Witnesses in Criminal Proceedings

- *The Status, Rights and Privileges of Witnesses in Criminal Proceedings*

A paper first presented at the **Aboriginal Legal Service NSW/ACT (Western Region)** Annual Lawyers Conference March 2017, Rydal, New South Wales.

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Introduction

1. The interests of the parties in criminal litigation are often significantly impacted by decisions relating to witnesses.

2. In some cases the success of the prosecution case may hinge on an argument over competence or compellability.

3. In some matters, witnesses can be granted anonymity or other special protections that impinge significantly on the fair trial right of the defendant.

4. Most criminal lawyers will also at some stage act for a witness.

5. A sound understanding of the law as it pertains to witnesses is accordingly essential for all criminal lawyers.

6. Such an understanding will ensure you can have maximum influence over when witnesses are called, what evidence is led and how that evidence is led.

7. In some cases it may be necessary to have recourse to appeal courts to test the correctness of decisions relating to witnesses.

8. This paper aims to provide a brief outline of the relevant law and procedure on the status, rights and privileges of witnesses, both in first instance proceedings and on appeal.

9. Restricted judgments from two 5F appeals have been handed down which address many of the issues addressed in this paper (one on 17 May 2017 and one on 23 July 2018), particularly in respect of the standing of witnesses at first instance and in appeal proceedings and the standing of accused persons in hearings concerning the compellability of witnesses pursuant to section 18 of the *Evidence Act 1995* (NSW).

Competence and Compellability

10. Sections 12 to 19 of the *Evidence Act 1995* (NSW) deal with witness 'competence' and 'compellability'.

11. Section 12 provides that everyone is presumed both competent and compellable to give evidence.

12. **Competence** is concerned with the question of whether a person can fulfil the basic requirement of being a witness, being able to understand questions and give answers.

13. The test has been characterised as concerning, "*the degree of mutual comprehension of those questioning and those questioned*".[1]

14. A witness will not be incompetent just because they are unbelievable and/or clearly dishonest. Competence should not be confused with credibility and the considerations should be kept separate.[2]

15. Section 13(1) provides that a person is:

> *"not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability): (a) the person does not have the capacity to understand a question about the fact, or (b) the person does not have the capacity to give an answer that can be understood to a question about the fact, and that incapacity cannot be overcome*".

16. Persons falling within this category might often be the very young, the seriously intellectually impaired and persons in coma states and so forth.

17. Sections 30 and 31 are examples of assistance that can be provided to overcome incapacity, being concerned with interpreters and measures for, 'deaf and mute' witnesses.

18. Section 13(2) provides that a person not competent to give evidence about a fact, "*may be competent to give evidence about other facts*".

19. Section 13(3) provides another level of competence, that of competence to give 'sworn evidence'[3], it provides that a person:

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[1] *Sed v The Queen* [2004] 1 WLR 3218.
[2] In *RAG* [2006] NSWCCA 343 the two were not kept separate and the trial judge erred in making a determination as to competence taking into account matters properly relevant to credibility.
[3] Oaths and affirmations are provided for in Division 2 of Part 2.1 of Chapter 2 of the Act.

"*who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence*".

20. Section 13(5) however provides that such a person may give unsworn evidence, so long as:

> *"The court has told the person: (a) that it is important to tell the truth, and (b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and (c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue"*

21. Strict compliance with these legislative commands has been insisted upon and convictions set aside when they are breached.[4]

22. A witness is presumed competent unless the contrary is proven, under section 13(6).[5]

23. Expert evidence on the question is permissible and the court has a broad power to receive relevant evidence under section 13(8).

24. **Compellability** refers to the question of whether a party can force a witness to give evidence.

25. The starting point under section 12 is that everyone is presumed to be able to be so forced, it being essential to the functioning of our legal system that parties can obtain evidence.

26. Section 14 provides that a person will not be compellable if the court is satisfied that substantial cost or delay would be incurred in rendering them competent and adequate evidence has or will be given from others.

27. Section 15 provides that certain senior government figures and foreign heads of states/sovereigns are not compellable, some categorically, others in certain circumstances.

28. Section 16 provides that judges and jurors in proceedings are generally not competent and judges generally not compellable unless the courts gives leave.

