

GUIDELINES

EVIDENCE OF AFFECTED CHILDREN

Part 2, Division 4A of the *Evidence Act 1977*

Queensland Magistrates
Court

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The *Evidence (Protection of Children) Amendment Act 2003* (the Act) amended the Criminal Code, the *Evidence Act 1977* and other statutes to improve the treatment of child witnesses by the criminal justice system.

The relevant provisions of the Act commenced on **5 January 2004**. However it is important to note that the new system for limiting the circumstances in which an affected child is required to attend at committal and for pre-recording an affected child's evidence for a summary trial apply only if the defendant is arrested, is the subject of the making of a complaint or served with a notice to appear after that date (see ss 140 and 141 of the Evidence Act). Similarly the new scheme for pre-recording an affected child's evidence for a trial on indictment only applies if the indictment is presented after this date.

It should be noted that other amendments such as those which raise a child's age to 16 years for the purpose of s.21A and s.93A apply to all proceedings and are not limited to proceedings commenced after 5 January 2004. This is also the case for the new provisions for taking an affected child's evidence using audiovisual link or screen, (Part 2, Division 4A, Subdivision 4, ss.21AP-21AR) the general provisions relating to the giving of evidence by affected children (Part 2, Division 4A, Subdivision 5, ss.21AS - 21AX) and dealing with a recording (Part 2, Division 4B, ss. 21AY-21AZC).

Careful regard should be had to the transitional provisions of the Act.

Unless otherwise indicated a reference to a legislative provision in these guidelines is a reference to the *Evidence Act*

PART 1 – OUTLINE OF LEGISLATION

1.1 **Principles** for dealing with child witnesses.

Section 9E of Division 1B sets out the general principles to be applied when dealing with a child witness.

The provision states that because a **child (under 16)** tends to be vulnerable in dealings with a person in authority, it is Parliament's intention that a child who is a witness in a proceeding should be given the benefit of special measures when giving evidence.

These principles include :-

- (a) children are to be treated with "dignity, respect and compassion";
- (b) the distress and trauma suffered by children when giving evidence is to be limited to the greatest practical extent;
- (c) children are not to be intimidated;
- (d) matters involving children are to be resolved as quickly as possible.

1.2 An **affected child** is a child witness, not the defendant in:

- (a) (i) a criminal proceeding for an offence of a sexual nature, or
(ii) an offence involving violence, if there is a prescribed relationship (such as a close family member or a member of the same household) between the child and a defendant in the proceeding; or
- (b) a civil proceeding arising from the commission of such an offence.

Note, that any such offence is a “relevant offence”.

See section 21AC which also defines “offence of a sexual nature”, “offence involving violence” and “prescribed relationship”.

To be an affected child, the child witness must be an individual **under 16 years** at the commencement of a criminal proceeding (when the defendant is arrested, is the subject of the making of a complaint or is served with notice to appear) or when a civil proceeding starts, or is **16 or 17 years** at the commencement of a criminal proceeding and is a special witness (s.21AD).

Part 2, Division 4A introduces special measures for the giving of evidence by an affected child.

Note, that an individual remains a child for the purpose of giving evidence for the proceeding until turning 18 years (s.21AD(2)). However under s.21AM, if the evidence has been pre-recorded, the tape remains admissible evidence if the child turns 18 before the evidence is presented to a court.

Note also, that although not an affected child, a defendant maybe eligible for the use of special measures as a special witness under s.21A.

- 1.3 **Special Witness** is a child under 16 years (formerly 12 years), a person who would be disadvantaged as a witness due to mental, physical or intellectual impairment or intimidation, or a person who would be likely to suffer severe emotional trauma (s.21A). This may include the defendant.

The special measures available in the case of a special witness will only apply to a child to the extent that Division 4A does not apply to the child (subs.21A(1A)).

The special measures include court directions about rest breaks for the special witness, that questions for the witness be kept simple, that the questions be limited by time or by the number of questions asked on a given issue (21A(2)(f)).

- 1.4 **Purposes of Division 4A** (s.21AA) are:

- (a) To preserve, to the greatest extent practicable, the integrity of an affected child’s evidence; and
- (b) To require, whenever practicable, that an affected child’s evidence be taken in an environment that limits, to the greatest extent practicable, the distress and trauma that might otherwise be experienced by the child when giving evidence.

- 1.5 **Measures** to achieve these purposes prescribed by s.21AB are:

- (a) for a criminal proceeding
 - (i) in advance of the proceeding, the child’s evidence is to be pre-recorded by means of video-tape in a judicial officer’s presence;
 - (ii) if (i) cannot be achieved, the child is to give evidence using an audio-visual link or screen;
 - (iii) in a committal hearing, evidence-in-chief of the child is to be given by way of a statement tendered to the court without the child being called (s.21AF(1)). Ordinarily, a child is not to be called for cross-examination.
- (b) for a civil proceeding – only (ii) applies

Audio visual link means facilities, including closed-circuit television, that enable reasonably contemporaneous and continuous audio and visual communication between persons at different times.

