

Evidence of Affected Children¹

Section 21AA *Evidence Act 1977* describes the purposes of Division 4A as to preserve, to the greatest extent practicable, the integrity of an affected child's evidence and to require, wherever practicable, that an affected child's evidence be taken in an environment that limits the distress and trauma that might otherwise be experienced by the child when giving evidence. The Division establishes a system of pre-recording an affected child's evidence and limits the evidence to be given on committal. The pre-recorded evidence is then played to the jury on the trial.

"Affected child" is defined in s 21AC as a child who is a witness in a relevant proceeding and who is not a defendant in the proceeding. A child in a criminal proceeding is a person who is under 16 when the defendant is arrested, a complaint is made in relation to the defendant or a notice to appear is served on the defendant (s 21AD(1)). The definition of a child is extended to include a person who is 16 or 17 when the first of the things mentioned above happened and the person is a special witness (s 21AD (1) (a) (ii)).

A "relevant proceeding" means a criminal proceeding for a "relevant offence" or a civil proceeding arising from the commission of a "relevant offence". A "relevant offence" means an offence of a sexual nature; or an offence involving violence if there is a prescribed relationship between the child witness and a defendant. "Prescribed relationship" is defined to include parents, grandparents, siblings and other relationships within the family. It also includes a relationship arising because a defendant lived in the same household as the child or because the defendant had the care of, or exercised authority over, the child in a household on a regular basis.

The affected child's evidence must be taken and video-taped at a preliminary hearing presided over by a judicial officer (s 21AK). The video-taped recording must be presented to the court at the trial. The judicial officer may give various directions for taking an affected child's evidence (s 21AL). The video-taped recording is as admissible as if the evidence were given orally (s 21AM). Section 21AU requires the exclusion of members of the public from the room while an affected child gives evidence and whilst a recording of that evidence is being played. An affected child is entitled to have a support person present when giving evidence (s 21AV).

Pursuant to s 21 AW(2), if an affected child's evidence is taken by pre-recording² or by using an audio visual link or a screen blocking the defendant from the witness's view or if a person is excluded under s 21AU or if a support person³ is present, the jury must be instructed that:

- (a) The measure is a routine practice of the court and that they should not draw any inference as to the defendant's guilt from it; and
- (b) The probative value of the evidence is not increased or decreased because of the measure; and
- (c) The evidence is not to be given any greater or lesser weight because of the measure.

¹ Division 4A *Evidence Act 1977*. For directions for Special Witnesses see No 11.2.

² In some circumstances, directions may need to be given in respect of a 93A Statement. See *R v H* [1999] 2 Qd R 283; *R v KAH* [2012] QCA 154. See Direction No 11A.

³ The term "adult person" does not mean the same as "support person", and it is not appropriate to use alternate language that does not convey the purpose of the person's presence: see *R v Carter* (2014) 241 A Crim R 522; [2014] QCA 120 at [71].

'Probative' means 'affording proof or evidence'. To say that the probative value of evidence is not increased or decreased because it is pre-recorded and played to you means it is not better evidence, or worse evidence, than evidence given by a witness in the presence of a jury.⁴

On the trial where the pre-recorded evidence is played to the jury, the video tape should be marked for identification rather than as an exhibit in the trial: *Gately v The Queen* (2007) 232 CLR 208; [2007] HCA 55. The video tape should be marked with a letter and should not be given into the possession of the jury for the purpose of their deliberations: *R v Nijamuddin* [2012] QCA 124 at [44]-[47].

Where the jury request the replaying of the video tape this, if permitted, should occur in the reconvened court: *Gately*. Hayne J (with whom Gleeson CJ, Heydon and Crennan JJ agreed) stated at [96],

“The purpose of reading or replaying for a jury considering its verdict some part of the evidence that has been given at the trial is only to remind the jury of what was said. The jury is required to consider the whole of the evidence. Of course the jury as a whole, or individual jurors, may attach determinative significance to only some of the evidence that has been given. And if that is the case, the jury, or those jurors, will focus upon that evidence in their deliberations. While a jury’s request to be reminded of evidence that has been given in the trial should very seldom be refused, the overriding consideration is fairness of the trial. If a jury asks to be reminded of the evidence of an affected child that was pre-recorded under subdiv 3 of Div 4A of the Evidence Act and played to the jury as the evidence of that child, that request should ordinarily be met by replaying the evidence in court in the presence of the trial judge, counsel, and the accused. Depending upon the particular circumstances of the case, it may be necessary to warn the jury of the need to consider the replayed evidence in the light of countervailing evidence or considerations relied upon by the accused. It may be desirable, in some cases necessary, to repeat the instructions required by s 21AW. Seldom, if ever, will it be appropriate to allow the jury unsupervised access to the record of that evidence.”

Where video evidence is replayed, failure to give a direction that the jury not give the complainant’s evidence undue weight by virtue of its repetition or to remind the jury of other evidence may result in a miscarriage of justice: *R v FAE* [2014] QCA 69; *R v SCG* (2014) 241 A Crim R 508; *R v MCC* [2014] QCA 253.

Suggested Direction – Re: Measures used to take and present an Affected Child’s evidence

- 1. The evidence of [...] which was just played to you was taken on [...].**
- 2. At the time the child gave evidence, she was in a room remote (separate) from the Courtroom.**

⁴ See *R v Hellwig* [2007] 1 Qd R 17 where the court noted the importance of the directions specified in s 21AW in dispelling speculation and conjecture that might arise as a result of the markedly different procedure adopted when evidence is given pursuant to Division 4A. The Court of Appeal has emphasised on a number of occasions the necessity of directing in accordance with s 21AW(2). Failure to give the required directions may result in a retrial: see *R v SAW* [2006] QCA 378; *R v DM* [2006] QCA 79; *R v HAB* [2006] QCA 80; *R v MBE* (2008) 191 A Crim R 264; *R v Horvarth* [2013] QCA 196.

3. The evidence was given by use of an audio visual link between the room in which the child was seated and the Courtroom.
4. At the time the child gave evidence there was a support person sitting in the room with her, and no other person.
5. Whilst the child gave evidence, all non-essential persons were excluded from the Courtroom.
6. At the time, the defendant was present in the Courtroom but was so positioned that the child could not see the defendant on the monitor, or at all.
7. The child's evidence was recorded as it was given and that is the recording that has just been played to you.
8. The Courtroom was closed and all non-essential persons were excluded while the pre-recorded evidence of the child was played.

Now, I instruct you as follows:

- (a) All of the measures which I have just outlined, used for the taking and showing of the child's evidence, are the routine practices of the court for taking and showing evidence of children such as ...

And you must not draw any inference as to the defendant's guilt because these measures were used.

- (b) The probative value of the evidence is not increased or decreased because these measures were used.⁵

[To say that the probative value of the evidence is not increased or decreased because these measures were used, means it is not better evidence, or worse evidence, than if the evidence had been given before you from the witness box.]

- (c) The evidence is not to be given any greater or lesser weight because these routine measures were used.

- [N.B. 1. Of course, a support person is not always used. Ascertain whether there is a support person by looking at the screen, checking the order on the file, checking endorsements on the indictment and/or asking counsel.
2. If an audio visual link is used, an alternative measure is to have the defendant in a room separate from the Courtroom (s 21AQ(2)(b) *Evidence Act 1977 (Qld)*).
 3. If there is no audio visual link available, an alternative measure is to have the child give evidence in the Courtroom with a “screen, one-way glass or other thing” blocking the child’s view of the defendant – (s 21AQ(5)).