29. Section 17 provides that criminal accused are not competent prosecution witnesses and associated defendants (co-accused) not compellable to give evidence for or against a defendant unless being tried separately.

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[4] *SH* [2012] NSWCCA 79
[5] With neither party bearing an onus, see: *RA* [2007] NSWCCA 251

30. Section 18 provides that spouses, de-facto partners, parents or children of defendants may object to giving evidence against them.

31. The limitations of the provision are obvious, it does not apply to siblings for example.

32. The following terms are defined in the dictionary to the Act and involve some complexity:
    - De-Facto Partner[6]
    - Parent[7]
    - Child[8]

33. The objection should be made as soon as practicable after a person becomes aware of the right to object.[9]

34. If it appears to the court that a person:

> "*may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person*".[10]

35. In *Trzesinski v Daire* (1986) 44 SASR 34 Prior J was concerned with somewhat analogous South Australian legislation, which required:

> *"The judge presiding at proceedings in which a close relative of an accused person is called as a witness against the accused shall satisfy himself that the prospective witness is aware of his right to apply for an exemption under this section"*

36. Prior J held as to the obligations of the trial judge at [46]:

> *"I am of the opinion, therefore, that, at least as a general rule, it is better if the trial judge makes the necessary explanation and inquiries under subs (5) of s 21 for himself, and satisfies himself from the prospective witness's own answers that the witness understands the questions that necessarily arise under s 21 where a close relative is called to give evidence against a person charged with an offence". (my emphasis)*

37. It is notable that the requirement in that South Australian legislation was less stringent than section 18(4), which of course requires that the judge be satisfied the witness, *"is aware of the effect of this section as it may apply to the person"* rather than merely being aware of the right to object.

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[6] Dictionary, Part 2
[7] Dictionary, Part 2.
[8] Dictionary, Part 2
[9] Sub-section 3
[10] Sub-section 4

38. The restricted judgment of the Court of Criminal Appeal on 17 May 2017 concerns the extent of the obligations of a trial judge in this respect.

39. The objection is heard in the absence of the jury.[11]

40. The ultimate test to be applied is stated in sub-section 6 in this way:

> *"A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:*
>
> *(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and*
>
> *(b) the nature and extent of that harm outweighs the desirability of having the evidence given".*

41. It is important to appreciate the section is concerned with two types of harm, (being to the person and to the relationship), the section requires proper consideration of both where relevant.

42. The low threshold in respect of harm, that there is a likelihood it 'might' occur, in effect means it may be unnecessary to lead specific evidence on that question.

43. Bellew J in *R v Rogerson; R v McNamara (No 1)* [2015] NSWSC 592 (26 May 2015) stated at [80]:

> *"The likelihood of harm being caused is qualified by the use of the alternative "might" in s. 18(6)(a). The word "might" connotes a possibility, as distinct from a probability or a certainty. It follows that in order for the section to be engaged I am not required to find that harm is certain".*

44. And further at [85]:

> *"It has been observed that if a spouse is required to give evidence in proceedings brought against her partner, there is a potential for harm to be caused to the relationship even if no particular harm can be readily identified: R v Flentjar (No. 2) [2008] NSWSC 648 at [4]. In my view, the position is no different when the witness in question is the daughter, as opposed to the spouse, of the person against whom proceedings have been brought".*

45. As to the meaning of "*harm*" Bellew J stated at [81]:

> *"The word "harm" is not defined in the Act, nor is the phrase "harm to the person". In my view, there is no warrant for restricting the notion of "harm" to the likelihood of physical harm. In the context of being called to give evidence, the likelihood of psychological harm can be equally serious. This is*

[11] Sub-section 5

particularly so in the context of the possible disruption to, or break down of, a marital or domestic relationship."