1.6 **BASIC PRINCIPLES – CRIMINAL PROCEEDINGS**

- (1) Affected children are entitled to expect that they will not be called as witnesses at a committal hearing unless the Court otherwise orders for the purpose of cross-examination.
- (2) Strict adherence to the requirements of the legislation is required when determining whether an affected child is required to be cross-examined at a committal hearing.
- (3) Affected child witnesses will be required to give evidence for the trial **WHETHER OR NOT THEY ARE CROSS-EXAMINED AT THE COMMITTAL** as the committal evidence (if required) will be restricted to limited issues.
- (4) However, Division 4A Subdivision 3 (ss21AI to 21AO) creates a scheme for the pre-recording of all the evidence of an affected child who is not a defence witness at preliminary hearing prior to the trial. The video-tape of evidence is then used at the trial instead of the child appearing as a witness.
- (5) If it is not possible to pre-record an affected child's evidence Division 4A, Subdivision 4 (ss21AP to AR) requires use of an audio visual link, if available or a screen when a child is giving evidence at the trial.

Note, that Subdivisions 3 and 4 apply to any cross-examination permitted of an affected child at a committal proceeding, in addition to a summary trial and a trial on indictment. Only Subdivision 4 also applies to a civil proceeding.

Note also, that the prosecutor or applicant is required to advise the court before a proceeding starts that an affected child may give evidence (s21AS).

PART 2 – APPLICATIONS TO MAGISTRATE FOR CROSS-EXAMINATION AT COMMITTAL

2.1 **GENERAL SCOPE**

For a committal proceeding, the affected child's evidence-in-chief **MUST** be given only as a statement and, ordinarily, the child is not to be called as a witness for cross-examination. [s.21AB9(a)(iii)].

The protection for affected children applies to the taking of an affected child's evidence for a committal proceeding for a relevant offence, whether or not the committal proceeding also relates to other offences. [s.21AE]. The intention of this section obviously is that the protection applies to the taking of the child's evidence concerning both the relevant offence and the related offences.

2.2 EVIDENCE-IN-CHIEF

The affected child's evidence-in-chief **MUST be given as a statement** (eg by hearing or viewing the typed, written, video or audio content of a document) without the child being called as a witness. [s.21AF(1)] Sections 110A and 111 of the Justices Act 1886 and s 4 of the Criminal Law Amendment Act 1892 apply with all necessary changes (see subsections (3), (4) and (5)) and a statement includes a reference to or the receiving or viewing of a statement contained in a document as defined in s.3. [s. 21AF(2)]

2.3 CROSS EXAMINATION

An affected child **MUST NOT be cross-examined** at committal UNLESS, **on application**, a magistrate requires a party to call the child as a witness for that purpose. [s. 21AG(1)].

The magistrate can not require the child to be cross-examined of his or her own initiative. There **MUST be an application** by the party asking the Magistrate to require the child to attend for cross examination.

2.4 The application may be made to a magistrate at either—

- (a) a direction hearing under the Justices Act 1886, section 83A; or
- (b) at the committal proceeding. [See s.21AG(2)]

The Explanatory Note to the *Evidence (Protection of Children) Amendment Bill 2003* (p29) states “It is intended that the application will be made at a direction hearing prior to the committal, but an application can also be made at the committal if the issue to which the application relates could not reasonably have been anticipated before the committal.”

2.5 REQUIREMENT FOR CHILD TO BE CROSS-EXAMINED

The common features in hearing the application at a direction hearing and the committal hearing are that before requiring a child for cross-examination, the magistrate MUST be satisfied the party seeking to cross-examine the child has—

- identified an issue to which the proposed questioning relates; and
- provided a reason why the evidence of the witness is relevant to that issue; and
- explained why the evidence disclosed by the prosecution before the direction hearing, or before the court at the committal, does not address the issue; and
- identified the purpose and general nature of the questions to be put to the witness to address the issue [see s. 21AG(3)(a) and (4)(a) and (b)].

However, if the application is made at the **committal hearing** the applicant **MUST also** satisfy the magistrate that the evidence before the court at the committal has identified the issue to which the proposed questioning relates and that the issue could not

reasonably have been anticipated before the committal, otherwise the magistrate **MUST NOT** require the child to be called [See s 21AG(4)(a)].

The magistrate **MUST ALSO** be satisfied, in either setting that the interests of justice cannot adequately be served by leaving cross-examination about the issue to the trial. [s 21AG (3)(b) and (4)(c)] This means that if the interests of justice would be adequately served by the child being cross-examined about the issue at the trial (when the child will definitely give evidence in accordance with either Subdivision 3 or 4), then there is no reason to also do so at the committal.

