Issues for the defence in trials with pre-recording of the evidence of vulnerable witnesses

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1. INTRODUCTION

The pre-recording at a special hearing of the testimony of vulnerable witnesses, in particular child complainants, has resulted in significant changes for defence advocates in sexual assault trials. Much has been written, including in this Journal[2], about constructive changes[3] that have been or need to be made to the way in which the evidence of a vulnerable witness is adduced in court.[4]

Very little has been written about the challenges pre-recording presents for the defence, the impact on the adversarial trial process from an accused's point of view or how defence advocates might adapt to these changes. The purpose of this paper is to examine some of those challenges in a practical way.

While the term *vulnerable witness* is broader than just a child complainant and can include witnesses with cognitive or physical impairment, and witnesses other than a complainant, the usual venue for pre-recording of testimony is in trials involving allegations of child sexual assault.

With the exception of NSW, Australian States and Territories[5] have adopted a model of pre-recording vulnerable complainant's evidence in chief and cross examination in the absence of the jury and often many months before a jury is empanelled. The pre-recording can involve one or more complainants, multiple accused, multiple Judges and can extend over a number of sittings.[6]

In 2014 the report of the NSW Parliamentary Joint Select Committee on Sentencing of Child Sexual Assault Offenders[7] recommended consideration of "trial measures to expand the use of pre-recorded evidence to include all evidence given by child victims (similar to the Western Australian and Victorian models)".[8]

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[2] Zhou J, "Challenges in prosecuting child sexual assault in New South Wales" (2010) 34 Crim LJ 306; Davies, Henderson & Hanna, "Facilitating children to give best evidence: are there better ways to challenge children's testimony?" (2010) 34 Crim LJ 347;
Henning T, "Obtaining the best evidence from children and witnesses with cognitive impairments – "plus ça change" or prospects new?" (2013) 37 Crim LJ 155;
Boyd, R, Hopkins A, "Cross-examination of child sexual assault complainants: Concerns about the application of s 41 of the Evidence Act" (2010) 34 Crim LJ 149;
Jackson H, "Child Witnesses in the Western Australian criminal courts" (2003) 27 Crim LJ 199.

[3] For a useful summary see Chapter 26 "Reporting, Prosecution and Pre-trial Processes", Family Violence - A National Legal Response (ALRC Report 114) albeit with less apparent support in New Zealand: *M v R* [2011] NZCA 303 at [36] where the Court of Appeal said the "sole advantage" of the pre-recording is to reduce the stress which long delays can cause to witnesses which had to be weighed against the against the "considerable disadvantages".

[4] See for example, "Bench Book for Children Giving Evidence in Australian Courts", AIJA, 2012; Cashmore J, "Child Witnesses: The Judicial Role" (2007) 8(2) Judicial Review 281.

[5] See also Youth Justice and Criminal Evidence Act 1999 (UK); R v Barker [2010] EWCA Crim 4.

[6] See for example *Morgan -v- WA* [2011] WASCA 185.

[7] Report 1/55, October 2014

[8] Recommendation 19, Report 1/55, October 2014

More recently, the NSW Government foreshadowed the introduction of the pre-recording of the evidence of child witnesses, the use of 'children's champions'[9] to support child witnesses (better described as 'Intermediaries'[10]), a pilot scheme with two specialist District Court Judges and the convening of a 'taskforce'.[11]

As is often the case, in a sexual assault case the complainant child is the key witness. An accused that is required to cross-examine a vulnerable witness at a pre-recording hearing is usually, in practical terms, required to 'put' his or her case many months before the prosecution opens its case to a jury and in so doing may disclose the substance of the defence case. On one view, there is nothing unfair about requiring an accused to declare (wholly or partially) his or her 'hand' months before a jury is empanelled as it sits alongside other contemporary examples of mandated defence disclosure.[12]

However, this de-facto defence case disclosure may also present opportunities for the prosecution to further investigate and mould or significantly change its case or respond to any impeachment of the complainant's reliability, in relation to truthfulness or accuracy or both.