46. Sub-section 7 requires, non-exhaustively, the court to consider the following factors in determining the objection:

> *(a) the nature and gravity of the offence for which the defendant is being prosecuted,*
>
> *(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,*
>
> *(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,*
>
> *(d) the nature of the relationship between the defendant and the person,*
>
> *(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant*

47. There are however two very important exceptions to the general regime established by section 18.

48. Firstly section 19 of the Act dis-applies section 18:

> *(a) in proceedings for an offence against or referred to in the following provisions of the Children and Young Persons (Care and Protection) Act 1998:*
>
> *(i) section 222 (Endangering children in employment),*
>
> *(ii) section 223 (Certain employers of children to be authorised),*
>
> *(iii) section 227 (Child and young person abuse),*
>
> *(iv) section 228 (Neglect of children and young persons), or*

49. Section 279 of the *Criminal Procedure Act 1986* (NSW) further dis-applies section 18 in respect of family members of the accused, including spouses, de-facto partners parents and children, in proceedings for:

> *(a) for a domestic violence offence (other than an offence arising from a negligent act or omission) committed on the spouse, or*
>
> *(b) for a child assault offence (other than an offence arising from a negligent act or omission) committed on:*
>
> *(i) a child living in the household of the accused person, or*

(ii) a child who, although not living in the household of the accused person, is a child of the accused person and the spouse,

50. The term de-facto partner is defined in section 21C of the *Interpretation Act 1987* (NSW) in a different way to in the Evidence Act.

51. Such a person will therefore be compellable; however, they can apply under section 279 to be excused and this can occur if the following conditions are satisfied:

> *(a) that the application to be excused is made by that family member freely and independently of threat or any other improper influence by any person, and*
>
> *(b) that it is relatively unimportant to the case to establish the facts in relation to which it appears that the family member is to be asked to give evidence, or there is other evidence available to establish those facts, and*
>
> *(c) that the offence with which the accused person is charged is of a minor nature.*

52. It will be immediately apparent that this is a far more stringent test than that created by section 18 and that spouses and others in most domestic violence cases will not be easily excused.

53. There is currently a live issue as to whether when a witness is not required to give evidence following a section 18 objection there is capacity for a party to make an application pursuant to section 65 of the Act that the witness be declared unavailable and their evidence then adduced.[12]

54. Judge Haesler in *R v B.O.* [2012] NSWDC 195 (24 September 2012) held that once a person is excused pursuant to section 18 of the Act they are not able to be held unavailable for the purposes of section 65 of the Act, stating at [25] to [28]:

> *"As I understand it the Crown submit that to tender a witnesses' prior representation as evidence does not involve the giving of evidence by the witness.*
>
> *Here I do disagree. It appears to me the clear words of the sections noted above mean that when evidence is allowed pursuant to the exception in s 65 it is still evidence given by the witness whose prior representation it is.*
>
> *This point becomes even plainer when applied to evidence from the previous trial by J (VD Ex H & Ex K). The words of s 65(3) are clear: " ... evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding ... ".*

> *If there were any ambiguity a purposive approach to the interpretation of section 18 would compel an interpretation which allowed the section work to do whenever a child's evidence was sought to be given against a parent no matter the form it took or whether as direct or hearsay evidence: s 33 & s 34 Interpretation Act 1987 and Project Blue Sky v ABA [1998] HCA 28; (1998) 194 CLR 355. This is because, as here, no matter in what form the evidence is given, the community interest in full exposition of available evidence may not be worth the risk to the relationship between a parent and a child should they believe their evidence brought punishment upon their parent"*

55. The contrary conclusion was reached in *DPP v Nicholls* [2010] VSC 397 (6 September 2010) by a single justice of the Supreme Court of Victoria and then by the Court of Appeal of Victoria in *Fletcher v The Queen* [2015] VSCA 146 (15 June 2015).

56. In comments of the nature of *obiter dictum* two single justices of the New South Wales Supreme Court have suggested the Victorian approach is correct.[13]

57. This approach would seem fundamentally counter to legislative purpose, there being no logical reason to suppose that harm to a relationship would be any lesser when the damage to the defendant's case is being inflicted by the tender of a police statement, as opposed to the adducing of oral evidence.

58. (Should it be correct, it may raise an issue as to whether police have acted properly in circumstances where they have not warned witnesses that giving a statement may diminish their rights in respect of compellability.

59. If police are obliged to caution persons to allow them to exercise their privilege against self-incrimination there perhaps exists an argument that a witness ought to have an opportunity to meaningfully exercise their rights in this particular respect.

60. True it is that potential witnesses do not enjoy the special status of criminal suspects/accused; but if the social importance of certain relationships warrants legislative protection (in the context of long standing common law protection), then perhaps it warrants police ensuring persons can preserve their rights in this respect).