Without limiting the matters to which the magistrate should have regard in considering the interests of justice under ss 21AG (3)(b) and (4)(c) to justify calling the child for cross-examination, the court **MUST** consider—

whether the prosecution case is adequately disclosed; and

whether the charge is adequately particularised; and

the vulnerability of children; and

the general principles stated in section 9E; and

the undesirability of calling a child as a witness for a committal proceeding. [s.21AG(5)]

2.6 REASONS

The magistrate **MUST** give **REASONS** for the decision on the application, whichever way it goes. [s. 21AG(6)]

The above test “is designed to link the ability to cross-examine to an identified issue relevant to the proper purposes of the committal.” (see Explanatory Note at p.30)

The magistrate can not allow the child to be cross-examined about an issue other than the issue in relation to which the child was required to be called unless the magistrate or justices are satisfied as mentioned in section 21AG(3)(a) and (b) or section 21AG(4)(a) to (c), whichever is relevant, in relation to the issue. [s.21AH(2)]

NB The regime in Queensland is unique in Australia and cases from jurisdictions requiring “special” or “substantial” reasons to call a child for cross examination are not necessarily authoritative or helpful. Contrast, for example—

R v Gould (1998) 101 A Crim R 162

DPP(NSW) v Losurdo (1998) 44 NSWLR 618; 103 A Crim R 189

McKirdy v McCosker (2002) 127 A Crim R 217

Lawler v Johnson (2002) 56 NSWLR 1

2.7 REQUIREMENT FOR CROSS-EXAMINATION – METHOD OF TAKING EVIDENCE

If the magistrate requires the child to be called as a witness for cross-examination, then subsection 21AG(7) provides that the child's evidence must be taken under subdivision 3 (Pre-recording of affected child's evidence) or under subdivision 4 (Taking of affected child's evidence using audio visual link or screen). The magistrate must make a decision about this and must give the appropriate directions as to how the evidence is to be taken.

Subsection 21AG(8), covered in the next Part, sets out the factors to which the magistrate must have regard in deciding how the child's evidence is to be taken.

The party calling the witness for cross examination may first ask the child questions for the purposes of identifying the child and the statement admitted as the child's evidence-in-chief and establish the truthfulness of the statement, and may also re-examine the child [see s.21AH(1),(4)].

PART 3 – PRACTICAL PROCEDURES

A. DISCLOSURE

3.1 Disclosure of Evidence by the Prosecution

The Amendment Act has also brought comprehensive amendments to the Criminal Code providing for a codification of the obligations of the prosecution to make disclosure to an accused person of all evidence and things it intends to rely on in the proceedings. These provisions are contained in sections 590AB to 590AX(Chapter 62, chapter division 3) of the Criminal Code. Reference should be made to those sections.

Any reference to an accused person also includes a lawyer representing the accused.

These sections apply to all committal proceedings, prescribed summary trials and trials on indictment and not just proceedings applicable to affected children.

They apply even if the offence concerned was committed before 5 January 2004 if the proceedings are started (eg by charging) or indictments are presented after this date (s.715)

A **prescribed summary trial** is a summary trial of an offence prescribed under a regulation for this definition.

A summary of the relevant provisions is contained in more detail in Appendix 2.

As set out in Appendix 2 s.590AH(2)(c)(ii) requires the prosecution to give the accused a written notice naming each prosecution witness who is, or maybe, an affected child and describing why the proposed witness is, or may be an affected child.

Subsection 590AJ(2)(a) makes provision for disclosure the prosecution must make under request including as to particulars if a proposed prosecution witness is, or may be an affected child.

The limits on disclosure of “*sensitive evidence*” will include some photographs and video evidence of children who may be victims or witnesses in court proceedings. In that case the prosecution must give an accused a written notice describing the evidence and stating that it considers it to be sensitive and that a copy is not required to be given (see s.590AO). For the powers of the court in such a case, see s.590AO(3)-(7) which are discussed in Appendix 2.

Subsection 83A of the *Justice Act* has been amended to include as an example of matters about which a direction may be given:

- The disclosure of prosecution evidence as referred to in the Criminal Code, chapter 62, chapter division 3.

B. DIRECTION HEARING

The court may hold such a direction hearing of its own initiative or on application of either party.

Section 83A of the *Justice Act* has also been amended to include as an example of matters about which a direction has been given:

- The arrangements necessary for the giving of evidence by an affected child in committal proceedings.

This section of the guidelines relates to a direction hearing to determine an application that an affected child be cross-examined at a committal proceeding and if so, the arrangements necessary for the child to give evidence under either Subdivision 3 or 4.

Note, because such an application can also be made to the magistrate presiding at the committal proceeding, considerations relevant to such an application are dealt with under this heading and not under a separate section dealing with committal proceedings.

