



## **Report**

# **Review of Vulnerable Witness Legislation**

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### 1. PURPOSE OF THIS REPORT

This report sets out the findings and recommendations of a review of vulnerable witness legislation in the Northern Territory undertaken by the Department of Justice (Department) in 2010-2011 (review).

The review was undertaken in response to a recommendation of the NT Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (Board of Inquiry). The Board of Inquiry was established in August 2006 and delivered its report in April 2007. The report is entitled 'Ampe Akelyernemane Meke Mekarle' which means 'Little Children Are Sacred', and is referred to in this report as the 'LCAS report'. The LCAS report contains 97 recommendations. This review was undertaken in response to recommendation 30, which states:

That, taking note of the Evidence of Children Amendment Bill currently before the NT Parliament, it is recommended the Department of Justice conduct a review of all legislation relating to court procedures for vulnerable witnesses and child victims of alleged sexual abuse following the first 12 months of the operation of the new legislation. This review is to be conducted within a period of six months of that time and is to include consideration of the recommendations of the Commissioner of Police and the Director of Public Prosecutions.

Recommendation 30 refers to the Evidence of Children Amendment Bill. This Bill was enacted and commenced on 10 October 2007 as the *Evidence of Children Amendment Act 2007 (NT) (Evidence of Children Amendment Act)*. It introduced a range of reforms to the vulnerable witness protections in the NT. Soon after its commencement, a number of practical problems with the amendments contained in the *Evidence of Children Amendment Act* were identified. The *Evidence Legislation (Authorised Persons) Amendment Act 2009 (Authorised Persons Act)* was introduced to address these problems. The *Authorised Persons Act* commenced on 12 March 2009.

The Department commenced its review of the vulnerable witness legislation in approximately December 2009. This enabled the review to consider the amendments made by the *Evidence of Children Amendment Act* and the *Authorised Persons Act*.

The primary purpose of the review is to consider whether any further legislative amendments should be made at this time to improve the operation of the vulnerable witness legislation in the NT.

## 2. VULNERABLE WITNESS LEGISLATION IN THE NT

### 2.1 Background and recent reforms

Vulnerable witness legislation is intended to reduce the impact of court proceedings on vulnerable witnesses by increasing the options for the delivery of evidence by vulnerable witnesses, and limiting the number of times that a vulnerable witness is required to give evidence.

In the NT, the phrase 'vulnerable witness' is used to refer to a witness who:<sup>1</sup>

- is a child (defined as a person under 18 years of age); or
- is a victim of a sexual offence to which the proceeding relates; or
- suffers from an intellectual disability; or
- is under a special disability because of the circumstance of the case or their own circumstances; or
- is the protected person named in a domestic violence order (DVO).

In the late 1990s, several reports recommended improvements to vulnerable witness legislation in Australia. The first was the 1997 report of the Australian Law Reform Commission (ALRC) entitled 'Seen and Heard: Priority for Children in the Legal Process'. Recommendations of this report were endorsed by the NT Law Reform Committee (NTLRC) in its 'Report on the Laws relating to the Investigation and Prosecution of Sexual Assault in the Northern Territory', which was published in December 1999.

In response to these reports, amendments to the vulnerable witness provisions in the NT were made as follows:

- in 2001 amendments were made to the vulnerable witness provisions in the *Evidence Act* (NT) (*Evidence Act*) by way of the *Evidence Amendment Act 2001* (NT);
- in 2004, comprehensive vulnerable witness legislation amendments were introduced through the *Evidence Reform (Children and Sexual Offences) Act 2004* (NT);
- in October 2007, further amendments to the vulnerable witness protections were made by the *Evidence of Children Amendment Act*;
- in March 2009, some technical amendments were introduced by the *Authorised Persons Act*.

In addition, in 2007 further vulnerable witness protections were introduced as part of the *Domestic and Family Violence Act* (NT) (DFVA), which commenced on 1 July 2008 and repealed and replaced the *Domestic Violence Act* (NT).

### 2.2 Protections for vulnerable witnesses

The legislative protections for vulnerable witnesses in all matters other than domestic and family violence matters are contained in the following three pieces of NT legislation:

- *Evidence Act*, Part IIA;
- *Justices Act* (NT) (*Justices Act*), section 105L; and
- *Sexual Offences (Evidence and Procedure) Act* (NT) (*Sexual Offences (Evidence and Procedure Act)*).

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<sup>1</sup> *Evidence Act*, section 21A(1); *Domestic and Family Violence Act* section 104.

Legislative protections in relation to domestic and family violence matters are found in the DFVA.

The protections are summarised below.

### **2.2.1 Protections available to all vulnerable witnesses**

There are a number of protections available to all vulnerable witnesses when giving evidence. A vulnerable witness is entitled (subject to the court being satisfied that the arrangement is in the interests of justice) to:

- give evidence by way of closed circuit television from a place outside of the courtroom (*Evidence Act*, section 21A(2)(a));
- give evidence in the courtroom from behind a screen so that they cannot see, or be seen by, the alleged offender (*Evidence Act*, section 21A(2)(b));
- be accompanied by a friend, relative or other support person while giving evidence (*Evidence Act*, section 21A(2)(c)); and
- have the court closed while giving evidence (*Evidence Act*, section 21A(2)(d)).

Where facilities are available, an audiovisual recording can be taken of the evidence of a vulnerable witness in criminal proceedings. This recording can be admitted into evidence in later civil or criminal proceedings (*Evidence Act*, section 21E).

### **2.2.2 Protections for vulnerable witnesses in proceedings for the trial of a sexual offence or a serious violence offence**

There are additional protections in place for vulnerable witnesses in proceedings for the trial of a sexual offence or serious violence offence. These include:

- a 'recorded statement' may be admitted into evidence as all or part of the witness's evidence in chief (*Evidence Act*, section 21B(2)(a)). This allows the initial interview of a vulnerable witness with an authorised person (which includes a member of the police force or a person authorised under the *Care and Protection of Children Act (NT) (CPCA)*) to be admitted as evidence in court;
- the examination of a vulnerable witness may be undertaken in a special sitting of the court, which is recorded. The recording can then be replayed as the witness's evidence at a later time (*Evidence Act*, section 21B(2)(b));
- when a vulnerable witness is giving evidence, the court must be closed (*Evidence Act*, section 21F);
- other protections for vulnerable witnesses in proceedings relating to sexual offences are contained in the *Sexual Offences (Evidence and Procedure) Act*. These include time limits within which proceedings must be commenced and a prohibition on cross-examination of a complainant in sexual offence proceeding by an unrepresented defendant.

### **2.2.3 Protections for child witnesses**

There are also protections that are specific to child witnesses. These include:

- guiding principles to which the court must have regard in relation to child witnesses (the child witness principles) are contained at section 21D of the *Evidence Act*. In short, the child witness principles require the court to take steps to limit any distress, trauma or indignity that may be suffered by a child when giving evidence. They are discussed further at 5.2.8 below;

- in a preliminary examination (committal hearing) in relation to a charge of sexual offence or serious violence offence, the evidence of a child must be given by written or recorded statement (oral evidence is not permitted) (*Justices Act*, section 105L);
- in determining whether to disallow a question to a child witness, the court must have regard to the child witness principles (*Evidence Act*, section 16(2)(b));
- in proceedings relating to a charge of a sexual offence or serious violence offence, an exception to the hearsay rule exists for evidence of a statement made by a child to another person, where that evidence is considered by the court to be of sufficient probative value to justify its admission (*Evidence Act*, section 26E); and
- there are exceptions to the formal requirements for statements made by children, namely they do not have to be in the form of a statutory declaration (*Justices Act*, section 105F(3)).