61. Rulings made as to the application of these provisions are capable of being interlocutory judgments and orders and therefore are reviewable with leave pursuant to section 5F of the *Criminal Appeal Act 1912* (NSW)[14] and likely pursuant to section 53(3) of the *Crimes (Appeal and Review) Act 2001* (NSW) in respect of Local Court matters.

Self-Incrimination

[13] *R v A2; R v KM; R v Vaziri (No. 4)* [2015] NSWSC 1306 (8 September 2015) (Johnson J at 175). *R v Quinn (No 1)* [2016] NSWSC 1101 (11 August 2016) (Beech-Jones J at 12)
[14] *R v Rag* [2006] NSWCCA 343 and *R v Abdullah & Ors* [1999] NSWCCA 188 (7 July 1999)

62. The privilege against self-incrimination is deeply embedded in our legal system[15] and finds expression in the Act.

63. Section 128 of the Act concerns the right of a witness to object to giving evidence that may incriminate them for wrongdoing.

64. It is this section that perhaps most commonly leads to criminal lawyers representing witnesses in criminal proceedings.

65. The section allows an objection to be taken, but rather than allowing a person to necessarily avoid giving evidence, it provides for the issuing of a certificate that prevents the evidence being subsequently used against the witness.

66. In this way, the course of justice is facilitated without the witness's privilege against self-incrimination being completely impinged.

67. The section applies:

> *"If a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness:*
>
> *(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or*
>
> *(b) is liable to a civil penalty.*

68. The Court must determine if there are reasonable grounds for the objection.[16]

69. If there are reasonable grounds, the court must initially not require the evidence to be given and must inform the witness:

> *(a) that the witness need not give the evidence unless required by the court to do so under subsection (4), and*
>
> *(b) that the court will give a certificate under this section if:*
> *(i) the witness willingly gives the evidence without being required to do so under subsection (4), or*
>
> *(ii) the witness gives the evidence after being required to do so under subsection (4), and*
>
> *(c) of the effect of such a certificate.*

70. Under sub-section 4 the court must require the witness to give the evidence if:

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[15] See *Sorby v Commonwealth* (1983) 152 CLR 281 for a discussion.
[16] Sub-section 2. Analysed in *R v Bikic* [2001] NSWCCA 537

(a) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(b) the interests of justice require that the witness give the evidence

71. In the event the evidence is given by compulsion or willingly, the court must issue the witness with a certificate against self-incrimination. [17]

72. Under sub-section 7 the certificate means the evidence cannot be later used in proceedings against the person, except in proceedings regarding the falsity of the evidence, i.e. perjury proceedings.

73. Section 132 of the Act states:

> *"If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself (if there is a jury, in the absence of the jury) that the witness or party is aware of the effect of that provision"*

74. It is important to be aware that a certificate will not be available in examination in chief or re-examination where a party has chosen to give evidence, on the basis that a party cannot "object" to giving evidence adduced by that party themselves.[18]

Standing of a Witness at First Instance

75. A witness objecting pursuant to section 18 or 128, or more unusually the subject of a competence argument, is entitled to retain legal representation and be heard in the proceedings.[19]

76. As referred to above two currently restricted judgments of the Court of Criminal Appeal are authority for the proposition that a witness and an accused both have standing as parties in section 18 matters at first instance and on appeal.

77. The provisions themselves (as discussed above) cast obligations upon the court to ensure certain matters are explained to the witness, no doubt to enable them to be properly heard.

78. A witness will, as a person effected by the exercise of statutory power that effects their interests, be entitled to procedural fairness.[20]

79. What procedural fairness requires however will depend on the circumstances of the witness and the case. But compliance with the legislative provisions is at least the minimum.

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[17] Sub-section 5.
[18] *Song v Ying* [2010] NSWCA 237
[19] *Witness v Marsden & Anor* [2000] NSWCA 52 at 51
[20] *Zakariah (as Tutor for SA) v New South Wales Crime Commission* [2016] NSWSC 506 at [38] to [42].

80. It may well be that at least the opportunity to seek legal advice and representation is the least that procedural fairness will require.

