



Précis Paper

Child Sexual Offence Evidence Pilot Program

Discussion of the Child Sexual Offence Evidence Pilot Program, why it was introduced, how it works, and how it can be improved

Discussion Includes

- Why the scheme introduced
- Stages of the process, in chronological order
- The witness intermediary
- Cross-examination
- Rights of the accused versus rights of the victim
- The trial itself
- Advice to practitioners involved in the Child Sexual Offence Evidence Pilot Program
- Suggestions for program's improvement

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Child Sexual Offence Evidence Pilot Program

1. In this edition of BenchTV, Anthony Bellanto QC (Barrister, Samuel Griffith Chambers, Sydney) and Ye Catherine Lin (Barrister, Trust Chambers, Sydney) discuss the Child Sexual Offence Evidence Pilot Program, which was introduced into NSW Parliament in 2015, effective until 2019, at which point it will most likely be reviewed as to its success or otherwise.

Why the scheme was introduced

2. The legislation introducing the scheme is the *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW), which inserted Part 29, Schedule 2 into the *Criminal Procedure Act 1986* (NSW).
3. Child sexual assault has been a problem for the authorities for many years. There were a number of reasons for the scheme's introduction, including:
 - The high prevalence in the community of sexual assault allegations. For example, statistically, 25% of girls were alleged to have been indecently assaulted, and 12.5% of boys were alleged to have been the victims of sexual assault.
 - Most of the offences were undetected or unreported.
 - There was a high acquittal rate for those who did get to trial.
 - There was a problem with secondary trauma. Sexual assault victims found it very traumatic to be put through the adversarial process (giving evidence, being cross-examined, having to relive the experience, and having to face the alleged perpetrator).
4. So the pilot scheme was introduced in an attempt to overcome these various difficulties. In 2019 we will find out whether or not it achieved its purpose.

Stages of the process, in chronological order

5. The process of running a case through the pilot program is quite different to the normal trial process. It is important for practitioners who find themselves involved in the program in any way to acquaint themselves with the various stages of the process. The key stages are:
 - *The allegation.*
 - *The JIRT interview.* Which finds its way to the investigating authorities, the police, etc., whereby the child is taken to an interview room, and interviewed by the Joint

Investigation Response Team (JIRT). The JIRT interview is audio and video recorded - the recording forms the basis of the complainant's evidence-in-chief later on when the trial takes place.

- *The accused is arrested on the strength of the allegations being made.* If the allegations are denied (as opposed to a plea of guilty being entered into), and a defence lodged, then the scheme applies to the Sydney and Newcastle District Court.
- *The committal.*
- *The arraignment and case management hearing.* Which should take place within 14 days of committal, and then go into the pilot list. The pilot list is a special list for these types of cases involving children (complainants under 18).
- *The first mention day in the pilot list scheme.* Which the defence and prosecution are expected to attend. It is also expected that the parties who appear initially will remain the same throughout the entire process until trial, which is a rather radical deviation from the normal process that the scheme introduced.
- *A timetable is set for the prosecution to file the various notices required under the Act, to which the defence is required to respond with a 143 notice, and the prosecution can then file, if necessary, another notice under s 144.*
- *The date is set for the pre-recorded hearing.* Where the cross-examination of the complainant takes place on the basis of the JIRT interview.

6. The cross-examination can take a number of different forms. It is assumed in most cases that the evidence-in-chief has been given orally, and the process simply proceeds on the basis of what is in the JIRT interview. In some cases, the JIRT interview has been played, and the normal process of cross-examination is gone through. The child who is being cross-examined is not there in person. This applies to all witnesses under the age of 18. Specifically, a child under the age of 16 *must* be cross-examined via audio-visual link.
7. The judge has the discretion to order the procedure to take place pursuant to the relevant legislation in relation to children aged between 16 and 18. Whether or not the judge will do so will be informed by the wishes of the child, among other factors that are contained in the Act.