2. LEGISLATIVE REGIME FOR SPECIAL HEARINGS

Legislation in Western Australia[13], Victoria[14], South Australia[15], Queensland[16], Tasmania[17], the Northern Territory[18] and the ACT[19] permits, on application, the pre-recording of a vulnerable witness's evidence in chief and cross-examination in the absence of the jury at the 'special hearing', with variations in terminology.[20]

NSW has yet to provide for a post-committal pre-trial regime that permits the pre-recording of the evidence in chief by, and cross-examination of, a vulnerable witness in advance and separate from the jury trial process, as it is normally understood. However, like some other jurisdictions, NSW permits the playing of a recording of a previous

[9] Modelled on the English 'Registered Witness Intermediary Scheme', see s.29 of the *Youth Justice and Criminal Evidence Act 1999* (UK) and http://www.theadvocatesgateway.org/intermediaries.

[10] For example, see '*Getting to Grips with Ground Rules Hearings: a checklist for Judges, Advocates and Intermediaries to promote the fair treatment of vulnerable people in Court',* Criminal Law Review, 2015, Issue 6, p.420

[11] Hansard, Legislative Assembly (NSW), 27 May 2015.

[12] For instance, in NSW the *Criminal Procedure Amendment Act* (mandatory pre-trial defence disclosure) 2013 (NSW) provides for defence disclosure as to nature of the defence, objections to evidence, defence witnesses, specific points of law that the defence intends to raise, service of expert reports, alibi notices, and notice of substantial mental impairment defence; see also s.89A *Evidence Act* (NSW) regarding the drawing of an unfavourable inference for remaining silent.

[13] *Evidence Act* (WA) ss.106I-K ,106RA.

[14] *Criminal Procedure Act* (Vic), ss.198, 370.

[15] *Evidence Act* (SA), ss.13A, 13C.

[16] *Evidence Act* (Qld), ss.21A(2)(e), 21AB-AO.

[17] *Evidence (Children and Special Witnesses) Act* (Tas) ss.6-6A.

[18] *Evidence Act (NT)*, s.21B.

[19] *Evidence (Miscellaneous Provisions) Act* (ACT), ss.40Q-40W.

[20] Western Australia: 'special hearing', S106RA(1) *Evidence Act* (WA); Victoria: 'special hearing', s.370 *Criminal Procedure Act* (Vic); South Australia: 'special arrangements', s.13A *Evidence Act* (SA); Queensland: 'preliminary hearing', s.21AK *Evidence Act* (Qld); Tasmania: 'special hearing', s.61 *Evidence (Children and Special Witnesses) Act* (Tas); Northern Territory: 'special sitting', s.21B *Evidence Act* (NT); ACT: 'pre-trial hearing', s.40Q *Evidence (Miscellaneous Provisions) Act* (ACT). Compare also a 'special measures direction' under the *Youth Justice and Criminal Evidence Act 1999* (UK).

representation (a recorded interview with a vulnerable person) as evidence in the trial.[21]

WA, NSW, Victoria, the Northern Territory and Commonwealth legislation[22] permits the playing of a pre-recorded interview between a vulnerable person and a police officer or other authorised person as part or whole of the evidence in chief of the witness. Being an out-of-court representation, it is admissible as an exception to the hearsay rule. It remains to be seen whether the admission of this hearsay evidence should attract a warning given the account to the interviewer is not contemporaneously tested by cross-examination.[23] The complainant is *eventually* cross-examined at the special hearing or trial but where there is a significant delay between the recorded interview and the cross-examination, a child witness is older, often self-evidently more mature and a different proposition. It will depend on the circumstances.