81. In *Jamal v Director of Public Prosecutions* [2013] NSWCA 35 Gleeson JA (with whom Meagher and Latham JJ agreed) considered a complaint of a want of procedural fairness in circumstances where a litigant was unrepresented and stated at [46]:

> *"Many of the cases dealing with the obligation of the Court to assist an unrepresented litigant are, in the main, concerned with assistance of an accused person. However, a court must also have regard to the capacity of a person to effectively represent his or her interests. This arises from the authorities dealing with the principles of procedural fairness and the right to representation. Relevant matters will include the person's familiarity with relevant rules and complexity of those rules, language difficulties and similar matters. The seriousness of the issue and any qualification which may place an opponent at an advantage will also be considered: Htut v Knowle s [2010] WASC 84 at [49] per Hasluck J".*

82. Mason J in *Kioa v West* [1985] HCA 81; (1985) 159 CLR 550 (18 December 1985) at [33] stated:

> *"In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, that is, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations (cf. Salemi (No. 2), at p.451, per Jacobs J.)".*

83. Gleeson CJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6 at [35]:

> *"Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."*

<u>Standing in Appeal Proceedings and Judicial Review</u>

84. A witness aggrieved by a decision to compel them to give evidence has standing to challenge the decision on appeal (if available), or in judicial review proceedings.[21]

85. In criminal matters heard on indictment a witness is able to launch an appeal pursuant to section 5F of the *Criminal Appeal Act 1912* (NSW) in relation to interlocutory

[21] *Witness v Marsden & Anor* [2000] NSWCA 52 at 61 – 82.

judgments and orders concerning the application of section 18 for example[22] and likely therefore pursuant to section 53(3) of the *Crimes (Appeal and Review) Act 2001* (NSW) in respect of Local Court matters.

86. As referred to above a currently restricted judgment of the Court of Criminal Appeal is authority for the proposition that a witness and an accused both have standing in section 18 matters at first instance and on appeal.

Abuse of Process/Judicial Discretion/Harm to Witnesses

87. Abuse of process is a well-recognised basis for setting aside a subpoena for documents.[23]

88. It is also a basis for setting aside a subpoena requiring oral evidence from a witness in court, though less commonly invoked.[24]

89. If it can be demonstrated a subpoena is oppressive, issued for an improper purpose or otherwise will undermine public confidence in the administration of justice a subpoena should be set aside.

90. In *R v Lewes Justices, ex parte Secretary of State for the Home Department* [1972] 1 QB 232[25] Lord Parker stated at [240]:

> *"I am quite satisfied that in any event it is within the inherent jurisdiction of the court, just as it was before subpoenas were abolished, to set aside a witness summons if there has been an abuse of the process of the court or if it is clear in fact that the witness cannot give relevant evidence"*

91. Heydon JA in *Witness v Marsden & Anor* [2000] NSWCA 52 stated at [51]:

> *"A witness attending pursuant to a subpoena ad testificandum has a sufficient interest to move that it be set aside. It is not necessary to cite authority for the proposition that a subpoena duces tecum may be set aside on the application of the person served on a variety of grounds, for example that it was being used to obtain discovery against a third party, that it was being used as a substitute for discovery, that it was oppressive, that it had an impermissible purpose, and that it was being used in proceedings for the recovery of a penalty. These are but instances of the court exercising its jurisdiction to prevent an abuse of process: Botany Bay Instrumentation & Control Pty Ltd v Stewart [1984] 3 NSWLR 98 at 101 per Powell J. A subpoena ad testificandum, or equivalent process, is in like case. In Waind v Hill and*

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[22] In *R v Abdullah & Ors* [1999] NSWCCA 188 (7 July 1999) the Australian Federal Police appealed pursuant to section 5F and in *Osborne v R* [2014] NSWCCA 17 (27 February 2014) the court allowed 'Medicare Australia' to be heard as a party in respect of an appeal pursuant to section 5F against a decision to set aside a subpoena.
[23] *Botany Bay Instrumentation & Control Pty Ltd v Stewart* [1984] 3 NSWLR 98 at 101
[24] *Witness v Marsden & Anor* [2000] NSWCA 52 at 51
[25] Discussed approvingly by Heydon JA in *Witness v Marsden & Anor* [2000] NSWCA 52 at 56.

National Employers' Mutual General Association Ltd [1978] 1 NSWLR 372 at 385 Mofffitt P spoke of "the invasion by the subpoena procedure of the rights of a stranger".