There is no separate section of the guidelines for committal proceedings because it is to be expected that an application at such proceedings will be the exception rather than the rule.

3.2 The Direction Hearing shall be listed at a time prior to the Committal Hearing if at all possible.

This is to ensure that the Prosecuting authority has sufficient time to make arrangements for the appearance of the child at the committal hearing if required. Otherwise, the hearing of an application (for a child to be ordered to be cross-examined) at the committal hearing may result in an adjournment of the proceeding in order to make appropriate arrangements for the child, taking into account witness availability and preparation for Court.

Further if an application is not made until the committal, and the court then requires that a child be called as a witness for cross-examination an adjournment will be required if the pre-recording of the child's evidence is ordered under Subdivision 3, and may be required if the evidence is to be given using an audiovisual link or screen under Subdivision 4.

3.3 Submissions

Submissions of the party seeking to cross-examine the child are required to specifically address the matters referred to in s.21AG(3). Submissions in writing are to be filed by the defence and served on the prosecution five (5) days prior to the direction hearing. The Prosecution are to file and serve written submissions two (2) days before hearing. Submissions in writing are not to exceed one (1) A4 page per issue and the defence will present as an annexure to the submissions the general nature of the questions relating to each issue referred to in s.21AG(3)(a)(iv). Each party will be restricted to 15 minutes oral submissions at the directions hearing.

3.4 Considerations in determining whether child witness should be cross-examined

THESE CRITERIA MUST BE MET BEFORE A REQUIREMENT CAN BE MADE.

- (a) The party seeking to cross-examine the child has:
- i. identified an issue to which the proposed questioning relates; and
 - ii. provided a reason why the evidence of the child is relevant to the issue; and
 - iii. explained why the evidence disclosed by the prosecution does not address the issue; and
 - iv. identified to the magistrate the purpose and general nature of the questions to be put to the child to address the issue; and

(s21AG(3)(a))

- (b) the interests of justice cannot adequately be satisfied by leaving the cross-examination of the child about the issue to the trial (s21AG(3)(b)), in relation to which the magistrate must:

- i. consider whether -
 - the prosecution case is adequately disclosed; and
 - the charge is adequately particularised; and
- ii. have regard to:
 - the vulnerability of children;
 - the general principles stated in s9E; and
 - the undesirability of calling a child as a witness at a committal.

(s21AG(5))

Without limiting the factors that the magistrate may have regard to, the factors set out in paragraph 2.8 above may be considered.

Note, if the application is not made until the **committal**, in lieu of (a)(i) the magistrate must be satisfied that:

- the evidence before the court at the committal has identified an issue to which the proposed questioning relates that could not reasonably have been anticipated before the committal.

(s21AG(4)(a))

3.5 Matters the subject of Directions after a requirement that a child witness should be cross-examined

The magistrate must decide whether the child's evidence is to be taken under Subdivision 3 or Subdivision 4, and how it is to be taken and give a direction accordingly. (s.21AG(7))

In deciding whether the child's evidence is to be taken under Subdivision 3 or 4, and how it is to be taken the magistrate must have regard to:

- (a) the distress or trauma likely to be suffered by the child when giving evidence and the need to minimise the child's distress or trauma;
- (b) whether a local court has an audiovisual link, and, if not, the availability of another appropriate place with appropriate equipment and facilities for taking or video-taping the child's evidence under Subdivision 3 or 4;
- (c) whether the parties would be substantially inconvenienced if the proceeding were to be adjourned to another place mentioned in paragraph (b) that is not within the same locality as the court;
- (d) the need for committal proceedings to be conducted expeditiously.
(s21AG(8))

Note, local court means:

- (a) in relation to a direction hearing - the court at which the committal proceeding would ordinarily be held; or
- (b) in relation to a committal proceeding - the court in which the committal proceeding is to be held or another court within the court precincts.
(s21AG(9))

Note, also, that s 21AB which sets out how the purposes of Division 4A are to be achieved expresses a clear preference for pre-recording the affected child's evidence in advance of the proceeding (see s21AB(a)(i) and (ii)).

C. SUBDIVISION 3 – PRE-RECORDING OF CHILD'S EVIDENCE

Note, Subdivision 3 applies to a summary trial and a trial on indictment in addition to a committal proceedings.

Although this section of the guidelines specifically relates to committal proceedings the same principles apply in the case of summary trials unless otherwise indicated. There is no separate section of the guidelines for summary trials.

Where a direction has been made that the affected child's evidence is to be pre-recorded under Subdivision 3 for the purpose of a committal proceeding the evidence must be taken and video taped at a preliminary hearing presided over

by a magistrate (s21AK(1)) and the video-tape must be presented to the court at the committal proceedings (s21AK(2)).