#### **2.2.4 Protections for children and vulnerable witnesses in domestic and family violence matters**

There are specific protections for children and vulnerable witnesses under the DFVA. They include:

- the court must be closed where the only protected person in the matter is a child, and while a vulnerable witness gives evidence (DFVA, section 106);
- evidence of children must be given by written or recorded statement (DFVA, section 107);
- a child cannot be cross-examined (DFVA, section 109); and a vulnerable witness is entitled to give evidence by way of audiovisual link and be accompanied by a support person (DFVA, sections 110-111).

In the DFVA, 'vulnerable witness' is defined to mean:

- an adult who is the protected person named in a DVO (being the person for whom the DVO is sought or in force); and
- an adult witness who suffers from an intellectual disability; and
- an adult witness who, in the court's opinion, is under a special disability.

#### **2.2.5 Practice Directions**

In addition to the legislative provisions summarised above, a number of practice directions have been issued by the Chief Justice of the Supreme Court which relate to matters in the Supreme Court involving vulnerable witnesses.

- Practice Direction Number 8 of 2009 - sets out procedures for notifying the Court that a party intends to call a vulnerable witness. It states that an audiovisual record should be made of the vulnerable witness' evidence unless a judge orders otherwise.
- Practice Direction Number 9 of 2009 - relates to special hearings under section 21B(2)(b) of the *Evidence Act*. It requires counsel to view the audiovisual record of a recorded statement that is to be tendered as part of the witness's evidence in chief before the special sitting.
- Practice Direction Number 11 of 2009 - states that the evidence of vulnerable witnesses shall be recorded in audiovisual form, and the recording shall be retained by the Sheriff to be available for playing to a jury should a further trial take place.
- Practice Direction Number 3 of 2005 - relates to sexual assault matters and sets out processes for case management, including in relation to the time limitations under the *Sexual Offences (Evidence and Procedure) Act*.

### 3. POSITION IN OTHER JURISDICTIONS

Most jurisdictions in Australia have taken steps to strengthen their vulnerable witness protections in recent years.

In 2005, a joint report of the ALRC, the New South Wales (NSW) Law Reform Commission and the Victorian Law Reform Commission on Uniform Evidence Law (Joint Report) noted that a number of states and territories had adopted the recommendations of the ALRC's 1997 Inquiry entitled 'Seen and Heard: Priority for Children in the Legal Process'.<sup>2</sup>

The Joint Report recommended that all Australian jurisdictions 'should work towards harmonisation of provisions relating to issues such as children's evidence'.<sup>3</sup>

The Standing Committee of Attorneys-General (SCAG) established a National Evidence Working Group to consider the various recommendations of the Joint Report.

The Working Group reported back to SCAG in March 2011, and Ministers concluded that the harmonisation of vulnerable witness legislation is not appropriate on the basis that significant harmonisation already exists in relation to many vulnerable witness protections across jurisdictions. In addition, Ministers noted that vulnerable witness provisions are inextricably linked to a jurisdiction's court procedures.<sup>4</sup>

It is difficult to compare the vulnerable witness legislation in each state and territory as, like the NT, most jurisdictions do not have one piece of legislation which contains vulnerable witness protections. Rather, the protections are found throughout legislation relating to evidence and court procedure. Further, each jurisdiction has a different definition of vulnerable witness and, often, various categories of vulnerable witness. For example, many jurisdictions have general vulnerable witness protections as well as special protections for witnesses in sexual offence matters. However, what can be said is that all jurisdictions (with the exception of Tasmania) have vulnerable witness protections which provide for, in various circumstances:

- the option for evidence to be given by way of CCTV;
- the option for screens or physical barriers to be used so that the witness cannot see or be seen by the accused person;
- a prohibition on cross examination by self-represented defendants;
- availability of a support person for the vulnerable witness;
- courts to be closed when a vulnerable witness gives evidence;
- a written or recorded statement to be admitted as a witness' evidence in chief;
- pre-recording of evidence at a special sitting (not available in NSW); and
- admission of a record of transcript in retrials or related proceedings.

Comments made in the Joint Report and the outcome of the work undertaken by the SCAG Working Group confirm that the protections available to vulnerable witnesses are largely consistent across jurisdictions, and that reforms recommended in the late 1990s have been implemented by most jurisdictions.

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<sup>2</sup> ALRC, NSW Law Reform Commission and Victorian Law Reform Commission, 'Joint Report' (Report 102, 2005) pages 688-699.

<sup>3</sup> ALRC, NSW Law Reform Commission and Victorian Law Reform Commission, 'Joint Report' (Report 102, 2005) page 691.

<sup>4</sup> SCAG Communique (4-5 March 2011) page 5.

## **4. SCOPE OF REVIEW AND CONSULTATION PROCESS**

### **4.1 Submissions made by the NT Police and the DPP to the Board of Inquiry in 2006**

In accordance with Recommendation 30 of the LCAS Report, the Department has revisited the recommendations of the NT Police and the DPP to the Board of Inquiry to consider whether those recommendations require amendment to the vulnerable witness legislation.

The recommendations of both the NT Police and the DPP are set out in the LCAS report. There are no recommendations from the NT Police that are specifically relevant to this review. The NT Police made a range of recommendations that relate mostly to the investigation and policing of sexual offences and matters involving children. In its submission in 2010 to the Inquiry into the Child Protection System in the NT, the NT Police indicated that many of its recommendations to the Board of Inquiry were implemented.<sup>5</sup>

The following recommendations of the DPP are relevant to the review:

- (a) that amendments recommended by the DPP to the Policy Division of the Solicitor for the NT be enacted;
- (b) that section 105AA of the *Justices Act* be extended to preclude children from giving evidence at any committal where one of the charges is a sexual offence;
- (c) that legislation be enacted to abolish the *Crofts* direction; and
- (d) that there should be determination on admissibility of evidence and other pre-trial matters that could delay the giving of the evidence of a child witness, before the child is called to give evidence.

The recommendations at (a) and (b) were addressed by amendments made to the vulnerable witness legislation by the *Evidence of Children Amendment Act* in 2007.

The recommendations at (c) and (d) are addressed in this report at 5.4.3 and 5.2.8 respectively.

### **4.2 Consultation**

In light of the fact that vulnerable witness legislation has been the subject of review and amendment in recent years, the Department considered it appropriate to limit the consultation undertaken as part of this review to key stakeholders and those directly involved in the practical application and operation of the legislation.

Letters were sent to stakeholders in December 2009. Due to the limited number of responses received, follow up letters were sent in October 2010.

Submissions were received from five organisations, stakeholders and government departments or agencies.

A number of the formal submissions received noted that the vulnerable witness protections are working well. Specifically, favourable comment was received in relation to the operation of section 105AA (now section 105L) of the *Justices Act*, which prohibits

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<sup>5</sup> NT Police Submission, Inquiry into the Child Protection System in the Northern Territory (2010) page 5.

the calling of a child to give oral evidence at a committal hearing involving a charge of sexual offence or serious violence offence. The child's evidence is required to be given by written or recorded statement.

A number of stakeholders that the Department contacted did not provide submissions but noted informally that they were not aware of any particular issue or concerns with the legislation.



## **5. SUMMARY OF SUBMISSIONS, RESPONSES AND RECOMMENDATIONS**

Set out below is a summary of the issues raised in the formal submissions received in relation to this review and by the DPP in its 2006 submission to the Board of Inquiry (where relevant). The summary of each issue is followed by the Department's response to the issue, including recommendations where applicable.

The issues have been divided into five categories:

- fairness for defendants and defence counsel;
- effectiveness of protections for vulnerable witnesses;
- child forensic interviews (CFIs);
- scope and application of the vulnerable witness protections; and
- other issues and concerns.