92. The same considerations will feed into judicial discretion and a witness will be entitled, as an aspect of procedural fairness, to be heard in Court on why they should not be forced to give evidence.

93. In *R v Yl* [2004] ACTSC 115 (27 October 2004) Crispin J was concerned with a situation where expert evidence suggested a reluctant 8-year-old witness would suffer significant harm if compelled to give evidence.

94. The nature of the charge meant the child was compellable.

95. Crispin J declined on a discretionary basis to invoke the coercive powers of the Court, stating at [30] to [34]:

> *"On the other hand, it seemed to me that a conclusion that the child was a competent and compellable witness did not require a further conclusion that the Court had no discretion as to whether to apply some or all of the coercive measures available to compel witnesses to give evidence. The Evidence Act does not address issues of this kind. Indeed it is clear from s 8 that the Act has no impact upon the effect of the Supreme Court Act 1933 (ACT) ("the Supreme Court Act"), s 20 of which confers upon the Court "all original and appellate jurisdiction that is necessary to administer justice in the Territory". Whilst it will normally be appropriate for the Court to take such measures as may be necessary to ensure the attendance of compellable but reluctant witnesses, such remedies are discretionary and the Court may decline to do so when satisfied that the interests of justice require such a course".*
>
> *...*
>
> *"The usual procedure for compelling a reluctant witness to give evidence involves a number of steps. Counsel for the party seeking to adduce the evidence calls on a subpoena that has been validly served on the witness and has commanded his or her attendance. If the witness does not appear, a warrant may be issued for his or her arrest. When due attendance is secured, the witness may be brought into court, by force if necessary, and ordered to enter the witness box. Any refusal to take an oath or make an affirmation, or any failure to answer questions may be dealt with by threats of proceedings for contempt of court and confinement to a cell at least until the witness agrees to comply with the relevant orders.*
>
> *Whilst I accepted that the child fell within the class of witnesses amenable to compulsion, it would, in my opinion, have been inappropriate to have applied any of these coercive measures to him. A seven year old boy could not be sensibly threatened with contempt proceedings and, save perhaps in the most compelling circumstances, such a child should clearly not be arrested, forced into court or intimidated in order to require him to give evidence when he*

might suffer significant psychological harm as a consequence of doing so. Children of that age should be protected by the law; not harmed by it.

For these reasons I informed the Crown that I was not prepared to make any order that would require him to be brought into court against his will".

Protection of Witnesses

96. An array of special measures also exist in legislation for witnesses (or classes of witnesses), which govern how their evidence is given, these include giving of evidence by closed circuit television[26], closed courts[27], exclusion of evidence of prior sexual history[28] and communications with counsellors for sex assault complainants[29], the giving of evidence in chief by way of a recorded interview[30], limitations on cross examination in committal proceedings[31], special assistance with giving evidence[32], protections against cross examination by unrepresented accused[33], special provisions for retrials[34] and the like.

97. An examination of these measures is beyond the scope of this paper but they constitute important rights and protections for witnesses in criminal proceedings.

98. Various criminal offences exist to protect witnesses from retaliation in respect of their role.[35]

99. The *Court Suppression and Non-Publication Orders Act 2010* (NSW) allows witnesses to be granted orders supressing their identity or their evidence[36] and gives them standing in appeals against orders made under the Act.[37]

100. Much authority exists for the proposition that courts, in their inherent or implied jurisdictions, can order that witnesses be referred to by a pseudonym and otherwise not be forced to reveal their identity. [38] Internationally however the compatibility of this with the fair trial has been questioned.[39]

