

## Protected Witnesses: s 21M *Evidence Act 1977*

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### Legislation

#### Evidence Act 1977 (Qld), Section 21M

#### Meaning of protected witness

- (1) For this division, each of the following persons is a protected witness—
  - (a) a witness under 16 years;
  - (b) a witness who is a person with an impairment of the mind;
  - (c) for a proceeding for a domestic violence offence or prescribed special offence, an alleged victim of the offence;
  - (d) for a proceeding for a prescribed offence, an alleged victim of the offence who the court considers would be likely to be disadvantaged as a witness, or to suffer severe emotional trauma, unless treated as a protected witness;
  - (e) for a proceeding for a domestic violence order-related offence, a person who—
    - (i) is named as the aggrieved, or a relative or associate of the aggrieved, in the domestic violence order; and
    - (ii) the court considers would be likely to be disadvantaged as a witness, or to suffer severe emotional trauma, unless treated as a protected witness.
- (2) It does not matter whether the proceeding mentioned in subsection (1)(c) or (d) relates also to another offence that is not a domestic violence offence, a prescribed special offence or a prescribed offence.
- (3) In this section—

***alleged victim*** of an offence means a person, other than the person charged, who is—

- (a) alleged to be a person in relation to whom the offence was committed; or
- (b) alleged to have been subject to violence in relation to the offence.

***domestic violence order-related offence***, in relation to a domestic violence order, means—

- (a) an offence for the contravention of the domestic violence order under the Domestic and Family Violence Protection Act 2012, section 177(2); or

- (b) an offence for an act or omission that also constitutes an offence mentioned in paragraph (a).

**prescribed offence** means an offence defined in the Criminal Code, section 75, 122, 127, 206, 229BB, 229BC, 308, 309, 319A, 323, 335, 338A, 339, 340, 346, 354, 354A, 355, 359, 413, 414, 415, 417A or 419.

**prescribed special offence** means an offence defined in the Criminal Code, section 210, 213, 215, 216, 217, 218, 219, 221, 222, 227, 229B, 306, 313, 315, 315A, 316, 317, 320, 320A, 322, 323A, 323B, 324, 359E, 363, 363A, 364, 409 or 412 or chapter 32.

**violence** means—

- (a) an assault on, or injury to, a person; or
- (b) a threat of an assault on, or an injury to, a person.

## Commentary

If a witness is a “protected witness” under s 21M of the *Evidence Act 1977*, the defendant may not personally cross-examine the witness: s 21N. In such cases, if he is unrepresented, the Court is obliged to inform him of the procedure provided for in s 21O(2).

If the defendant does not have a legal representative other than for the cross-examination of a protected witness, or does not have a legal representative for the cross-examination of a protected witness, the court must give the jury any warning necessary to ensure the defendant is not prejudiced by any inference that might be drawn from the fact that he has been prevented from cross-examining the protected witness in person: s 21R.

## Suggested Direction

Where the defendant has a lawyer to cross-examine the witness

**It is a fundamental right of every person accused of a crime to represent himself at his trial. The defendant has elected to do so. You must not draw any adverse inference against him because he has exercised the right of every citizen.**

**However, if a defendant elects to defend himself, the law prevents him from cross-examining any witness who is a “protected witness”. (Name of witness) is a protected witness. That (name of witness) is a protected witness does not, by that fact alone, add to or detract from the witness’s reliability and credibility.**

**A lawyer has represented the defendant for one purpose: to cross-examine (name of protected witness). You might think that (name of lawyer) was at somewhat of a disadvantage in that he has not been involved in the whole trial. However the law provides for such a procedure in the trial of an unrepresented defendant who chooses otherwise not to have a lawyer represent him.**

**[The evidence of (name of protected witness) is, you might think, essential to the prosecution case. Indeed, you will probably conclude that the prosecution case stands or falls on your assessment of her reliability and truthfulness. Keep in mind that you cannot convict unless satisfied beyond reasonable doubt that the evidence upon which the prosecution relies to support (the counts) is both truthful and reliable.]**

**You must not draw any adverse inference against the defendant because he is required to have a lawyer for the purpose of cross-examining (name of protected witness).**

If the defendant elects not to have a lawyer to cross-examine the protected witness in the presence of the empanelled jury, say to the defendant:

**(Name of defendant) you have elected to represent yourself. As you are aware, (name of protected witness) is a protected witness who will give evidence on behalf of the prosecution. As you also know, you are therefore prevented from personally cross-examining that witness. You are entitled to have a lawyer, either to represent you generally at the trial or only to cross-examine (name of protected witness). Legal Aid is available free of charge. It is your choice.**

**You have informed the Court before today that you wish to represent yourself and that you do not require a lawyer to cross-examine (name of protected witness). Before the trial gets under way, I wish to give you a further opportunity to have a lawyer to represent you for the entire trial or else solely to cross-examine (name of protected witness). Do you want a lawyer?**

At the time the witness is called, and repeated in the summing up

The same as the above direction (where lawyer cross-examines witness), except that for the second and third paragraphs substitute:

**The defendant has chosen not to have a lawyer to cross-examine (name of protected witness). So (name of protected witness) will not be [was not] cross-examined, because the defendant is not permitted to cross-examine her. Cross-examination tests whether a witness is truthful and reliable. It is often an important aid to a jury's assessment of where the truth lies. As (name of protected witness) has not been cross-examined, you will have to assess the accuracy of her evidence without the assistance cross-examination might have provided.**

And, instead of the last sentence in the first direction above:

**You must not draw any adverse inference against the defendant because he has chosen not to have a lawyer, as a result of which the evidence of (name of protected witness) has not been tested by cross-examination.**