To facilitate this the presiding magistrate may order that the preliminary hearing be conducted by audio visual link (s21AK(3)), in which case the provisions of Part 3A relating to the use of an audio link in committal proceedings apply.

The presiding magistrate may make any order he/she considers appropriate for taking the affected child's evidence, including directions as to -

- (a) whether the child is to be in a courtroom or a separate room when evidence is taken;
- (b) who may be present in the same room as the child at this time (subject to s21AU which provides for the exclusion of persons).
(s21AL(1) and (2)).

The presiding magistrate may also decide to adjourn the preliminary hearing to a place, whether or not a court which is equipped to take and video-tape the child's evidence and allows the defendant to see and hear the child while giving evidence, eg through an audio visual link. This power is expressly given by s.21AK(5) in the case of a trial.

The magistrate, counsel, parties and witnesses may be at different places during the preliminary hearing (s21AK(8)).

The defendant **must not** be in the same room as the child but **must** be capable of seeing and hearing the child while the child is giving evidence (s21AL(4)).

The affected child is to give evidence-in-chief and be cross examined and re-examined subject to the presiding magistrate's control, and except as otherwise provided by Subdivision 3 the usual rules of evidence apply (s21AL(4)).

The preliminary hearing may be adjourned from time to time until the child's evidence is complete (s21AL(5)).

However where after giving such evidence the child has been excused from further attendance a party may apply to the court for an order that the child:

- (a) give further evidence under Subdivision 3; or
- (b) attend at the proceeding to give evidence.

The court must not make the order unless satisfied that:

- (a) if the child was giving evidence in the ordinary way he/she could be recalled; and
- (b) it would be in the interests of justice to do so.

The court must not order the child to attend at the proceeding to give further evidence unless satisfied that it is not possible or practical to give the evidence at another preliminary hearing (s21AN(4)).

As indicated, Subdivision 3 applies not only to a committal proceeding, but also to summary trial and a trial on indictment. The intention of the Subdivision is that the affected child will give their evidence at a preliminary hearing. However, s21AO which applies only to a summary trial and a trial on indictment allows a party to apply to the court for an order that the child's evidence not be taken under the Subdivision. The court may make the order for good reason, having regard to the child's wishes and the purpose of Division 4A.

The video-taped recording of the affected child's evidence or a lawfully edited copy of it is as admissible at the proceeding for which it was made as if the evidence were given in the usual way at the proceeding. It is also admissible at any rehearing, re-trial or appeal, or in another proceeding in the same court for the relevant charge, or in a civil proceeding arising from the commission of the relevant offence, unless the later court otherwise orders (s21AM).

A party may apply to a magistrate presiding at the proceeding in which the recording is made or the proceeding in which it is presented or to be presented, or at a direction hearing under s83A of the *Justices Act* for approval to edit or otherwise change a copy of a recording of the child's evidence (s21AZ(1)). The original tape cannot be edited or changed in any way (s21A(2)). The purpose of this section is to allow tapes to be edited to facilitate their admissibility.

D. SUBDIVISION 4 – TAKING CHILD'S EVIDENCE USING AUDIO-VISUAL LINK/ SCREEN

Note, as indicated Subdivision 4 applies not only to a committal proceeding, but also to a summary trial, a trial on indictment and a civil proceeding.

Although this section of the guidelines specifically relates to committal proceedings the same principles apply in the case of summary trials and civil proceedings unless otherwise indicated. There is no separate section of the guidelines in relation to summary trials and civil proceedings.

Where a direction has been made that the affected child's evidence is to be taken under Subdivision 4 for the purpose of a committal proceeding or the child has been ordered to attend at the proceeding to give further evidence under s21AN the evidence must be taken by use of an audio visual link if available, or otherwise with the use of a screen when the child is giving evidence. (21AP)

However if a child is able and wishes to give evidence in the defendant's presence without using an audio visual link or screen, the party calling the witness may apply to the court for an order that these methods of taking evidence not be used, and the court may so order. (s21AR)

If a direction has been made that the child's evidence be taken by use of an audio visual link, it is necessary that a courtroom with such a link be pre-booked for the committal proceeding.

The court must direct the use of an audio visual link for when the child is giving evidence, if one is available in the court precincts, to enable the child to give evidence from outside the court room (not necessarily within the court precincts) or to enable the evidence to be transmitted to the defendant outside the court room. (s21AQ(2) and (3)).

The child's evidence must be video-taped if the audio visual link permits.

If there is no audio visual link available then a screen, one way glass or other thing must be placed so that the child cannot see the defendant while giving evidence. (s21AQ(5))

As with evidence pre-recorded under Subdivision 3 a video-taped recording under Subdivision 4 or a lawfully edited copy of it is admissible in any rehearing, re-trial or appeal, or in another proceeding in the same court for the relevant charge, or in a civil proceeding arising from the commission of the relevant offence, unless the court otherwise orders. (s21AQ(6))

E. GENERAL MATTERS FOR ORDERS, DIRECTIONS and RULINGS

Subdivision 5 (ss.21AS to 21AX) has a number of general provisions relating to the evidence of affected child witnesses in committal proceedings, summary trials, trials on indictment and civil proceedings.

