

Special Witnesses¹

If the evidence of a special witness is given under an order or direction in s 21A(2)(a) to (f) *Evidence Act 1977*, the jury must be instructed in accordance with s 21A(8) that –

- (a) they should not draw any inference as to the defendant's guilt from the order or direction; and
- (b) the probative value of the evidence is not increased or decreased because of the order or direction; and
- (c) the evidence is not to be given any greater or lesser weight because of the order or direction.²

The orders or directions that can be made under s 21A(2) include:

- (a) that the defendant be obscured from the view of the special witness;
- (b) that non-essential persons be excluded from the courtroom;
- (c) that the special witness give evidence from a remote witness room from which all persons other than those specified by the court are excluded;
- (d) that a person approved by the court be present to provide emotional support to the special witness;

¹ s 21A(1) of the *Evidence Act 1977*.

special witness means –

- (a) a child under 16 years; or
- (b) a person who, in the court's opinion—
 - (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
 - (ii) would be likely to suffer severe emotional trauma; or
 - (iii) would be likely to be so intimidated as to be disadvantaged as a witness;if required to give evidence in accordance with the usual rules and practice of the court; or
- (c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a member of a criminal organisation; or
- (d) a person—
 - (i) against whom domestic violence has been or is alleged to have been committed by another person; and
 - (ii) who is to give evidence about the commission of an offence by the other person.
- (e) a person—
 - (i) against whom a sexual offence has been, or is alleged to have been, committed by another person; and
 - (ii) who is to give evidence about the commission of an offence by the other person.

Where a special witness is to give or is giving evidence, the court may, of its own motion, or upon application made by a party to the proceeding, make or give 1 or more of the orders or directions in s 21A(2).

² The failure to comply with the mandatory requirements of s 21A(8) is an error of law: *R v Bisht* [2013] QCA 238 at [49]; *R v Little* [2013] QCA 223 at [24]. The directions to the jury must include all orders made under s 21A(2) including an order under s 21A(2)(d) that a person approved by the court be present to provide emotional support to the special witness.

- (e) that the evidence of the special witness be video-taped and played at the trial instead of direct testimony; and
- (f) another order or direction considered to be appropriate such as a direction that questions be kept simple or be limited by time.

Directions

1. **The evidence of [...] was taken on [...]**
2. **An order of the court permitted her evidence to be taken in the way it was. It is not uncommon for evidence to be given in this way.**
3. **[...] was in a room separate from the courtroom. Her evidence was given by the use of an audio-visual link between the room in which she was seated and the courtroom.**
4. **Her evidence was recorded as it was given, and that is the recording that was played to you.**
5. **When [...] gave her evidence, there was a support person sitting in the room with her, and no other person.**
6. **All non-essential persons were excluded from the courtroom itself.**
7. **The defendant was present in the courtroom, but he was positioned in such a way that [the witness] could not see him on the monitor or at all while she gave her evidence.**
8. **The procedure I have just outlined for taking [the witness' evidence] conformed with the court order.**
9. **In these circumstances:**
 - **You must not draw any inference as to the defendant's guilt from the order.**
 - **The probative value of the evidence [the witness] gave is not increased or decreased because of the order.**
 - **[To say that the probative value of the evidence is not increased or decreased because of the order, means it is not better evidence, or worse evidence, than if the evidence had been given before you from the witness box.]**

- **That evidence is not to be given any greater or lesser weight because of the order.**