### **5.1 Fairness for defendants and defence counsel**

#### **5.1.1 *Fairness for the defendant***

One submission noted that in some instances, an allegation made by a vulnerable witness may be a mere assertion and unsupported. A defendant may be deprived of liberty pending a trial despite being a person of prior good character. The submission stated as follows:

A vulnerable witness is vulnerable not because of any independent assessment but because of a statutory definition usually stemming from the fact that the witness has made a sexual allegation against an adult male. In many cases the allegation is unsupported and in some cases it is little more than a bare assertion. A defendant will often be deprived of his liberty pending trial, despite being a person of good character ...

[There have been cases where a person has] been in custody many months to have charges withdrawn shortly prior to trial when a prosecutor has finally looked at the case in detail. There is a risk that in placing too much emphasis on the perceived need to protect all witnesses the defendants are deprived of the usual tools of investigation and cross examination ... and it is submitted that care needs to be taken when considering further restrictions to the trial process.

#### *Department response:*

The vulnerable witness protections have been introduced to try to address the barriers to, and challenges associated with, vulnerable witnesses giving evidence in court. The protections seek to balance the need to support vulnerable witnesses through the court process with the need to ensure that defendants have a fair trial.

In all matters, irrespective of whether the matter involves vulnerable witnesses, the DPP has the same obligations to ensure that the matter is appropriately assessed and that only those matters with merit are pursued. The DPP Guidelines clearly state that:

The prosecution process should be initiated or continued whenever it appears that there is a reasonable prospect of conviction and it is in the public interest. There is a continuing obligation to review the decision to prosecute in light of relevant material and information as it becomes available.<sup>6</sup>

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<sup>6</sup> NT Office of Public Prosecutions Guidelines [2.1].

It should be noted that there are a range of reasons why a matter may be withdrawn close to the trial date. These may include a witness being unable or unavailable to give evidence in a matter (this could be for a range of reasons), or new evidence which weakens the prosecution case.

In the most recent annual report of the Office of the DPP, a new quality performance measure was introduced relating to the number of matters that were withdrawn within 28 days before the trial date. The intention behind this is to closely monitor and reduce the number of matters that are being withdrawn close to the trial date.<sup>7</sup>

The Department is of the view that the vulnerable witness protections in the NT strike a balance between protecting and supporting witnesses and upholding the right to a fair trial.

The Department acknowledges that there is currently no clear means of capturing data about vulnerable witnesses and the vulnerable witness provisions, such as the number of matters involving vulnerable witnesses that are withdrawn. The Department recommends that steps should be taken to monitor the effectiveness of the vulnerable witness legislation, including by way of capturing data. This information would assist the Department in the future to assess whether there are issues with the vulnerable witness legislation which may need to be addressed, or to consider the appropriateness of further reforms.

**Recommendation 1: That steps be taken by the Department to monitor the effectiveness of the vulnerable witness legislation.**

### **5.1.2 Committal proceedings and the vulnerable witness protections**

One submission commented on the exemption for child witnesses from giving oral evidence at a committal hearing involving a sexual or serious violence offence (section 105L of the *Justices Act*). The submission raised concerns that this means that a proper assessment by the prosecution of the veracity of evidence in a case is sometimes postponed until close to the date of a trial. In addition:

it may only be at this point [close to the date of the trial] that the prosecutor will discuss the matter with the complainant and his or her family, who sometimes are reluctant to proceed or have had second thoughts about the validity of the complaint or the extent of the allegations.

#### *Department response:*

In relation to the impact of the vulnerable witness protections in committal hearings on fairness for the defendant, the Department notes that recent changes to the committals process mean that most committals will now proceed by way of paper or hand up committal. The *Justice Legislation Amendment (Committals Reform) Act 2010* (NT) (*Committals Reform Act*) commenced on 1 April 2011. As a result of the *Committals Reform Act*, oral committals will only be conducted with leave of the court and when it is in the interests of justice (*Justices Act*, section 105H).

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<sup>7</sup> NT DPP, *Annual Report 2009-2010* (2010) page 20.

The intention behind these reforms is to increase the efficiency of the court process and to avoid, as much as possible, the requirement for witnesses to give evidence twice – at the committal proceeding and at the hearing. This will apply to all witnesses in all matters, not just children in sexual and serious violence matters and complainants in sexual matters.

### **5.1.3 Cost shifting to the Supreme Court**

One submission suggested that the ease of the committal process for vulnerable witnesses may result in matters progressing quickly to trial stage in the Supreme Court. Where a matter suffers from weak evidence, this would have the effect of cost shifting to the more expensive Supreme Court jurisdiction.

*Department response:*

As noted above, reforms to the committals process mean that from 1 April 2011, most committals will proceed on paper, without the need for witnesses to be cross examined.

In the course of the consultation that was undertaken in relation to the *Committals Reform Act*, concerns were raised about the possibility of cost shifting to the Supreme Court. In response to those concerns, it was agreed that the *Committals Reform Act* would be reviewed 12 months after its commencement.

The concerns raised in relation to cost shifting as a result of the vulnerable witness provisions in the *Justices Act* will be addressed as part of the 12 month review of the *Committals Reform Act*.

### **5.1.4 Funding implications for defence lawyers**

One submission noted that the vulnerable witness legislation creates some additional workload for defence lawyers, as follows:

- defence lawyers are effectively required to prepare their case twice – initially for the cross examination on the pre-recording (within three months of the allegations), and secondly for the trial (which can be months later);
- Counsel is funded twice, once for the pre-recording and then for the time the pre-recording is played in the trial;
- if Counsel representing the accused during the pre-recording is not available for the trial, then additional preparation time is required for new Counsel at the trial; and
- time is required to carefully review the pre-recorded evidence to ensure inadmissible parts are excluded.

The submission indicated that funding implications of the vulnerable witness legislation need to be taken into account if the regime is to continue or expand and legal services need to be funded appropriately.

*Department response:*

The Department notes the concerns raised in relation to funding for defence lawyers.

## **5.2 Effectiveness of protections for vulnerable witnesses**

### **5.2.1 Support person**

One submission raised for discussion and consideration the possibility of the child interviewer acting as a support person throughout the court process. The submission notes that 'the person who originally conducted the CFI has built up a level of rapport and has already elicited the intimate details from the child and developed a ... functional and effective mode of communication with the child'.

#### *Department response:*

The Department considers that it is highly unlikely that a situation would arise where it would be appropriate for the police officer who conducted a CFI to act as a support person for the child in court. This is because of the likelihood that the police officer would, themselves, be called as a witness in the matter.

Section 21A(2)(c) of the *Evidence Act* provides that a vulnerable witness can be accompanied by a friend, relative or 'any other person who the vulnerable witness requests to accompany him or her and who the Court considers is in the circumstances appropriate to accompany the vulnerable witness'. Therefore, in the unlikely event that a situation arises where a court considers it appropriate for the police officer who conducted the CFI to be a support person for a child witness, there is scope within the legislation for this to occur.

One way that the issue could be addressed would be for increased cooperation at an earlier stage between the NT Police and WAS, that would see WAS commence its involvement around the time of the CFI (although not being involved in the actual CFI) and then continuing their support role through to trial. This may require an increase in the current resources of WAS.

### **5.2.2 Evidence of child witnesses at a special sitting**

Section 21B of the *Evidence Act* relates to the evidence of vulnerable witness in cases of sexual offence and serious violence offence. It provides that evidence of vulnerable witnesses in such cases may be provided at a special sitting.

One submission raised concerns about child witnesses being faced with the 'daunting prospect of relaying the most intimate details to complete strangers or relative strangers during pre-recording and proofing ie Defence / Judge / Prosecutor / Interpreter'. A 'pre-recording' is a reference to a special sitting under section 21B of the *Evidence Act*.