The witness intermediary

8. The Act also provides for a witness intermediary to accompany the child whilst the child is being cross-examined. The witness intermediary is appointed at the same time as the pre-recorded interview is fixed, so the witness intermediary is part of the process from a very early stage. The witness intermediary must be qualified within the terms of the legislation (e.g. social worker, psychologist, teacher, speech therapist, etc.)

9. In circumstances where a witness intermediary appears to be adopting a supporting role (in a physical sense) in relation to the child, the objectivity that is required under the legislation can be perverted. This is one of the difficulties of the scheme.
10. What often happens in these situations is that the witness intermediary interviews the child at an earlier stage, and prepares a report. This report is given to the parties, and opportunity is provided to both for cross-examination of the witness intermediary on the strength of the report. Counsel have to be vigilant in ensuring that the impression is not given that the child is giving evidence with the concurrence and encouragement of the witness intermediary.
11. The report prepared by the intermediary usually contains:
 - The do's and don'ts
 - An assessment of the child's mental acuity, and level of intelligence and cognition
 - Examples of what questions should be asked, and how they should be asked
 - Whether the child is capable of understanding certain types of questions
12. The witness intermediary often puts their hand up and stops the proceedings. This adds another layer of complexity and difficulty for the advocate, because when an advocate is cross-examining, he or she has their mind on the sequence of questions, and the answer that is given at a particular point in time, and the question that is to follow that answer.
13. The problem is that during this process, the witness intermediary can put up his or her hand and interrupt the process. This interruption usually involves the judge saying something about asking a different, less complex question. This interrupts the cross-examiner's process of cross-examination quite considerably.
14. It is important for practitioners to consider the *District Court Criminal Practice Note 11*, which briefly sets out some of the features of the pilot legislation. During the pre-trial hearing, there is a provision for editing some of the answers, arguments, etc. so that when it is played to the jury at trial, the jury does not have to listen to anything that might be prejudicial, or unnecessary, or a waste of time.
15. In relation to the JIRT interview, a copy of the examination-in-chief by the complainant and any other witnesses under the age of 18 is not provided to the defence, although the defence is given an opportunity view it.
16. The legislation refers to the witness intermediary as a witness intermediary, as well as a 'Children's Champion'. 'Children's champion' is an unfortunate expression. It suggests a degree of partisanship with the child on the part of the intermediary. So if change is going to take place with the scheme in the future, one of the most important changes will hopefully be the deletion of any reference in the legislation to a 'Children's Champion'.

17. S 88 of the Criminal Procedure Act sets out the role of the witness intermediary, stating that their main purpose is to communicate and explain questions to the witness, and to perhaps explain, clarify, or assist with answers.

Cross-examination

18. The advice to cross-examiners in the literature on this scheme is to pose short, simple questions, to avoid legal niceties and tag questions, and to give the child time to consider and answer the questions. It is important to remember of course that the judge under the *Evidence Act 1995* (Cth) has power to control the cross-examination in any event.
19. The practitioner needs to be able to know in advance what the limitations are about the questions that they intend to ask. In other words, it is much better to maintain the flow and avoid interruptions.
20. In conducting cross-examination in this context, it is helpful to commence with less linguistically-challenging questions (like who, what, where, when), and then, later on, introduce a more complex form, if necessary (like how, why). The danger of using the who, what, where and when type questions in excess is that the yes/no answer will likely have the counter-productive effect of shutting the witness down.

The common law rule in Browne v Dunn

21. The practitioner needs to be able to know in advance what the limitations are about the questions that they intend to ask. In other words, it is much better to maintain the flow and avoid interruptions.
22. The difficulty with the *Browne v Dunn* type questioning in the context of the pilot scheme is how to raise with the witness a prior inconsistent statement, for example. Advocates can be fairly delicate in the *Browne v Dunn* approach, by avoiding expressions like 'I put it to you', and instead putting the question in a different way, one that is not intimidating or coercive.
23. Advocates are advised to visit www.theadvocatesgateway.org for useful information on matters of advocacy in this area.

