form, rather than by question and answer.

The Australasian Institute of Judicial Administration has updated its *Bench Book for Children Giving Evidence in Australian Courts* to include sections setting out the type of language and questioning that can lead to lack of comprehension on the part of child witnesses which in turn can lead to apparent inconsistencies in evidence.

To support these initiatives, this Bill inserts a new provision in the Principal Act setting out the principles that apply when dealing with a child witness.

The provision acknowledges the vulnerability of child witnesses and the need for special measures to ensure that the child is traumatised as little as possible by the trial process.

Both Queensland and the Northern Territory have set out similar principles in the relevant legislation.

A significant amendment made by this Bill is the insertion of a provision that allows a court to order a special hearing to pre-record the whole of the evidence of an affected child, including cross examination and re-examination.

This provision will bring Tasmania into line with the majority of the mainland states and territories.

The pre-recording of the whole of a child's evidence has several benefits.

- it allows a child to get on with life sooner, including participating in therapy without the risk of contaminating evidence that has yet to be given.
- there is less waiting time at court because other machinery aspects of the trial are handled separately. The giving of evidence

is less stressful as the child does not have to wait for a jury to be empanelled and preliminary matters dealt with before giving evidence.

- the pre-recorded evidence can be used in the event of a re-trial, thus preventing the child having to give evidence several times.
- the evidence is likely to be more reliable as there is less of a gap between the original incident and the giving of evidence.
- the prosecution and defence know the strength of the child's evidence well before trial. This means that the prosecution can determine whether the evidence justifies proceeding with the charges and the defence can decide whether a change of plea is warranted.

Additionally, the Bill inserts a provision stating that, if an affected child or special witness gives evidence at the time of trial, and facilities are available, that evidence is to be audio-visually recorded.

A further amendment provides that if the audio-visual recording of that evidence is relevant to a later civil or criminal proceeding a judge may admit the audio-visual record into evidence and wholly or partially excuse the witness from giving evidence in that later proceeding.

The provision will be of particular benefit in the event of a retrial as the recording may be used in lieu of the witness having to testify about traumatic events again.

The Bill also inserts a provision to protect the audio-visual recording from unauthorised possession or use.

The Bill also inserts amendments to expand the orders available to a judge when making a declaration that a person is a special witness.

The new provisions allow a judge to order in respect of a person declared to be a special witness that a prior statement be admitted, a special hearing be held and that a special witness not be present at trial if a special hearing is held.

The Bill also addresses the rare instance where a defendant in prescribed proceedings is unrepresented.

All other jurisdictions have provisions in place to prevent the direct cross examination of a child, mentally impaired person or victim of a sexual offence by an unrepresented accused.

This Bill inserts a similar protection in the Act.

Unfortunately, there is little consistency in the provisions adopted in other jurisdictions, which provide either for a lawyer to be appointed for the purpose of cross-examination or for the questions to be asked by another person appointed by the court.

Of the alternatives, representation by a lawyer was considered preferable for two reasons. Firstly, a lawyer will be familiar with how to cross-examine a witness, something that should be of benefit to the accused. Secondly, having a member of court staff cross-examine a victim or key witness may diminish the apparent objectivity of the court.

The Bill inserts a provision based on the South Australian provision, which does not allow the court to order the provision of legal aid, but informs the defendant that he may be entitled to legal assistance under the *Legal Aid Commission Act 1990*.

As a corollary the Bill also amends the *Legal Aid Commission Act 1990* to include the category of a person who is an unrepresented accused seeking legal assistance for the purposes of cross-examination in the list of circumstances in which legal aid may be provided and to ensure that the prohibition on cross-examination is a matter taken into account when making a decision about the provision of legal aid.

The Legal Aid Commission of Tasmania has been consulted on this amendment.