The court may make any orders, directions or rulings it considers appropriate to facilitate the operation of Division 4A of its own initiative or on the application of a party. This does limit s 83A of the *Justice Act*. (s21AX)

3.6 Orders as to Identification of persons or things by affected child

If an affected child is required to identify a person or thing while giving evidence, s 21AT requires the court to ensure that the identification is conducted in a way that does not defeat the purpose of any special measures used for the benefit of the witness (Explanatory Note at 32)

To achieve this, the court:

- may make orders it considers appropriate to ensure that the identification is carried out in a way that limits the distress or trauma that might be suffered by the child when making the identification.
- must decide the point in the child's evidence when the identification is to be made eg. it may be appropriate that the identification be made at the end of the child's evidence.
- Should ensure that if the child is required to be in the defendant's presence for the purposes of identification, this should not be for any longer than necessary.

3.7 Exclusion of public

3.7.1 Offence of a sexual nature

The court must exclude non-essential persons from the room in which it is sitting while the child is giving evidence about a sexual offence (s21AU(2)).

This is consistent with s5 of the *Criminal Law (Sexual Offences) Act 1978*.

Essential persons include:

- The parties (including the prosecutor) and their representatives;

- A person whose presence is, in the court's opinion, necessary or desirable for the proper conduct of the proceeding; eg. Court staff;
- A support person for the child;
- A person who applies to the court to be present and whose presence, in the court's opinion:
 - (i) would serve a proper interest of the person; and
 - (ii) would not be prejudicial to the child's interests. For example, a researcher.

(s21AU(4)).

3.7.2 Other offences

For an offence of violence the court must exclude non-essential persons unless satisfied that the interests of justice require that the child's evidence be heard in open court (s21AY(3)).

3.8 Approval of support person

Section 21AV(1) creates an entitlement for an affected child to have a support person while giving evidence.

The court must approve the actual support person on application of the party proposing to call the child (s21AV(2)).

While the child is giving evidence the support person must be:

- permitted to be in close proximity to the child; and
- within the child's sight

(s21AV(3))

The child may waive the entitlement to a support person, with the court's agreement (s21AV(4)) which must not be given if the court considers this is not in the child's best interest (s21AV(5)).

F. **CONSIDERATIONS WHEN CHILD CALLED – RULINGS REQUIRED**

This section of the guidelines applies generally to committal proceedings, summary trials, trials on indictment and civil proceedings unless otherwise indicated.

3.9 Capacity of child to give evidence

Section 9 presumes every child is competent to give evidence in a proceeding and to give that evidence on oath. If an issue is raised about this and the Court is of the opinion that the child is able to give an intelligible account of events seen or experienced then the child remains competent (s.9A). Expert evidence is admissible as to the child's intelligence, powers of perception, memory and expression and other relevant matters. (s9C)

3.10 **Competency of a child to give sworn evidence**

If an issue is raised about a child's competency to be sworn, the witness is competent to give evidence an oath if in the court's opinion, the witness understands that the giving of evidence is serious and he/she has an obligation to tell the truth over and above the normal duty (s.9B(2)). Again expert evidence is admissible on this issue (s9C).

The Court must explain the duty of speaking the truth if the child is competent to give unsworn evidence (s9B(3)).

3.11 **Limitations on cross-examination at committal proceeding**

If an affected child is called for cross-examination at a committal proceeding cross-examination **must not be allowed**

- (a) About an issue other than the issue for which the child was required to be called.

Where there has been a direction hearing, this issue should be identified in the written submission to the court and the decision of the court at the hearing.

This is subject to the court allowing cross-examination on additional issues that also satisfy the test set out in s21AG(3)(a) and (b) or s.21AG(4)(a) to (c), whichever is relevant. See paragraph 2.5 for a discussion of s21AG.

- (b) If it does not appear relevant to an issue for which it may be conducted;
- (c) If it involves a 'fishing expedition';
- (d) If it is a question that may be disallowed under s20 (Cross-examination as to credit) or 21 (Improper questions).

See s 21AH which also permits the party calling the child to re-examine.

Note also that s21 requires the court to take into account the personal circumstances and characteristics of the witness including age, mental capacity, relationship to the defendant etc.

G. COURT SETTING

This section of the guidelines applies generally to committal proceedings, summary trials, trials on indictment and civil proceedings unless otherwise indicated.

3.12 USE OF AUDIO VISUAL LINK FACILITIES BY CHILD WITNESSES

(1) Location of Facilities

AUDIO VISUAL LINK facilities are located at the Court Houses shown in Appendix 1.

