GUIDELINES FOR CONDUCTING PRE-RECORDING OF AN AFFECTED WITNESS

Practices and procedures applicable to conducting pre-recordings of the evidence of affected witnesses pursuant to Division 4A *Evidence Act* 1977.

LISTING ISSUES

One of the purposes of Division 4A (s.21AA(a)) is "to preserve, to the greatest extent practicable, the integrity of an affected child's evidence". Section 9E(2)(d) *Evidence Act* 1977 provides that, in relation to child witnesses, the proceedings should be resolved as quickly as possible.

- Pre-recording proceedings should be listed to occur at the earliest time possible after the presentation of the indictment. Convenience of counsel (either prosecution or defence) is of minor consideration if it leads to a delay in the listing of the pre-recording. Only if good reason is shown (eg if the prosecutor has conferred with the witness) would availability of counsel lead to deferment of the listing from the earliest available date. Such listing should ideally occur on the presentation of the indictment.

Pursuant to s.21AJ, the indictment must be presented before the evidence can be taken pursuant to Division 4A. Section 21AS(2) provides that the prosecutor must inform the court at the time the indictment is presented, that an affected child may give evidence in the proceeding. Practice Direction 1 of 2005 requires that the Director of Public Prosecutions must inform the court at the time of presentation of the indictment of the need to pre-record evidence of an affected child. It further provides that at that time all parties must be prepared to indicate readiness to proceed with the pre-recording of evidence and supply a realistic estimate of time for the proposed hearing. It also provides that the Director of Public Prosecutions file a transcript of the affected witness's statement made pursuant to s.93A *Evidence Act* with the indictment.

- The judge, before whom the indictment is presented, should ensure that the prosecution has filed a transcript of the s.93A material.

- At the listing, parties should be asked to provide (realistic) time estimates for the pre-recording.

Experience has shown that a child witness should give evidence commencing as soon as possible to the listed time (ie 10am). The longer the child witness has to wait around on the pre-recording day, the more onerous the giving of evidence becomes.

- Ideally a pre-recording should be listed as the only matter before a particular judge on the day in question. This should ensure that the pre-recording should commence at 10am and the child gives evidence immediately. This will not always be possible, particularly where more than one child is to give evidence in a particular matter. Otherwise, the pre-recording should be listed to commence at 10am.

- At the listing proceeding, the parties should be requested to indicate whether there are any pre-trial issues to be resolved prior to the pre-recording. These should be listed to occur prior to the date of the pre-recording. For example, arguments about the admissibility of the s.93A material or the capacity of the child to give evidence need to be resolved prior to the day of the pre-recording.

- As a matter of caution, the matter should be listed for a mention two weeks prior to the pre-recording for the parties to advise as to whether there are any pre-trial issues and, if so, the matter should be listed for a s.590AA pre-trial hearing to occur before the date of pre-recording.

The trials of matters involving affected witnesses (particularly those involving alleged sexual offences) should also be given priority.

Practice Direction 1 of 2005 requires that an application to copy or edit a pre-recording should be made within 21 days of the conclusion of the pre-recording hearing after a consideration by the parties of the transcript of the pre-recording hearing.

- At the time of listing the pre-recording, a further mention date should be listed, within 21 days of the hearing, for applications to be made for copying or editing.

Some centres where indictments are presented do not have appropriate facilities to properly conduct pre-recordings. Pursuant to s.21AK(5), if it is not practicable at the place of the trial to take and videotape the child's evidence, the trial may be adjourned to an appropriately equipped place to allow the evidence to be taken and videotaped.

- At the time of listing, enquiries should be made of the parties as to where the pre-recording is proposed to be conducted and appropriate orders made.

- Use should be made of the draft orders attached to the Practice Direction as to the formal orders (eg s.21AK(3)) required for the pre-recording and the safe custody of the videotapes.

- The indictment should be endorsed as to the orders made

PREPARATION FOR THE PRE-RECORDING

The preparation of the affected witness in relation to the giving of evidence is a matter for the Director of Prosecutions. The court, if requested, should allow the availability of a court room for the familiarisation of the affected witness with the physical layout. The Director of Public Prosecutions is responsible for ensuring that the affected witness is appropriately dressed.