It was noted that members of the Child Abuse Taskforce Team work hard to develop rapport and trust with a child witness before a CFI is conducted or a recorded statement is taken. It was suggested that there may be cases when a child would be better able to cope with cross-examination in a special sitting if the questions were asked by the same officer who undertook the initial interview. In other words, the officer would act as a conduit between the defence lawyer and the child. This would occur outside of the courtroom and in the same setting where the original pre-recorded interview occurred.

*Department response:*

It would not be appropriate for a mechanism to be introduced whereby cross examination of a vulnerable witness is undertaken by a police officer or member of the Child Abuse Taskforce Team. There is a need to draw a clear line between the investigative role of police officers and the court process.

Several law reform reports and articles in relation to vulnerable witnesses and sexual assault matters have referred to the possibility of using inquisitorial rather than adversarial mechanisms when the vulnerable witness gives evidence. These include:

- having the questions asked by a judge;<sup>8</sup>
- having separate representation for the vulnerable witness (who might intervene or require questions to be structured in a particular way);<sup>9</sup>
- introducing court appointed intermediaries (social workers, psychologists or other relevant professionals) trained in child cognition, language and development to assess defence questions during the cross-examination of a child complainant.<sup>10</sup>

In 1992, Western Australia passed legislation which provided for a child to give evidence with the assistance of a court communicator, whose role is to communicate and explain:

- (a) to the child questions put to the child; and
- (b) to the court, the evidence given by the child.<sup>11</sup>

However, since their commencement the court communicator provisions have been scarcely used. There is lack of clarity around the training and qualifications required to be a court communicator and whose responsibility it is to facilitate the provision of a court communicator. In addition, concerns have been raised about such an approach, including that it represents a marked shift away from the adversarial system,<sup>12</sup> and that it may be a poor substitute for the requirement that judges and lawyers have training in appropriate skills for dealing with children.<sup>13</sup>

The Department considers that there are other steps that can be taken to improve the way that special sittings are conducted at this time. As noted above at 5.2.1, there is potential for cooperation at an earlier stage between the NT Police and WAS that would see WAS commence its involvement around the time of the CFI (although not being involved in the actual CFI) and then continuing their support role through to trial. This would require an increase in the current resources of WAS.

In addition, WAS has identified that the protection provided by being able to give evidence by CCTV would be greatly enhanced if the child was able to do so from a place outside of the courtroom. WAS has suggested that a purpose designed room at the WAS offices within the DPP would be the most suitable location. This would overcome the requirement for the vulnerable witness to go to court at all, and mean that they could give evidence in an environment with which they are already familiar.

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<sup>8</sup> Justice Wood, 'Sexual Assault and the Admission of Evidence' (Paper presented at the Practice and Prevention: Contemporary Issues in Adult Sexual Assault in NSW Conference, Sydney, 12 February 2003) available at <[http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_speech\\_wood\\_120203](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_wood_120203)>.

<sup>9</sup> As above.

<sup>10</sup> Annie Cossins, 'Cross Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33(1) *Melbourne University Law Review* 102-104; see also ALRC, 'Seen And Heard: Priority for Children in the Legal Process' (Report 84, 1997) [14.113].

<sup>11</sup> *Evidence Act 1906 (WA)* s 106F.

<sup>12</sup> NSW Parliament in its Report on Child Sexual Assault Prosecutions (2002) at page 211-212.

<sup>13</sup> ALRC, 'Seen And Heard: Priority for Children in the Legal Process' (Report 84, 1997) [14.113].

This would require additional funding to create an appropriate facility in, at least, Alice Springs and Darwin. It is beyond the scope of this review to make recommendations that would involve funding.

### **5.2.3 *Replaying recorded statement in a special sitting***

As part of the witness preparation and proofing process, the prosecutor or WAS officer will ask a vulnerable witness to review their recorded statement before the special sitting. Some recorded statements are quite lengthy and the process can be upsetting for the witness. As a result, the witness does not usually wish to see or hear the statement again after the proofing.

Unfortunately, there is nothing in the *Evidence Act* to exempt witnesses from the requirement to be present in court for the replay of the recorded statement in a special sitting. In practice, judges have not insisted on this requirement. However there is uncertainty as to whether a witness will or will not be required to sit through a replay of their recorded statement at a special sitting.

This situation can be contrasted with the replay of the recorded statement or the audiovisual recording of the special sitting (which may include the recorded statement, any additional evidence in chief and cross-examination) to the jury. Section 21B(5) clearly states that a vulnerable witness may, but need not, be present in the courtroom when this takes place.

#### *Department response:*

An amendment should be made to the *Evidence Act* to clarify that a vulnerable witness is not required to be present while their recorded statement is played at a special sitting of the Court. This amendment would be in keeping with the objectives of the vulnerable witness legislation, being to reduce the trauma experienced by vulnerable witnesses during the court process.

**Recommendation 2: That section 21B of the *Evidence Act* be amended to clarify that a vulnerable witness does not need to be present when their recorded statement is being played at a special sitting of the Court.**

### **5.2.4 *Giving evidence with the use of a screen***

Concern was raised in relation to the practical difficulties of implementing section 21A(2)(b) of the *Evidence Act* in Court 4 of the Alice Springs Magistrates' Court to allow a vulnerable witness to give evidence from behind a screen so that they cannot see, or be seen by, the alleged offender.

WAS has advised that, due to the layout of Court 4 of the Alice Springs Magistrates' Court, the defendant needs to be taken out of the courtroom by court guards so that the victim does not have to walk past the defendant as they make their way to the witness box.

WAS notes that there are occasions where, although the use of a screen is agreed by the parties, the magistrate does not require the alleged offender to be removed from the

court when the witness enters, and the witness is walked past the alleged offender in full view on their way to the witness box.

Even where the magistrate does require the alleged offender to be removed from the court, the layout of Court 4 and the location of the WAS room (where a witness would wait) means that the alleged offender will, on most occasions, be visible to the witness at some stage.

*Department response:*

In order to address this concern, improvements to the court facilities are required, including to the location of the WAS room and the space available there for witnesses to wait to give evidence.

The Department notes that the need for suitable waiting areas so that witnesses do not come into contact with defendants was raised by the DPP as an issue in its submission to the Board of Inquiry in 2006.

However, it is beyond the scope of this review to make recommendations that involve funding.

The Department recommends that this issue be drawn to the attention of the Chief Magistrate and that consideration be given to interim solutions, such as trying to avoid listing matters involving vulnerable witnesses requiring the use of a screen in Court 4. It is noted that it is unlikely that this will be achievable in all instances, as it can be difficult to predict whether a matter will involve a vulnerable witness and require the use of a screen.

**Recommendation 3: That the issues associated with the use of screens at the Alice Springs Magistrates' Court be drawn to the attention of the Chief Magistrate.**

### **5.2.5 Dress of judicial officers, court staff and legal representatives**

One submission noted that it would be appropriate in matters involving child witnesses, particularly children from remote communities, for people in the courtroom to look more like 'everyday citizens' rather than 'formalised authority figures'. The submission suggested that this could be achieved by removal of wigs and robes.

*Department response:*

In its 1997 report, the ALRC recommended that:<sup>14</sup>

*Upon the application of a party or on its own motion, a court should have the discretion to:*

- *modify seating arrangements*
- *require the removal of wigs and gowns*
- *exclude from the court any or all members of the public.*

In Victoria there is scope for orders to be made for legal practitioners not to robe, and to be seated while asking questions.<sup>15</sup>

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<sup>14</sup> ALRC, 'Seen And Heard: Priority for Children in the Legal Process' (Report 84, 1997) recommendation 114.

In the NT, the appropriate dress of judicial officers, court staff and lawyers is not prescribed by legislation. Rather, the court dress reflects traditions and customs of the court. In the Supreme Court, the Chief Justice has the power to make practice directions in relation to all matters of practice and procedure in the Court which are not otherwise covered by the *Supreme Court Act*.<sup>16</sup> This includes dress.<sup>17</sup>

The Department is aware of at least one instance where a judge has disrobed and appeared in civilian clothing when a child witness was giving evidence.

