

## Child Witnesses: 93A Statements

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### Legislation

#### 93A Evidence Act 1977

#### Statement made before proceeding by child or person with an impairment of the mind

- (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document, shall, subject to this part, be admissible as evidence of that fact if—
  - (a) the maker of the statement was a child or a person with an impairment of the mind at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
  - (b) the maker of the statement is available to give evidence in the proceeding.
- (2) If a statement mentioned in subsection (1) (the **main statement**) is admissible, a related statement is also admissible as evidence if the maker of the related statement is available to give evidence in the proceeding.
- (2A) A **related statement** is a statement—
  - (a) made by someone to the maker of the main statement, in response to which the main statement was made; and
  - (b) contained in the document containing the main statement.
- (2B) Subsection (2) is subject to this part.
- (3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.
- (3A) For a committal proceeding for a relevant offence, subsections (1)(b) and (3) do not apply to the person who made the statement if the person is an affected child.

*Note—*

For the taking of an affected child's evidence for a committal proceeding for a relevant offence, see part 2, division 4A, subdivision 2.

- (3B) This section does not affect the application of the *Justices Act 1886*, sections 110A to 110C to a committal proceeding.

(4) In the application of subsection (3) to a criminal proceeding—

**party** means the prosecution or the person charged in the proceeding.

(5) In this section—

**affected child** see section 21AC.

**child**, in relation to a person who made a statement under subsection (1), means—

- (a) a person who was under 16 years when the statement was made, whether or not the person is under 16 years at the time of the proceeding; or
- (b) a person who was 16 or 17 years when the statement was made and who, at the time of the proceeding, is a special witness.

**relevant offence** see section 21AC.

## Commentary

Commonly, recorded interviews between a child witness and a police officer are used for the purpose of the child's evidence in chief under section 93A of the Evidence Act 1977.

Statements admissible under s 93A are subject to exclusion as a matter of discretion under s 98 of the Evidence Act. However, the judicial discretion under ss 98 (or 130) should not, be exercised to frustrate the policy of s 93A: R v FAR [\[1996\] 2 Qd R 49](#); R v Morris; ex parte A-G [\[1996\] 2 Qd R 68](#).

Section 102 of the Evidence Act 1977 authorises, in appropriate cases, directions to a jury on circumstances relevant to the weight to be given to a s 93A statement. It provides:

“102. Weight to be attached to evidence

In estimating the weight (if any) to be attached to a statement rendered admissible as evidence by this part, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the statement, including –

- (a) the question whether or not the statement was made, or the information recorded in it was supplied, contemporaneously with the occurrence or existence of the facts to which the statement or information relates; and
- (b) the question whether or not the maker of the statement, or the supplier of the information recorded in it, had any incentive to conceal or misrepresent the facts.”

Where a direction to the jury in accordance with s 21AW(2) Evidence Act 1977 in relation to the pre-recorded evidence of an affected child witness is given, there is no need for a similar direction in relation to the evidence admitted pursuant to s 93A: *R v Lovell* [\[2016\] QCA 151](#) at [139]-[140].

Although tendered as an exhibit, a statement admitted pursuant to s 93A should not, in ordinary circumstances, go into the jury room, for the jury may give undue weight to it as against other evidence, such as the evidence of the defendant which is not in written form: see *R v H* [\[1999\] 2 Qd R 283](#); *R v BAH* [\(2002\) 135 A Crim R 150](#); *R v GAO* [\[2012\] QCA 54](#); *R v KAH* [\[2012\] QCA 154](#).

If the jury ask to see a child witness's section 93A recorded a second time, then a warning not to give the evidence excessive weight *may* be required. As Mullins P explained in *R v WBY* [\[2023\] QCA 230](#), with reference to *R v SDL* [\[2022\] QCA 207](#), "when a complainant's video-recorded evidence is replayed to the jury a second time, the overall question is whether fairness and balance require a warning to guard against the risk of giving the evidence undue weight and whether the jury should be reminded of competing evidence" ([33]). Her Honour explained that such a direction may be required if fairness and balance warrant it, but in *WBY* it was not considered necessary. Her Honour said whilst it was desirable as a matter of prudence, the fairness and balance of the appellant's trial neither required a warning to be given to the jury to guard against the risk of the jury's giving the evidence that was replayed undue weight nor another reminder to the jury that the appellant denied that he touched the complainant as she alleged in the incident.

A finding that a child witness is not competent to give evidence in a proceeding precludes the admission of an earlier out of court statement by the child witness under section 93A of the Evidence Act 1977. However, a finding that a child witness is not competent to give evidence in a proceeding of itself does not preclude the admission of earlier out of court representations by that child witness under section 93B of the Evidence Act 1977: see *R v SCJ; Ex parte Attorney General of Queensland* [\[2015\] QCA 123](#).

### **Suggested 93A Statement direction**

**As you know, part of the complainant's evidence is comprised of her conversations with police at the ... police station on ...**

**These conversations were recorded and the recording has been played to you.**

**The presenting of the child's evidence in this way comprises the routine practice of the Court. This measure is adopted in every case involving children such as ...**

If the s 93A statement does go into the jury room, (for example, by consent), the following direction may be given in the summing-up:

**The video recording of the child’s evidence [and the transcript] will be with you when you consider your verdict.**

**Ordinarily, these documents remain in the courtroom, and are available for you to hear and view in the courtroom during your deliberations. But both counsel in this case wish you to have access to the exhibit [and the transcript] while you are deliberating in the jury room.**

**Keep in mind what I said earlier about the transcript. It is someone else’s impression of what was said during the recorded interview. The transcript is not evidence and was made available to you as an aid only. It is what you hear on the recording that matters, not what is in the transcript.**

**As you will not have any other witnesses’ evidence with you in recorded or written form, be careful not to place undue weight on the child’s evidence because you are able to hear and read it on a number of occasions.**