- Prior to the pre-recording proceeding the hearing judge should familiarise himself or herself with at least the s.93A material.

The judge's associate must, on being notified that the pre-recording has been listed before the judge, collect the file and check that the transcript of the s.93A statement is on the file and check whether there have been other pre-recordings of affected witnesses and, if so, whether the transcripts of those proceedings are on the file. The associate should also check whether other orders have been endorsed on the indictment and bring them to the attention of the judge.

The judge may also wish to read the depositions in relation to the matter although, in most cases, an affected witness may not have given evidence at committal. The depositions would need to be obtained from the DPP.

Whether a judge raises of his or her own volition a question of inadmissible material in the s.93A statement is a matter for the judge. This is really a matter for the parties.

THE PRE-RECORDING HEARING

On occasions the physical facilities have been deemed inappropriate to conduct a pre-recording. A judge, in those circumstances, should decline to conduct the hearing where the facilities are inappropriate (eg confined and oppressive remote rooms). That issue should be resolved prior to the date of the hearing (to avoid the attendance of the witness).

On the day of the pre-recording the equipment should be tested to ensure it is working correctly. This test will normally be conducted by the bailiff and the associate. The parties should also be invited to participate in a "dry run" to ensure the equipment is recording correctly.

There have been instances where hearings have been held only to later discover that the volume levels recorded for particular persons have been inadequate or that the volume levels differ between particular participants. It is particularly important that those volumes have been checked on the day of the prerecording. It would also be appropriate to check that the recording machine is properly recording as there have been instances where, although the machine appeared to be working, in fact nothing was being recorded. It may be appropriate, during any breaks in proceedings, to ensure that the parties again check the system to see that the evidence is being properly recorded. Additionally, at the end of the hearing, before the witness is permitted to leave, that the recording again be checked to ensure it recorded. There have been instances where an affected witness has had to attend for a second hearing where the equipment malfunctioned. All steps should be taken to avoid that.

- The equipment should be appropriately tested on the day of the pre-recording hearing.

The testing should also ensure that the appropriate view of the child is being recorded. The view of the child giving evidence should be a face and shoulders one. It may be appropriate that the recording also show the relative size of the witness. In those circumstances, the issue should be raised with the parties. The system should enable a shot of the witness being brought into the witness room so that the relative size of the witness is seen.

The scenes shown on each of the video screens may also need to be adjusted. For example, there sometimes appears on the screen in the remote witness room a smaller screen showing the witness. This should be deleted as it is distracting to the witness. The settings on the screens in the court room should be canvassed with the parties to ensure they are suitable. The judge's screen should allow a view of any support person in the remote room. Ideally the view available to the parties should also show the support person. In that way inappropriate behaviour of the support person may be monitored. However, some of the systems do not allow this view. A further possible safeguard may be the positioning of a second bailiff in the remote witness room. This option is not available in all centres and, in any event, may be detrimental to the witness in terms of giving evidence in the physical presence of a stranger. The scene on the screen in the witness room should show no view of the accused. Pursuant to s.21AL(4) at the preliminary hearing, the defendant must not be in the same room as the witness when the witness's evidence is being taken but must be capable of seeing and hearing the child while the child is giving evidence.

- The testing of equipment and preliminary issues raised with the parties should ensure that each screen is showing the appropriate view and that the view to be recorded is the appropriate one.

The movement of parties around the court room during the hearing is sometimes visible to the witness through the remote link. Movement of people through the section of court room which is visible to the witness should be restricted. It can be particularly distracting to a witness to see strangers (eg instructing solicitors) moving on screen.

- Pursuant to s.21AL(1) the court should make the orders thought appropriate restricting the movement of people through that section of the court room which is viewable to the witness through the video link.

Considering the priority to be given to these matters and the effect of long waiting periods on the capacity of affected witnesses (particularly young children) to give evidence, priority

should be given to commencing the pre-recording hearing promptly on the hearing day. The court should be aware of fatigue issues where evidence is given by a young witness in the afternoon.