Consideration could be given to legislative amendment to provide an express power for the court to make an order in relation to the formality of the courtroom. The appropriate place for this amendment would likely be in section 21A(2) of the *Evidence Act*.

However, the Department is of the view that, at this time, the Chief Justice of the Supreme Court is best placed to manage the practice and procedure of the Court.

The Department recommends that this issue be drawn to the attention of the Chief Justice of the Supreme Court and that consideration be given to the possibility of disrobing in some matters involving vulnerable witnesses, particularly children under the age of 10. In considering this, the Court should have regard to the child witness principles, at section 21D of the *Evidence Act*.

**Recommendation 4: That the issue of judicial dress in matters involving vulnerable witnesses be drawn to the attention of the Chief Justice so that consideration can be given to the appropriateness of a practice direction on this issue.**

#### **5.2.6 Closure of the Court**

One submission recommended that 'automatic closure of the court is inappropriate when the audiovisual recordings of interviews with a witness or of evidence given by a witness are later played to the jury ... the requirement for automatic closure should be deleted and the question of closure left to the discretion of the Judges'.

This refers to the requirement in section 21F of the *Evidence Act*, which provides:

- (1) The Court is to be closed, in a case involving a charge of sexual offence or serious violence offence, while the evidence of a vulnerable witness is being taken.
- (2) This section extends both to the examination of the vulnerable witness and to the re-play before the Court of an audiovisual record of the witness's evidence. ...

The submission also noted that occasionally witnesses who would qualify to give evidence remotely choose to give evidence in court either with or without the assistance of a screen. The submission suggested that, in those situations, judges should have discretion in relation to closure of the court.

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<sup>15</sup> *Criminal Procedure Act 2009* (Vic) section 360.

<sup>16</sup> See *Supreme Court Act* (NT) section 72.

<sup>17</sup> There is currently a practice direction relating to wigs (Practice Direction 2 of 1999) and has previously been a practice direction relating to court dress: Practice Direction 1 of 1987, which was rescinded by Practice Direction 3 of 2008.



*Department response:*

The Department considers that section 21F of the *Evidence Act* should remain unchanged.

Where evidence is given by recorded statement or in a special sitting, it may be important to be able to reassure the vulnerable witness that their evidence will not be re-played in open court.

In relation to the situation where a vulnerable witness in sexual offence or serious violence offence proceedings chooses to give evidence in court rather than by CCTV, the Department considers that the court should still be closed. Closure of the court in these circumstances is an important legislative safeguard for vulnerable witnesses and should not be the subject of judicial discretion.

**5.2.7 Recalling of witnesses**

One submission noted that vulnerable witnesses should not be able to be recalled to provide evidence. The submission referred to a case where new evidence was introduced and two children were recalled for cross-examination. The submission noted that:

The cross examination occurred 10 months after the conclusion of the children's original traumatic courtroom experience and was compounded by the fact the [children] had been assured by investigators they would not have to give evidence again.

A second submission noted that when a matter is retried, it seems that the defence has to seek leave for a vulnerable witness to be called to provide evidence, rather than the witness automatically being called. This requires the defence counsel to effectively 'declare their hand' when, in fact, a retrial will almost always raise or focus on different issues to the trial, and so the witness will almost always need to be recalled.

The second submission suggested that the legislation should permit counsel for the defence to file confidential written submissions to the court so that the judge can consider the merits of further cross-examination without having to disclose to the prosecution the defence case concept.

*Department response:*

Section 21E(6) of the *Evidence Act* provides that 'if a Court admits an audiovisual record in evidence under this section, the Court may relieve the witness wholly or in part from an obligation to give evidence in the later proceedings.'

While section 21E(6) does not entirely overcome the need for the vulnerable witness to give evidence in later proceedings, it should mean that the witness only needs to provide evidence in relation to new matters or new issues that may arise. Although this does not avoid the trauma associated with having to give evidence again, it is intended to reduce this trauma as much as possible.

Section 21E(6) of the *Evidence Act* gives rise to the situation where parties will be required to make submissions in relation to whether the vulnerable witness should be required to give further evidence. The Department considers that it is appropriate that

defence counsel should be required to provide enough information about the new matters in relation to which the vulnerable witness will be questioned to enable the court to determine whether the cross examination is appropriate.

Similar provisions operate in other jurisdictions. For example, in the Australian Capital Territory (ACT), where recorded evidence of a vulnerable witness is admitted in related proceedings, a party is required to apply to the court for an order that the witness attend the hearing to give further evidence. The court must not make the order unless it is satisfied that:

- the applicant has become aware of something that the applicant did not know or could not reasonably have known when the recording was taken; and
- if the witness had given evidence in person at the hearing, the witness could be recalled; and
- it is in the interests of justice to make the order.<sup>18</sup>

In NSW, while a vulnerable witness may elect to give evidence in a retrial, they are not compellable.<sup>19</sup>

At this time, the Department is of the view that the status quo in the NT should remain.

### **5.2.8 Evidentiary issues to be raised and determined pre-trial**

In its 2006 submission to the Board of Inquiry, the DPP gave a number of examples of circumstances where the evidence of a child has been delayed or interrupted, creating stress for the child.

While there are circumstances where ‘last minute’ issues arise and delay of a child’s evidence is unavoidable, where possible determinations on the admissibility of evidence or whether a witness is a vulnerable witness should be determined pre-trial.

The Bench Book for Children Giving Evidence in Australian Courts (published by the Australian Institute of Judicial Administration updated in December 2010) supports this approach. It recommends that issues about vulnerable witness evidence, including pre-recordings, should be resolved at directions hearings before trial.<sup>20</sup>

Such an approach would be consistent with the child witness principles at section 21D of the *Evidence Act*. They provide that:

- the Court must take measures to limit, to the greatest extent practicable, the distress or trauma suffered (or likely to be suffered) by the child when giving evidence;
- the child must be treated with dignity, respect and compassion;
- the child must not be intimidated when giving evidence; and
- proceedings in which a child is a witness should be resolved as quickly as possible.

The Department considers that an amendment should be made to the child witness principles to add a principle which provides that ‘all efforts should be made to ensure that matters that could delay or interrupt a child’s evidence are determined pre-trial’.

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<sup>18</sup> *Evidence (Miscellaneous Provisions) Act 1991* (ACT) section 40V.

<sup>19</sup> *Criminal Procedure Act 1989* (NSW) section 306C.

<sup>20</sup> Australian Institute of Judicial Administration, ‘Bench Book for Children Giving Evidence in Australian Courts’ (December 2010) page 87.

**Recommendation 5: That an amendment be made to the child witness principles at section 21D of the *Evidence Act* to add an additional principle which provides that ‘all efforts should be made to ensure that matters that could delay or interrupt a child’s evidence are determined pre-trial’.**

### 5.3 CFIs

#### 5.3.1 *Interviewing skills and training*

One submission identified a need for improvements in the conduct of CFIs, noting that the ‘techniques of extracting disclosures are still frequently short of professional’. The submission noted that persons are authorised to conduct interviews under legislation, rather than having regard to their training, skills or experience. The submission recommended that people conducting interviews need to be provided with appropriate training.

*Department response:*

Currently, the *Evidence Act* provides that ‘recorded statements’ may be taken by an ‘authorised person’, which is defined to include police officers and persons authorised under the CPCA (*Evidence Act*, section 21A).

The conduct of CFIs and training of police and prosecutors who conduct CFIs and take recorded statements is the subject of recommendation 31 in the LCAS Report and is monitored annually by the NT Children’s Commissioner. The 2009-2010 Annual Report of the Children’s Commissioner states:

All NTFC and NT Police members of the Child Abuse Taskforce (CAT) who conduct interviews with victims of child sexual assault have completed the Child Forensic Interviewing Course. A number of Police NT and Australian Federal Police who are not members of CAT have also been CFI trained, enhancing the Police capacity to conduct CFI’s at a regional level.