Rights of the accused versus rights of the victim

24. Juries normally prefer to see the witness in person. But this scheme is designed to protect the child from the trauma of being in Court, and the trauma of facing the accused. It is an attempt to do everything to make the experience as easy as possible on the child.

25. But of course this conflicts with the rule of law, the right of silence, the right to a fair trial, the presumption of innocence, and so on, which are the fundamental rights of the accused; and the adversarial process necessitates witnesses being tested about allegations.
26. The real difficulty is how to balance the rights of an accused with the rights of the child in order to have a fair trial. The position is affected by Australia's obligations under Article 3 (1) of the *UN Convention on the Rights of the Child*. As Australia is a signatory, the interests of the child have to be taken into account, which states that: '*in all actions concerning children...the best interests of the child shall be a primary consideration*'. So the pilot scheme is really a balancing process.

The trial itself

27. At the trial itself, the child is not present.
28. A big question for advocates at trial is whether or not they will have any further opportunity to re-cross-examine if new evidence presents itself. Normally, there will be no such opportunity, unless there is a truly exceptional situation.
29. At the end of the day, it should really come down to how the interests of justice will be best served.

Advice to practitioners involved in the Child Sexual Offence Evidence Pilot Program

30. Some advice for practitioners who find themselves involved in some way with the Child Sexual Offence Evidence Pilot Program include:
 - Be prepared to work hard, and diligently, at the earliest opportunity, because counsel and solicitors are expected to get on top of the case virtually within weeks of the accused being arrested.
 - Legal Aid needs to be considered.
 - Briefing counsel has to be taken on board seriously.
 - Counsel that conducts cross-examination at the pre-recording hearing, should be the same counsel at trial.
 - Practitioners must give great consideration to the way in which they will cross-examine under this entirely new regime.
 - A lot of preparation must be done for the pre-trial, pre-recorded hearing. (The pre-recorded hearing will take place very quickly after instructions have been received).
 - It is very important to bear in mind that the trial may take place months after the pre-recorded hearing, at which the child will not be present.

31. The overarching takeaway is that the pilot scheme really is dramatically different to the normal trial process; in other words, practitioners should not expect the process of running a trial through the pilot scheme to be at all the same as the process of running a normal trial.

Suggestions for program's improvement

32. Some suggestions for the program's improvement include:
- The deletion of the expression 'Children's Champions'
 - To address the difficulty that arises for the defence after the pre-trial hearing, which is that the prosecution then has the opportunity reshape or change somewhat their approach to the trial, almost without restraint. The legislation should be amended to disallow the prosecution from being able to do this.
 - Compared to the normal trial process, the one under the pilot program has proven itself to be, on a number of occasions, more costly, and probably more inconvenient. Reform to address this will become necessary if the program is to continue to exist after 2019.

BIOGRAPHY

Anthony Bellanto QC

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Anthony Bellanto QC was called to the Bar in 1967 and took silk in 1988. Anthony has worked as the Crown Counsel and Senior Crown Counsel in Hong Kong and as a Crown Prosecutor in Australia. He possesses extensive experience in criminal law matters, trial advocacy, sentencing and appeals. Further, Anthony is an active participant in the Bar Reading Course, Continuing Professional Development programs and has delivered a collection of papers in both NSW and abroad, making him well-recognised within the academic community as well as the courtroom. He was the advisory editor of *Sentencing Law: New South Wales*, published by LexisNexis in 2003.

Ye Catherine Lin

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Ye Catherine Lin was called to the Bar in 2013. She has a diverse practice with a particular focus on criminal law. She has appeared in a number of high profile matters including appearing as junior counsel on behalf of the New South Wales Worker's Union in the Royal Commission into Trade Union Governance and Corruption.

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Cases

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Legislation

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Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015 (NSW)

District Court Criminal Practice Note 11

Evidence Act 1995 (Cth)

International instruments

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

Online resources

www.theadvocatesgateway.org