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[26] Section 294B, 306ZA - I *Criminal Procedure Act 1986* (NSW)
[27] Section 291 *Criminal Procedure Act 1986* (NSW)
[28] Section 293 *Criminal Procedure Act 1986* (NSW)
[29] Section 295 – 306 *Criminal Procedure Act 1986* (NSW)
[30] Sections 185, 185A, 298C – M, 306R – Z, *Criminal Procedure Act 1986* (NSW)
[31] Sections 91 and 93 *Criminal Procedure Act 1986* (NSW)
[32] Section 275B, 294C, 306ZK *Criminal Procedure Act 1986* (NSW)
[33] Section 294A, 306ZL *Criminal Procedure Act 1986* (NSW)
[34] Sections 306 – 306L *Criminal Procedure Act 1986* (NSW)
[35] See Part 7 of the *Crimes Act 1900* (NSW)
[36] Section 7(1)
[37] Section 14
[38] See *R v Smith* (1996) 86 A Crim R 308 and *R v Ngo* [2003] NSWCCA 82 (3 April 2003) for an extensive discussion from [56].
[39] *R v Davis* [2008] UKHL 36 after which the Parliament of the United Kingdom passed the *Criminal Evidence (Witness Anonymity) Act 2008* (UK).

101. Witnesses are liable to prosecution for perjury for giving false evidence or prosecution for contempt of court if they refuse to provide evidence.[40]

Calling of Child Witnesses

> *"The legal system has traditionally given little support and preparation to child witnesses. Within the courtroom children are often subject to harassing, intimidating, confusing and misleading questioning. In addition, court buildings do not provide privacy for the child or promote the safety of the child outside the courtroom. A significant amount of evidence was presented to the Inquiry that children are frequently traumatised by their court appearance due to these factors. The abuse many children suffer is compounded by the abuse perpetrated by the legal system itself"*[41]

102. The interests of a child should be carefully considered before they are summoned to court as a witness in criminal proceedings. This will be particularly so where there is an issue as to the operation of section 18 of the Act in respect of the child.

103. The 'best interests' test (to which Australia has committed as a matter of international law) contained in the *Convention on the Rights of the Child* is applied before they are summoned, at least in indictable proceedings where the Director of Public Prosecutions has carriage.

104. This is required by the Guidelines promulgated by the Director of Public Prosecutions for NSW[42] which state (at Guideline 19):

> *"In the case of a child witness the ODPP Lawyer is to ensure that the child is appropriately prepared for and supported in his or her appearance in court. All child victims and witnesses should be referred to the WAS at the earliest opportunity. Child witnesses are to be treated consistently with the provisions of the UN Convention on the Rights of the Child (excerpts from which are contained in Appendix G)".*

105. Authority exists for the proposition that a breach of a legitimate expectation is a valid consideration in an application based on abuse of process. In *R v Inland Revenue Commissioners, Ex Parte Mead and Another* [43] Stuart-Smith LJ. "*specifically*

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[40] Part 7, Division 4 *Crimes Act 1900* (NSW). As to contempt of court, see *R v Razzak* (2006) 166 A Crim R 132, *Smith v The Queen* (1991) 25 NSWLR 1; *Registrar of the Court of Appeal v Raad* (unrep, 9/6/92, NSWCA); *In the matter of Daniel James Ezold* [2002] NSWSC 574; *NSW Crime Commission v Field* [2003] NSWSC 5; *R v Taber and Styman; Re Shannon Styman* [2005] NSWSC 1329 and *Principal Registrar of the Supreme Court of NSW v Tran* (2006) 166 A Crim R 393; *Prothonotary of the Supreme Court of NSW v Jalalabadi* [2008] NSWSC 81.

[41] Seen and Heard: Priority for Children in the Legal Process. Australian Law Reform Commission. At 14.90. http://www.alrc.gov.au/publications/14-childrens-evidence/child-witness-courtroom

[42] http://www.odpp.nsw.gov.au/prosecution-guidelines

[43] [1993] 1 ALL ER 772

held (at 784) that a member of the public enjoyed a legitimate expectation that a prosecution agency would follow published guidelines".[44]

106. These guidelines in New South Wales reflect significant work done on the international level to address the predicaments in which child witnesses are often placed.