CFI courses are being conducted twice a year with 14 participants in each course. NTFC are allocated two position on each course, with NT Police making up the other 12 positions.

The Department met with the Officer in Charge of the Sex Crimes Command within the Major Crime Division of NT Police as part of the review and was advised that:

- it is NT Police policy that CFIs are undertaken with a person who has undertaken CFI training;
- it is NT Police policy that interviews are always audiovisually recorded so that they are able to be used as a recorded statement under section 21B(2) of the *Evidence Act*;
- the CFI training program within NT Police is currently the subject of review and consideration is being given to some changes to the program; and
- the CFI training program has previously been changed and adapted to respond to feedback received from the courts, both through judicial comments and in forums and workshops.

### **5.3.2 Interviewing child witnesses in remote communities**

One submission suggested that it is very difficult for police conducting forensic interviews to engage with Aboriginal children, particularly in remote communities. The submission recommended that consideration should be given to Aboriginal Community Police Officers (ACPOs) being included within the definition of 'authorised person'.

A second submission raised serious concerns about all ACPOs being 'authorised' under the regime, noting that authorisation should be determined on an individual assessment and accreditation, rather than on the basis that a person is an ACPO.

#### *Department response:*

The current definition of authorised person in section 21A of the *Evidence Act* includes police officers of various ranks, as well as:

- a person appointed by the CEO of the Department of Children and Families as an authorised officer under section 304(1)(a) of the CPCA, section 304(1)(a)); and
- a person prescribed by regulation.

The Department is of the view that these avenues provide sufficient scope for qualified persons, including ACPOs where they have undertaken appropriate training, to be made authorised officers.

## **5.4 Scope and application of the vulnerable witness protections**

### **5.4.1 Definition of 'vulnerable witness' in the Evidence Act**

Section 21A(1) of the *Evidence Act* defines a vulnerable witnesses as 'a witness who is, in the opinion of the court, under a special disability because of the circumstances of the case or the circumstances of the witness'.

One submission indicated that there should be some clearer guidance about when a witness will fall within section 21A(1) of the *Evidence Act*. It noted that the breadth of the definition of vulnerable witness in section 21A(1) of the *Evidence Act* has resulted in inconsistencies in decisions and uncertainty in relation to whether the protections will be available in some circumstances. This is particularly the situation in relation to male victims of offences and witnesses in matters which relate to indigenous family group disputes.

#### *Department response:*

The definition of vulnerable witness used in the NT is similar to that used in several other jurisdictions in the sense that it is broad enough to allow for a range of persons to fall within the scope of the definition, having regard to their individual circumstances and the circumstances of the case.<sup>21</sup>

However, some jurisdictions provide more detail in legislation about the types of circumstances that might give rise to a court determining that a person is vulnerable. For example, the Victorian *Evidence Act 2008* (s 41(4)) defines a vulnerable witness to

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<sup>21</sup> See, eg, *Evidence Act 1906* (WA) section 106R; *Evidence Act 1929* (SA) section 13A.

include a child, a person with a cognitive impairment or intellectual disability and a witness whom the court considers to be vulnerable having regard to:<sup>22</sup>

- any relevant condition or characteristic of the witness of which the court is, or is made aware, including age, education, ethnic and cultural background, gender, language background and skills, level of maturity and understanding and personality; and
- any mental or physical disability of which the court is, or is made, aware and to which the witness is, or appears to be, subject; and
- the context in which the question is put, including —
  - the nature of the proceeding; and
  - in a criminal proceeding — the nature of the offence to which the proceeding relates; and
  - the relationship (if any) between the witness and any other party to the proceeding.

The Victorian Law Reform Commission has noted that this definition of vulnerable witness:<sup>23</sup>

removes the need for argument as to whether a witness is vulnerable in the most obvious of cases, while leaving scope for a witness to be treated as a vulnerable witness in other circumstances. A witness may be vulnerable not because of any inherent attribute he or she may have, but because of the circumstances of the particular offence or a relationship to other parties to the proceedings. Conversely, a witness may not be vulnerable simply because he or she is the victim of a certain type of offence. Judges, therefore, must be given some capacity to find a witness vulnerable for the purposes of limiting cross-examination based on the particular circumstances of the case.

The Department considers that it is appropriate for the definition of vulnerable witness in section 21A(1) to remain broad, and for there to be scope for judicial discretion in relation to whether a witness is vulnerable (other than where the witness is a child, victim of a sexual offence or person with an intellectual disability). However, it would be appropriate to consider amending the *Evidence Act* to provide some clarity around when a court might exercise this discretion.

The preferred option would be to amend section 21A(1) of the *Evidence Act* so that the definition of 'vulnerable witness' (at clause (d)) more closely mirrors the definition in the Victorian legislation (as described above), and sets out the types of factors that may go to establishing that a person is vulnerable.

A second option would be to include a note after the definition of 'vulnerable witness' in section 21A(1) of the *Evidence Act* to provide an example of the type of witness who could be considered to be vulnerable. The note could say words along the lines of:

An example of a witness who is vulnerable having regard to his circumstances and the circumstance of the case could include a witness for the prosecution who is a male and/or has a domestic relationship to the accused.

Both of these options would require legislative amendment.

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<sup>22</sup> *Evidence Act 2008* (Vic) section 41(3)(c) and (4). Note that this section relates only to improper questions. Broader vulnerable witness provisions are contained in part 8.2 of the *Criminal Procedure Act 2008* (Vic).

<sup>23</sup> ALRC, NSW Law Reform Commission and Victorian Law Reform Commission, 'Joint Report' (Report 102, 2005) [5.126].

A third option would be for the judiciary to be provided with further training about the scope of the vulnerable witness provisions and the types of factors that might be relevant to determining whether a person is vulnerable having regard to their circumstance and/or the circumstance of the case.

It should be noted that if legislative amendment is made in relation to section 21A(2) of the *Evidence Act*, amendment should also be made to the definition of vulnerable witness in section 104 of the DFVA, which provides that vulnerable witness include ‘an adult witness who, in the Court’s opinion, is under a special disability’.

**Recommendation 6: That amendment be made to section 21A(1) of the *Evidence Act* and section 104 of the *Domestic and Family Violence Act* to clarify the circumstances in which it is appropriate for a Court to determine that a person is under a special disability and, therefore, within the scope of the definition of ‘vulnerable witness’.**

#### **5.4.2 Application of vulnerable witness protections to hearings for serious violence offences in the Court of Summary Jurisdiction and Youth Justice Court**

A suggestion was made that the recorded statement protections under the vulnerable witness legislation should be extended to the Court of Summary Jurisdiction and the Youth Justice Court.

This would seek to address some of the challenges associated with victims of serious violence offences (which may be tried in the Court of Summary Jurisdiction or the Youth Justice Court) giving evidence, particularly in remote communities.

##### *Department response:*

It should be noted that most vulnerable witness protections, with the exception of the recorded statement protection in section 21B of the *Evidence Act*, apply in any court. They are not limited to the Supreme Court. This includes the provision in section 21E of the *Evidence Act*, which allows evidence to be recorded and replayed at a future hearing or retrial.