- Priority should be given to the pre-recording on the day of listing so that it commences promptly at 10am.

There is no requirement to arraign the accused prior to the commencement of the pre-recording: See R -v- WAH [2009] QCA 263. The court should also be closed during the prerecording: See s 21AU.

Prior to the taping commencing the judge should canvass any preliminary matters with the parties. These matters should include in what form the prosecutor intends to lead the evidence-in-chief. Is it to be only the s.93A material? Does the prosecution propose to lead further evidence-in-chief? (See Hayne J. Gately -v- R [2007] HCA 55, paragraph 103).

Section 21AK(1) provides that the affected child's evidence must be taken and videotaped at a preliminary hearing. Section 21AL(4)(b) provides that, subject to the judicial officer's control, the child is to give evidence-in-chief and be cross-examined and re-examined at the preliminary hearing. The s.93A material should be tendered on the pre-recording as the child's evidence-in-chief and admitted as an exhibit in the pre-recording. This should occur before the child is sworn.

- The s.93A material should be tendered as an exhibit before the child is sworn on the pre-recording. Give an exhibit number to the s93A tape, and mark the accompanying transcript for identification.

The preliminary matters should include whether there are any issues concerning the ability of the witness to give sworn evidence. They should include whether there are any documentary exhibits or other items to be shown to the witness during the pre-recording. Appropriate arrangements need to be put in place to achieve that with minimum disruption. A second bailiff may be needed to take the items to the remote witness room whilst the first bailiff operates the equipment. They should include whether a view of the witness needs to be recorded to show the relative size of the witness.

It should also be canvassed whether the witness will be required to identify any person, particularly the accused. Appropriate orders would need to be made under s.21AT that ensure that those identification procedures are carried out in a way that limits the distress or trauma to the witness. The preliminary matters should include orders for the closing of the court and orders for the presence of a support person.

- Prior to the pre-recording commencing and in the absence of the witness, relevant preliminary matters should be canvassed with the parties.

The judge should speak to the witness over the video link prior to the recording commencing. The judge should introduce the participants by name, including himself or herself and the prosecution and defence counsel. The judge should explain that the court is closed. The judge should explain about those present in the courtroom (excluding the accused) and that the witness may see others moving around the court, but that they are permitted personnel. The judge should canvass that if the witness needs a break or doesn't understand a question, that the witness should raise that. The judge should canvass any issues with the witness to decide the witness's ability to give sworn testimony. The witness should be advised to raise immediately any difficulties they might experience with the equipment. The canvassing of these issues may settle the witness prior to the recording commencing. There is no need to record them as they form part of the transcript.

- Prior to the recording, the judge should canvass relevant preliminary issues with the witness.

If there is a support person, that person should be invited to advise if they perceive any problems with the equipment as operating in the remote room. On occasions the particular view (particularly of documents shown over the link) has “frozen” and the witness can no longer see the person questioning.

- The judge should invite the support person to advise immediately if a problem with the equipment arises.

Once any issue concerning the ability of the witness to give sworn testimony has been decided, the recording should be commenced. It should commence with the witness being sworn or taking the affirmation. The judge should then address the witness on the tape and advise that the prosecutor (by name) will now ask questions to be followed by questions by the defence counsel (by name.)

- The recording should commence with the swearing of the witness and a brief introduction of the counsel by the judge to the witness.

The oath to be administered is that pertaining to giving evidence before a jury rather than that pertaining to a voir dire. The matter is for eventual resolution by a jury and the jury trial oath is the appropriate one.

- The oath to be administered is that pertaining to evidence given before a jury.

The judge should monitor the need to have breaks in the evidence which, depending on the circumstances, may be frequent. The attention span of a young child is limited and there may be a need for frequent breaks, even if not requested. Repetition by a child witness of phrases such as “I don’t remember” or “I don’t know” may be indicative of the need for a break. Appropriate and regular breaks maintain the focus of a witness, particularly a young witness.