(2) Guidelines for Operation

AUDIO VISUAL LINK facilities will be operated by the Depositions Clerk or a Registry Officer with training to operate same. Detailed Operating Instructions for the use of the facilities are available from the Registry in the centre in which the facilities are located.

(3) Contact with Child Witness

It is the responsibility of the Prosecution to ensure that there is no inappropriate contact between the child witness and any person, including during the giving of evidence. Submissions on an appropriate support person to be seated in the remote room with the witness during evidence should be heard and determined BEFORE the witness is placed in the remote room.

(4) Role of Support Person

An appropriate person approved by the court, not a witness in the proceeding, may be seated in close proximity of the child when giving evidence. This person can also assist the Court if the child needs to be repositioned before the monitor, for instance to ensure that the child's face is properly seen or the child is close enough to the microphone. The Support person should not intervene or prompt the child witness during the course of the proceedings.

(5) Custody of the Video-tape

The magistrate presiding at the proceeding at which a video-taped recording is made or the proceeding in which the recording is presented or to the presented, or at a direction hearing under s83A of the *Justices Act* may make appropriate orders about its use or safe keeping (s21AZA(1)).

The orders may extend to a copy of the video tape (see (c) of the definition of recording in s21AY) and as to the copying of the recording (21AZA(4)).

Without limiting the orders which may be made, the magistrate may give directions, with or without conditions, as to:

(a) the person, or classes of person, who are authorised to have possession of a recording; and

(b) the giving up of possession of a recording.

In deciding who is authorised to have possession of a recording regard must be had to:

(a) the need for counsel to have access;

- (b) the need to ensure that persons authorised to have possession of the recording are able to take appropriate measures to ensure there is no unauthorised access to the recording.

(s21AZA(3))

Where a person is committed to trial the video-tape of the child's cross-examination should be provided to the Office of the DPP with the original depositions and exhibits for safe custody prior to trial and the magistrate should make an order under s21AZA(2) reflecting this.

Note, that a magistrate's power to give directions about the use of safe keeping of a recording extend to a video tape made under s21A of a special witness's evidence.

Note also, s21AZB creates an offence of unauthorised possession of, or dealing with a recording; and s21 AZC creates an offence of publishing a recording.

3.13 SCREENS

- (1) If the child's evidence cannot be pre-recorded, as indicated an AUDIO VISUAL LINK **MUST be used** where such a facility exists within the court precincts where the magistrate is presiding for the giving of the evidence by the affected child, including by the child giving evidence outside the court precincts to which the evidence can be transmitted by this means.
(s21AQ(2)and (3))

This includes the notion of taking the child's evidence from a different city from that in which the court is sitting.

All new and refurbished Court Houses, including in regional centres now or in 2004 will have access to AUDIO VISUAL LINK facilities. (see APPENDIX 1)

- (2) If AUDIO VISUAL LINK facilities are not available, s.21AQ (5) **requires** that a screen or one-way glass or other thing must be placed in such a way that the child **cannot see the defendant** whilst giving evidence.
- (3) **SCREENS SHOULD ONLY BE USED IF NO OTHER APPROPRIATE OPTION REASONABLY EXISTS.**

The use of a screen raises issues to be addressed including:

- (a) the layout of the Courtroom e.g. can the screen be positioned in an appropriate fashion to allow the defence representative to have access to the defendant and such that the child cannot see the defendant.
- (b) positioning of parties at the Bar table – consideration may have to be given to changing seating arrangements to move defence away from the witness box. Additional screens may need to be placed around the defendant to properly shield any view of him. **PERSONS SHOULD NOT BE USED TO SCREEN THE DEFENDANT FROM THE WITNESS AT ANY TIME.**

- (c) entrances to the Courtroom vis-à-vis the parties in the Courtroom – can the witness be brought into the Courtroom without having to pass by or see the defendant despite the screen?. The child witness should be the last person into Court and the first person out before adjournments In some Court Houses separate waiting areas are available for witnesses. If this is not the case, the Registrar of the Court should make appropriate arrangements in this regard.
- (d) availability of appropriate screen e.g. screening defendant to the floor.
- (4) **IT IS NOT REQUIRED THAT THE EVIDENCE OF THE CHILD BE VIDEO-TAPED IF THE EVIDENCE IS BEING GIVEN PURSUANT TO S.21AQ(5) AND SCREENS ARE IN USE.** (Compare s21AQ(4) which requires that where an audio visual link allows video-taping, the child's evidence must be video-taped.)
- (5) Screens are not suitable in a small Court room and if this situation prevails then the hearing should be moved to another Court or venue, if practical (it is accepted that some remote court houses, including in Aboriginal or Torres Strait Island Communities are small and it may not always be practical to move to another venue). Where screens are, for some reason, not available or not suitable, the hearing should be moved to a more appropriate place.
- (6) NOTE – the provisions of s.21AQ can be opted out of, if, on application of the party calling the child, the Magistrate is satisfied that the child is able and wishes to give evidence without the aid of screens or AUDIO VISUAL LINK (s.21AR).