The recorded statement protections are limited by section 21B(1) to ‘proceedings for the trial of a serious violence offence or sexual offence’. The use of the word ‘trial’ in section 21B(1) has the effect of limiting the protection to the Supreme Court (although there is arguably some ambiguity in relation to this as trial is not defined in the *Evidence Act*).<sup>24</sup>

Other jurisdictions do not have the same restriction on the court or type of proceeding in which the recorded statement protections apply. However, in all other jurisdictions, the protections apply to more limited category of people, namely children and people with a mental or cognitive impairment.<sup>25</sup> By comparison, in the NT the recorded statement protections are available to all vulnerable witnesses, which includes not only a child and person with an intellectual disability, but also the victim of a sexual offence to which the

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<sup>24</sup> The use of the term ‘trial’ elsewhere in the *Evidence Act* suggests that it is to be distinguished from a committal or a hearing (see, eg, section 56A(3) of the *Evidence Act*). In addition, the absence of its use in relation to the other vulnerable witness protections in Part IIA of the *Evidence Act* would indicate a distinction between those provisions and section 21B.

<sup>25</sup> See *Criminal Procedure Act 1986* (NSW), section 306U; *Criminal Procedure Act 2009* (Vic) section 366; *Evidence Act 1906* (WA), section 106HB; *Evidence Act 1977* (Qld) section 93A; *Evidence Act 1929* section 34CA; *Evidence (Miscellaneous Provisions Act 1991)* (ACT), section 40F.

proceeding relates and a person who is under a special disability because of their own circumstances or the circumstances of their case.

Therefore, extension of the recorded statement protections to matters in the Court of Summary Jurisdiction and the Youth Justice Court would be an expansion of the vulnerable witness protections in the NT beyond the protections available in other jurisdictions.

The Department is mindful of the fine balance between introducing measures to protect and support victims, and maintaining fairness for defendants in the court process – which, in spite of protections that have been introduced for vulnerable witnesses, remains essentially an adversarial and public process.

Further consultation with the legal community would be required on this specific issue before recommending change. Consultation would also be required with the Courts, given that there may be resource implications for them. As the suggestion was made toward the end of the review, and there was not sufficient time for further consultation to be undertaken as part of the review.

It is not proposed to make a recommendation for change in relation to matters in the Court of Summary Jurisdiction and the Youth Justice Court at this time. However, the Department should undertake further consultation and consideration of this issue.

**Recommendation 7: That the Department undertake further consultation and consideration of the possibility of extending the application of the recorded statement protections to the Court of Summary Jurisdiction and the Youth Justice Court.**

#### **5.4.3 Response to the High Court decision in Crofts**

In its 2006 submission to the Board of Inquiry, the DPP raised an issue in relation to section 4(5) of the *Sexual Offences (Evidence and Procedure) Act*. Section 4(5) requires a direction to be given by trial judge if there is evidence to suggest that there has been delay by the complainant in a sexual offence matter. The judge must:

- warn the jury that delay in complaining does not necessarily indicate that the allegation is false; and
- inform the jury that there may be good reasons why a victim of a sexual offence may hesitate in complaining about it.

Section 4(6) of the Act qualifies this as follows: ‘nothing in subsection (5) prevents a Judge from making any comment on evidence given in a trial that it is appropriate to make in the interests of justice.’

Provisions similar to section 4(5)-(6) were introduced in all jurisdictions in Australia following a High Court decision in *Kilby v The Queen*,<sup>26</sup> which endorsed a court direction to juries to the effect that delay or absence of complaint can be used as a factor in determining a complainant’s credibility.

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<sup>26</sup> (1973) 129 CLR 460.

In *Crofts v The Queen*,<sup>27</sup> the High Court considered the Victorian equivalent to section 4(5) of the *Sexual Offences (Evidence and Procedure) Act*.

The High Court held that the provision does not preclude the court from commenting that delay in complaint of sexual assault may affect the credibility of the complainant. It found that the purpose of the provision is to 'restore the balance' and rid the law of stereotypical notions as to the unreliability of sexual assault complainants. It noted that '[i]n restoring the balance, the intention of the legislature was not to 'sterilise' complainants from critical comment where the particular facts of the case, and the justice of the circumstances, suggested that the judge should put such comments before the jury for their consideration'.<sup>28</sup>

The High Court in *Crofts* said that where a delay is substantial, the Court *should* provide direction to the jury (now referred to as the *Crofts* warning) that the delay is a relevant factor in determining the complainant's credibility, with two qualifications:

- the direction need not be given where 'the peculiar facts of the case and the conduct of the trial do not suggest the need for a direction to restore the balance of fairness' (for example, where there is an explanation for the delay); and
- the warning should not be expressed in terms that suggest a stereotyped view that sexual assault complainants are unreliable.<sup>29</sup>

The decision in *Crofts* received widespread criticism for being based on a premise which 'reflected discredited assumptions as to the nature of sexual assault and the behaviour of sexual assault complainants'.<sup>30</sup> In its submission to the Board of Inquiry, the DPP noted that:

It is the view of the ODPP that the giving of a *Crofts* direction fails to accurately reflect the reality of patterns of disclosure of sexually abused children, namely that delay in disclosure is a typical feature of child abuse rather than an aberrant one. In Queensland, s4A(4) of the *Criminal Law (Sexual Offences) Act* effectively abolishes the *Crofts* direction by prohibiting a trial judge from warning a jury or suggesting to it "that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint". Similar legislation should be enacted in the Northern Territory.

Since the time of the DPP's submission, there has been considerable comment on the *Crofts* direction by law reform commissions and committees. Jurisdictions have implemented various legislative responses to *Crofts*. These, including the Queensland approach referred to in the DPP submission, are discussed in the 2010 ALRC report entitled 'Family Violence – A National Legal Response'.<sup>31</sup> That report recommended an amendment to federal, state and territory legislation to provide that, in sexual assault proceedings:

- (a) the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury;
- (b) subject to paragraph (c), except for identifying the issue for the jury and the competing contentions of counsel, the judge must not give a direction regarding the

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<sup>27</sup> (1996) 186 CLR 427 (*Crofts*).

<sup>28</sup> (1996) 186 CLR 427, 451.

<sup>29</sup> (1996) 186 CLR 427, 451-452.

<sup>30</sup> ALRC, NSW Law Reform Commission and Victorian Law Reform Commission, 'Joint Report' (Report 102, 2005) [18.153].

<sup>31</sup> ALRC, 'Family Violence – A National Legal Response' (Report 114, 2010) chapter 28.



- effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so to ensure a fair trial; and
- (c) if evidence is given, a question is asked, or a comment is made that tends to suggest that the victim either delayed making, or failed to make, a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence may delay or fail to make a complaint.<sup>32</sup>

**Recommendation 8: That an amendment be made to the *Sexual Offences (Evidence and Procedure) Act* in response to the High Court’s decision in *Crofts* to provide clear guidance as to the directions, if any, that should be given to the jury in relation to the timing of a complaint.**

## 5.5 Other issues and concerns

### 5.5.1 Definition of ‘recorded statement’ in the DFVA

A concern was raised about the definition of ‘recorded statement’ in the DFVA and the need for clarity around who is authorised to take a recorded statement.

A ‘recorded statement’ in the DFVA is defined as ‘a statement recorded in an audio, visual, audiovisual or other electronic format.’ There is no requirement for the statement to have been taken by a particular person or category of persons.

This is in contrast to the definition of recorded statement in the *Evidence Act*, which provides that a recorded statement means:

an interview, recorded on video-tape or by other audiovisual means, in which an authorised person elicits from a vulnerable witness statements of fact which, if true, would be of relevance to legal proceedings.

An ‘authorised person’ is defined in the *Evidence Act* to include a police officer and a person authorised under the CPCA.

#### *Department response:*

The Department is concerned that the DFVA does not clearly provide for recorded statements to be taken by qualified persons. This gives rise to a risk that statements could be found by a court to be partially or entirely inadmissible, which may result in a further statement being required from the vulnerable witness.

The Department is of the view that the DFVA should be amended to clearly state the categories of people that are authorised to take a recorded statement.