107. The *Convention on the Rights of the Child* itself is an annexure to the Guidelines.

108. In its resolution 2005/20 of 22 July 2005, the Economic and Social Council of the United Nations[45] adopted the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime[46], which at VIII notes a right in the following terms:

> *"VIII. The right to be heard and to express views and concerns 21. Professionals should make every effort to enable child victims and witnesses to express their views and concerns related to their involvement in the justice process, including by: (a) Ensuring that child victims and where appropriate witnesses are consulted on the matters set forth in paragraph 19 above; (b) Ensuring that child victims and witnesses are enabled to express freely and in their own manner their views and concerns regarding their involvement in the justice process, their concerns regarding safety in relation to the accused, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process; (c) Giving due regard to the child's views and concerns and, if they are unable to accommodate them, explain the reasons to the child".*

109. The guideline's preamble recognises:

> *"That children who are victims and witnesses are particularly vulnerable and need special protection, assistance and support appropriate to their age, level of maturity and unique needs in order to prevent further hardship and trauma that may result from their participation in the criminal justice process".*

110. This guideline has been the basis of the promulgation of a United Nations *Model Law* in 2009[47] published by the 'United Nations Office on Drugs and Crime', which again recognises significant international concern about the plight of child witnesses (and victims).

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44 Human Rights, Prosecutorial Discretion and Judicial Review – The Emergence of Missing Links? Martin Flyn. Lecturer, Faculty of Law, Northern Territory University. Australian Institute of criminology. Available on-line at http://www.aic.gov.au/events/aic%20upcoming%20events/1996/~/media/conferences/prosecuting/flynnrtf.ashx (accessed 12 May 2011).

45 This Council is created by Chapter 10 of the United Nations Charter. (http://www.un.org/en/ecosoc/).

46 http://www.un.org/en/ecosoc/docs/2005/resolution%202005-20.pdf

47 https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf

111. The Model Law recognises the obligation to have regard to the best interests of the child witness (Article 1), the right for the child witness to be heard on decisions affecting them (Article 2), a right to be informed of range of things from, "*the earliest opportunity*" (Article 9) and the right to an, "*opportunity to express his or her personal views and concerns on matters related to the case, his or her involvement in the justice process in particular his or her safety with respect to the accused, his or her preference to testify or not and the manner in which the testimony is to be given, as well as any other relevant matter affecting him or her*" (Article 20). Article 20 further provides that, "*In cases where his or her views have not been accommodated, the child should receive a clear explanation of the reasons for not taking them into account*".

112. A failure by the prosecution to comply with the above guidelines and international best practise in respect of a child may form the basis of an application that a subpoena be set aside.

113. Practically speaking the accused will not generally have the resources to consider the interests of a child witness in the same manner. But an attempt to subpoena very young child without taking appropriate steps to ensure their interests are considered may well result in an application to set aside the subpoena.

Factual Scenarios

114. The factual scenarios over page may be useful in considering the operation of the provisions and the power of the court to control the use of its processes.

115. The author welcomes comments and feedback on this paper.

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Scenario One

The trial of Smith and Jones is separated upon an application by Smith for a separate trial.

The trial of Smith is listed in January 2018, the trial of Jones in December 2018.

A witness subpoena is served upon Jones to attend the trial of Smith in January 2018 as a prosecution witness.

What issues arise?

Scenario Two

Brown is being prosecuted for fraud.

His father is an elderly man who allowed him to store boxes at his house. Unbeknown to Mr. Brown the boxes contained documents relevant to the fraud.

At the time his house was searched by police Mr. Brown gave a police statement detailing how his son left the boxes at his house.

A witness subpoena is served upon Mr. Brown to attend and give evidence at the trial.

What issues arise?

Scenario Three

Mr. Chan is charged with assaulting his mother.

On the day of hearing his mother attends court and says she does not wish to give evidence against her son.

Mr. Chan is also charged with assaulting his wife.

The wife is also a witness to the assault against Mr. Chan's mother.

The wife also does not wish to give evidence.

Both charges are listed for hearing on the same day together.

What issues arise?

Scenario Four

You are briefed to represent a 7-year-old boy who has been subpoenaed to give evidence in a murder trial in the Supreme Court.

The accused is his father and is charged with killing his wife, the mother of your client.

You are advised that the child has had no contact with the Crown Prosecutor and a subpoena was simply served upon him at school by police.

You are briefed with a medical report from a GP which states the child has been self-harming and is anxious.

What issues arise?

Scenario Five

You represent the accused in a criminal trial. They are charged with break and enter.

They instruct you that on the night in question they broke into a house, but not the house the subject of the charge.

You determine the accused needs to give evidence and admit to the other break and enter.

Your client further arises you that he had used heroin earlier in the evening and has no memory of an earlier part of the evening. You anticipate the prosecutor will seek to cross-examine him about that part of the evening

What issues arise?