- The judge should ensure that appropriate breaks are taken.

Section 9E(2)(c) *Evidence Act* 1977 provides that one of the principles for dealing with child witnesses is that the child should not be intimidated in cross-examination. The judge should be vigilant in disallowing impermissible questioning. In determining this issue, regard needs to be had to the age of the witness ensuring that any question which is beyond the capacity of the child to answer is disallowed. Such questions could contain inappropriate language or terms which the witness cannot understand. For example, a child under a certain age may have no or little concept of time or distance. The use of double negatives and confusing questions should be disallowed. Similarly, repetitive questioning should be discouraged. The judge should be quick to intervene if questioning becomes harassing, intimidating (including volume and tone of voice), offensive or oppressive. Note the particular requirements as to special witnesses (s.21A(2)(f) *Evidence Act* 1977.

- The judge should ensure that the cross-examination of a child witness is not intimidating.

If legal argument occurs during the course of the pre-recording, the witness should be informed that the recording will cease while that is dealt with. The link with the remote room should be severed and the witness given a break. There is no need to record the legal argument as it will be transcribed in any event and obviate the need for editing the tape later.

- During any legal argument the taping should be ceased.

The completed recording should be marked as an exhibit in the preliminary hearing. The disc should be marked with the exhibit number. The indictment should be endorsed with the appearances and the date of the hearing, the name of the affected witness whose evidence has been recorded, the list of exhibits and items marked for identification, and any other orders. The file should be noted with any exhibit list. The recording should then be sent to the Principal Registrar as per the earlier draft order. In Brisbane the bailiff delivers the recording to the Principal Registrar.

- At the conclusion of the hearing the recording and the file should be appropriately annotated and the indictment endorsed. The recording should be sent to the Principal Registrar for safe keeping as per the original draft order.

If there is more than one witness to be pre-recorded, separate discs should be used for each witness. Each disc should be a separate exhibit and the notations to the file and endorsement of the indictment should so indicate.

- Where more than one witness is pre-recorded, separate discs should be used.

ORDERS FOR COPYING AND EDITING

Practice Direction 1 or 2005 provides that at the conclusion of the recording of the pre-recorded evidence of an affected witness, the SRB is directed to make available a transcript of the evidence of the witness to the principal registrar, the DPP and the legal representatives of the accused or, where the accused is not legally represented, to the accused.

The Practice Direction provides that a party is to apply for the copying and/or editing of the original recording within 21 days of the conclusion of the recording of the pre-recorded evidence. Any editing order shall specify the parts of the transcript to be edited and the associate shall forward to the principal registrar the entire transcript of the recording with the passages to be edited marked on the transcript.

- Applications for copying and/or editing should comply with Practice Direction 1 of 2005.

THE TRIAL

When a judge is listed to preside over a trial involving an affected child witness, the judge's associate must collect the file and check to ascertain how many affected child witnesses are involved. In Brisbane, the associate must collect the recordings from the Child Evidence Manager (Listings) before the commencement of the trial. The associate must also check the file to ensure that the s.93A material (including transcript) is present. When the trial is to take place on circuit, the associate should take the steps referred to above and also check with the Child Evidence Manager that the recordings are with the file at the circuit centre.

- Prior to the trial the judge's associate should obtain the file to ensure that the appropriate material is present and orders have been complied with. At a Brisbane trial, the associate should collect the pre-recordings from the Child Evidence Manager and, if a regional or circuit trial, ensure that the Child Evidence Manager has forwarded the recordings in sufficient time before the commencement of the trial.

At the commencement of the trial it should be confirmed with the parties as to which actual recording is to be played, particularly if it has been edited. Ideally the parties should view the disc to be played to ensure it is the correct one and that any editing has been correctly done. The disc should be in a position to be commenced with the actual swearing of the

witness. There is no need for the jury to see any preliminary matters that might have been recorded.

- The discs played to the jury and any transcripts should be marked for indentification (See Gately -v- R [2007] HCA 55).

- At the commencement of the trial the parties should confirm which actual disc is to be played and the disc positioned to commence with the swearing of the witness.