1. Dress

When a proceeding or part of it is being video-taped, whether at the committal hearing or at another time, the participants should dress in the same manner as they normally would for a hearing to ensure consistency for the child witness and with regard to the use of the video-tape at subsequent proceedings.

2. Exclusion of the Public

Section 21AU makes provision for the exclusion of persons from the courtroom when an affected child gives evidence – for an offence of a sexual nature exclude, all persons other than essential personnel; for other offences, exclude all but essential personnel unless satisfied in the interests of justice the evidence should be heard in open court. NOTE: an approved support person is an essential person under the section. See paragraphs 3.7, 3.7.1. and 3.7.2 above for more details.

APPENDIX 1

LOCATION OF AUDIO VISUAL LINK (CCTV) FACILITIES IN QUEENSLAND

Magistrates Courts: Roma Street Arrest Court
Brisbane Court 9
Caboolture
Wynnum

District Courts to which the Magistrates Court has access:

Beenleigh
Cairns
Gladstone
Gympie
Ipswich
Kingaroy
Maroochydore
Maryborough
Mt Isa
Rockhampton
Southport
Townsville

Magistrates Courts in 2004:

Beenleigh
Brisbane Central
Cairns
Caloundra
Cooktown
Hervey Bay
Ipswich
Mackay
Maroochydore
Maryborough
Richlands
Rockhampton
Southport
Thursday Island
Toowoomba
Townsville

APPENDIX 2

DISCLOSURE

1 Relevant Provisions

- There is a distinction between **mandatory disclosure** of material referred to in s 590AH (eg statement of witnesses, forensic reports and tests, criminal history of the accused) and **disclosure** the prosecution must make **under request** by the accused as set out in s 590AJ.

Section 590AH(c)(ii) for instance provides that the prosecution must give the accused a written notice naming each prosecution witness who is, or may be, an affected child and describing why the proposed witness is, or may be an affected child.

Subsection 590AJ (2)(a) provides that the prosecution must provide on request particulars if a proposed prosecution witness is, or may be, an affected child.

- **Mandatory disclosure** must be made at least 14 days before a committal proceeding or prescribed summary trial (s590AI(2)(a)). The court may at any time shorten this time period. However the court may not extend this period.
- There is an **ongoing obligation to disclose** as soon as practicable after the thing comes into the possession of the prosecution (s590AL(1)).
- The **court may also waive disclosure** (s 590AU) if satisfied there is good reason and a miscarriage of justice will not result. The accused may also in writing to the prosecution waive the disclosure entitlement.

2 Sensitive Evidence

There is a limit on the disclosure of “*sensitive evidence*” which is defined in s590AF as being **obscene or indecent or which would interfere with the imaged person’s privacy**. Clearly this will include some photographs and video evidence of children who may be victims or witnesses in the proceedings. In that case the prosecution must give the accused a written notice describing the evidence and stating that it considers it to be sensitive and that a copy is not required to be given (see s 590AO).

In such cases the court (s590AO(3)) may direct that the prosecution allow an *appropriate person*” to view and examine the thing upon being satisfied as to conditions which ensures that there can be no unauthorised reproduction or circulation and its integrity is protected (s590AO(4)).

An appropriate person includes the accused and/or his lawyer or another person engaged by the accused (s590AO (7)).

A court may direct that a copy of the sensitive evidence be given but only if satisfied that a legitimate purpose is achieved and that terms of the direction ensure it is not reproduced or circulated (s590A(5) and (6)).

3 Disclosure Directions

Section 590AV provides for the court on its own initiative or on application by the accused to **make disclosure directions** including but not limited to:

- Partial disclosure;
- Disclosure only to a lawyer acting for the accused;
- The exclusion of persons from all or part of the proceedings;
- Limiting the reporting of the proceedings in a particular way;
- How to deal with sensitive evidence (s590AO);
- Limits on disclosure of witness contact details (s590AP);
- Limits on disclosure on public interest grounds (s590AQ);
- Viewing original evidence that is not sensitive evidence (s590AS).

4 Applications for Directions - s 83A Justices Act

The court of its own initiative or on application of either party may hold a direction hearing as to the conduct of the proceedings. Section 83A of the *Justices Act* has been amended to include as examples of matters about which directions may be given:

- The disclosure of prosecution evidence as referred to in the Criminal Code, chapter 62, chapter division 3
- The arrangements necessary for the giving of evidence of an affected child in committal proceedings

Note, the list of examples also includes the cross-examination of a protected witness in committal proceedings. A witness under 16 years is a protected witness (s21M).