**Recommendation 9: That the definition of ‘recorded statement’ in the *Domestic and Family Violence Act* be amended to ensure that a recorded statement is taken by an appropriately qualified person, which should include a police officer.**

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<sup>32</sup> ALRC, ‘Family Violence – A National Legal Response’ (Report 114, 2010) recommendation 28-4.

### **5.5.2 Equipment issues**

One submission noted that there were a number of operational issues as a result of problems with equipment at the Darwin Magistrates Court and Supreme Court. These problems result in delays in courts.

There is also only limited access to vulnerable witness facilities at bush courts. At most bush courts, screens are used to prevent a vulnerable witness from being able to see the alleged offender. Tennant Creek is the only court, outside Darwin Alice Springs and Katherine, where CCTV facilities are available.

#### *Department response:*

The Courts and Court Services division of the Department is aware of the problems with equipment and is working to address those problems. Significant investment has been made in new equipment in Alice Springs, including new videoconferencing facilities in the remote witness room and the court. An upgrade of the vulnerable witness recording facilities at the Darwin Supreme Court is expected to be completed by June 2011. Some of the operational issues have arisen from user error, and steps are being taken to ensure that court officers are properly trained in how to use and test the equipment.

However, there continue to be constraints on the equipment, which can adversely impact on matters involving vulnerable witnesses.

The Department is aware of a recent situation in the Darwin Supreme Court where two sexual offence proceedings were taking place at the same time. Only Court 6 at the Darwin Supreme Court is fully electronic. In the matter that was not listed in Court 6, there were technical issues which impacted so severely on the proceedings that a mistrial was entered and the jury discharged. The matter was re-listed for a later date, and witnesses from remote communities were required to travel to Darwin a second time.

In relation to bush courts, it may be difficult to increase the availability of facilities for CCTV given that the courts typically sit in multi-purpose facilities that are not owned or controlled by the Department. The Department notes that where matters require the use of CCTV, they can be listed in Darwin, Katherine, Tennant Creek or Alice Springs, as appropriate.

The Department acknowledges that, due to resource constraints and the remoteness of witnesses it can be difficult to identify which matters should be transferred before the day of bush court. The Department notes that these concerns were raised by the DPP in its submission to the Board of Inquiry, where it said:

conferencing and forming rapport with victims is magnified if the child lives in a remote community because of time and transport constraints. The ODPP simply does not have the resources to send prosecutors and WAS officers to remote communities for witness conferencing. It is necessary for the child to come to the prosecutor. This is not ideal for many children.

It is, however, beyond the scope of this review to make recommendations that involve funding.

### **5.5.3 Time limitations**

Section 3A of the *Sexual Offences (Evidence and Procedure) Act* provides for time limits on prosecutions of sexual offence matters, as follows:

- if the matter is tried summarily, the trial must be commenced within 3 months of the matter first being mentioned in court (section 3A(1)); and
- if a person is to be tried on indictment for sexual offences, the trial must be commenced within 3 months of the person being committed for trial (section 3A(3)).

Section 3A(4)-(5) provides that the court may grant an extension not exceeding three months at any time.

One submission indicated that too many extensions are being given and it recommended either that more time should be provided by the legislation, or the provision should be 'tightened up'.

*Department response:*

Section 3A of the *Sexual Offences (Evidence and Procedure) Act* sets out the timeframes that the court should follow in relation to sexual offence matters.

There are a range of circumstances that may give rise to a need for these timeframes to be extended, which is why there is provision for this in the Act. However, it remains important that the timeframes are prescribed in the legislation so that sexual offence matters are heard as soon as possible and, when resources and circumstances permit, within the three months of the matter first being heard in court.

## 6. CONCLUSION AND LIST OF RECOMMENDATIONS

The Department considers that vulnerable witness protections in the NT are comprehensive and in line with those in other Australian jurisdictions.

Feedback received in the consultation process has indicated that the reforms that have occurred in this area since 2004 have, on the whole, been effective. The Department has made the following 9 recommendations that are aimed at further strengthening the vulnerable witness protections in the NT.

- Recommendation 1: That steps be taken by the Department to monitor the effectiveness of the vulnerable witness legislation.
- Recommendation 2: That section 21B of the *Evidence Act* be amended to clarify that a vulnerable witness does not need to be present when their recorded statement is being played at a special sitting of the Court.
- Recommendation 3: That the issues associated with the use of screens at the Alice Springs Magistrates' Court be drawn to the attention of the Chief Magistrate.
- Recommendation 4: That the issue of judicial dress in matters involving vulnerable witnesses be drawn to the attention of the Chief Justice so that consideration can be given to the appropriateness of a practice direction on this issue.
- Recommendation 5: That an amendment be made to the child witness principles at section 21D of the *Evidence Act* to add an additional principle which provides that 'all efforts should be made to ensure that matters that could delay or interrupt a child's evidence are determined pre-trial'.
- Recommendation 6: That amendment be made to section 21A(1) of the *Evidence Act* and section 104 of the *Domestic and Family Violence Act* to clarify the circumstances in which it is appropriate for a Court to determine that a person is under a special disability and, therefore, within the scope of the definition of 'vulnerable witness'.
- Recommendation 7: That the Department undertake further consultation and consideration of the possibility of extending the application of the recorded statement protections to the Court of Summary Jurisdiction and the Youth Justice Court.
- Recommendation 8: That an amendment be made to the *Sexual Offences (Evidence and Procedure) Act* in response to the High Court's decision in *Crofts* to provide clear guidance as to the directions, if any, that should be given to the jury in relation to the timing of a complaint.
- Recommendation 9: That the definition of 'recorded statement' in the *Domestic and Family Violence Act* be amended to ensure that a recorded statement is taken by an appropriately qualified person, which should include a police officer.

## ADDENDUM

Subsequent to the finalisation of the review of vulnerable witness legislation, two further issues have been raised by stakeholders. They are described below. It is proposed that these additional issues will be the subject of further targeted consultation by the Department of Justice.

1. Concerns in relation to section 5(1) of the *Sexual Offences (Evidence and Procedure) Act*.

Section 5 of the *Sexual Offences (Evidence and Procedure) Act* is intended to protect complainants in sexual offence matters from being questioned in court by an unrepresented accused. Section 5(1) provides that, in proceedings relating to sexual offences, an unrepresented defendant:

- (a) shall not be entitled to cross examine the complainant directly; and
- (b) shall put any question to the complainant by stating the question to the Justice, Judge or another person approved by the Court, and the Justice, Judge or other person shall repeat the question accurately to the complainant.

The issue that has been identified is that it may be inappropriate for a trial judge to ask questions of a complainant, particularly in circumstances when the complainant's credibility is in issue. A request has been made that section 5(1) be amended to remove the ability for judges to put questions to complainants.

2. Concerns in relation to the definition of 'vulnerable witness' in section 104 of the DFVA.

Section 104 of the DFVA defines 'vulnerable witness' as:

- (a) an adult who is the protected person named in a DVO; or
- (b) an adult witness who suffers from an intellectual disability; or
- (c) an adult witness who, in the Court's opinion, is under a special disability.

It has been suggested that limb (a) of the definition of vulnerable witness in section 104 should be expanded to include an adult who is the protected person named in a DVO application. Otherwise, an adult may not benefit from any of the vulnerable witness protection until *after* the proceedings to hear the Domestic Violence Order application have been finalised. This would appear to be contrary to the intention of the provisions, as identified in the second reading speech:

"Another major reform in the bill is the adoption of vulnerable witness provisions in domestic violence proceedings. Under the amendment the public, the applicant and some witnesses may be able to give their evidence at a place outside the court, or utilise a screen or partition in the courtroom to protect them from the view of the defendant whilst they are giving evidence.

Victims in court are often overwhelmed by appearing in court and potentially having to deal with the intimidating stare of their partner or husband. These measures will ensure that applicants will be protected from intimidation during proceedings."