The prosecution should also confirm as to how the evidence-in-chief is to be led. It should either be on the pre-recording or consist of s.93A material or both. The parties should also indicate their attitude to the transcripts of the various evidence. That is, whether there are any objections to the jury having a transcript and retaining that transcript after the recording has been played. In general, transcripts of the s.93A material should be retrieved from the jury at the conclusion of the playing of those recordings. For purposes of consistency, the transcript of the pre-recorded evidence should also be retrieved after the recordings have been played. These practices should be confirmed with the parties before the evidence is introduced.

- The trial judge should confirm with the parties any relevant aspects concerning the jury's access to transcripts.

When the prosecution "calls" the first affected witness, the trial judge should explain to the jury that the evidence has been pre-recorded at an earlier date, inform the jury of that date, inform the jury as to the presence of any support person and the role that person plays, that the court was closed, and tell the jury that the counsel and judge on the trial may well be different from those at the pre-recording. It may also be advisable at that stage to give the warnings to the jury set out in s.21AW(2). That is, that the measure is a routine practice of the court, that the jury should draw no adverse inference as to the defendant's guilt from it, that the probative value of the evidence is not increased or decreased because of the measure and the evidence is not to be given any greater or lesser weight because of the measure.

- The trial judge should inform the jury of the details of the pre-recording and give appropriate warnings.

Division 4A provides no power to close the court during the playing of the pre-recorded material. Similarly, with respect to s.93A material, there is no power to close the court.

- The various discs and the transcripts should be marked for identification.

During the playing of the recordings it is usual for a transcript to be supplied for the benefit of the jury. The usual warning should be given to the jury that the evidence is as is contained on the recordings rather than the transcript, and to warn of the dangers of inaccuracies in the transcript. Unless the parties agree otherwise, the transcripts should be taken back from the jury at the conclusion of the playing of the recordings. The transcripts should be marked for identification but held back from the jury.

- Transcripts of the pre-recorded evidence should be taken back from the jury at the conclusion of the playing of the recordings unless the parties agree otherwise.

Auscript will not further transcribe the recordings (whether s.93A or pre-recorded discs) as they are played at the trial. Any later references from transcripts must rely on those already supplied.

During the summing-up the trial judge must give the warnings about the pre-recording procedure as contained in s.21AW. That is, that the measure is a routine practice of the court and that the jury should not draw any inference as to the defendant's guilt from it and

the probative value of the evidence is not increased or decreased because of the measure and the evidence is not to be given any greater or lesser weight because of the measure. Court of Appeal decisions have held that not to give the full warning amounts to a miscarriage of justice: *R v SAW* [2006] QCA 378; *R v MBE* [2008] QCA 381.

- The jury should be given the appropriate warnings pursuant to s.21AW.

The recorded evidence of a child which is admitted under s.93A *Evidence Act* 1977 should not go into the jury room during deliberations: *R v H* [1999] 2 Qd R 283 at 290. The rationale of that decision was that the transcript of the cross-examination of the witness would not similarly be available to the jury. This concern does not apply to a recording of evidence admitted under s.21AM where both the evidence-in-chief and cross-examination of the witness are contained in the pre-recording: *R v GT* [2005] QCA 478. Provided that both the s.93 recording and the recording of the cross-examination are available, there appears to be no rationale from *R v H* which would still prohibit their being sent into the jury room. The safest course, unless the parties agree otherwise, would still seem to be to keep the recordings out of the jury room (in view of the danger of over reliance on that part of the evidence). Should the jury request to see the recorded evidence again, it should be played to them in open court. Should the latter course be followed, an appropriate warning should be given that due regard should be given to the other evidence called in the trial (See Gately -v- R [2007] HCA 55).

- The recordings under s.93A and s.21AM should not go into the jury room unless the parties agree. If the jury request to see the recordings again, this should be done in open court. Appropriate warnings should be given.

At the conclusion of the trial, the recordings of the pre-recorded evidence should be ordered to be returned to the safe keeping of the Principal Registrar in Brisbane.