It cannot be doubted the special hearing procedure has benefits for taking an account from a vulnerable witness and for reducing the likelihood of interruptions of the trial once the jury is empanelled. The pre-recorded interview and special hearing sit with other protective or facilitative provisions that assist in obtaining the best evidence or account from a vulnerable witness.[24] Examples of protective provisions include:

- The power to control of improper questioning.[25] Intellectual and developmental characteristics, such as age and maturity, of the vulnerable witness can be relevant.[26] Use of the term 'unduly' in s.41 of the Uniform Evidence Act (UEA) permits adaption to the characteristics of the witness.
- Remote audio-visual linking or CCTV[27], which is now commonplace.
- Limiting visual contact between the witness and accused.
- The use of support people or communicators[28] and even multiple support people.[29]
- The replaying of a recording of evidence in any subsequent trial.[30]

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[21] ss.306S, 306U *Criminal Procedure Act* (NSW) though the video itself should not become an exhibit: *R v NZ* [2005] NSWCCA 278. In Victoria, s.223 of the *Criminal Procedure Act* (Vic) lists the documents, including transcripts of audio-visual recordings, that may be provided to the jury.

[22] *Evidence Act* (WA) s.106HB (child or person with a mental impairment); *Criminal Procedure Act* (NSW) ss.306M, 306S, 306U (children and cognitively impaired witnesses); *Criminal Procedure Act* (Vic) ss.366–368 (persons under 18 years and cognitively impaired witnesses); *Evidence Act* (NT) ss.21A-21B (a child, a witness who suffers from an intellectual disability, alleged victim of a sexual offence, a witness with a 'special disability'); *Crimes Act* (Cth) s.15YM (re child witnesses, vulnerable adult complainant or 'special witness').

[23] *Mendham and Foster* (1993) 71 A Crim R 382 at 388.

[24] Generally see Henning T, "Obtaining the best evidence from children and witnesses with cognitive impairments – "plus ça change" or prospects new?" (2013) 37 Crim LJ 155.

[25] s.26 *Evidence Act* (WA); ss.22-25 *Evidence Act* (SA); s.21 Evidence Act (Qld); s 15YE Crimes Act 1914 (Cth); ss.41-42 of the Uniform Evidence Acts; *Stack v Western Australia* (2004) 29 WAR 526 at [28] on the discretion to control leading questions; *Libke v The Queen* (2007) 230 CLR 559 at 597-60 per Heydon J. who commented, "Hence the powers given to cross-examiners are given on conditions…." at 598.

[26] Obtaining the best evidence from children and witnesses with cognitive impairments – "plus ça change" or prospects new? (2013) 37 Crim LJ 155.

[27] s.15YI *Crimes Act* (Cth); s.306ZB *Crimes Act* (NSW); s.360 *Criminal Procedure Act* (Vic); s.43 *Evidence (Miscellaneous Provisions)* Act (ACT); s.21C *Evidence Act* (NT); s.21AQ; *Evidence Act* (Qld); s.6B *Evidence (Children and Special Witnesses)* Act (Tas).

[28] For example, in Western Australia, a 'communicator for the child' can be appointed by the court, ss.106E106F *Evidence Act* (WA); or a support person who may also act as an interpreter, s.306ZK(3)(b) *Criminal Procedure Act* (NSW); a person to provide 'emotional support', s.12 *Evidence Act* (SA); an adult to 'accompany' the child, s.15YO *Crimes Act* (Cth); s.40R, s.101 *Evidence (Miscellaneous Provisions) Act* (ACT); a relative or friend to provide 'emotional support', s.21B *Evidence Act* (NT); a 'support person', s.21AV *Evidence Act* (Qld).

[29] s.38E *Evidence (Miscellaneous Provisions) Act* (ACT).

- Warnings to a jury.[31]
- Non-publication orders and closed-court sessions are now commonplace.
- The Court may also make orders for questioning by a nominated person if the accused is not legally represented.[32]
- In the UK, for example, a *special measures* direction under the *Youth Justice and Criminal Evidence Act* 1999 (UK) can relate to screening, AV linked evidence, evidence in private, removal of wigs and gowns, video recorded evidence in chief, pre-recorded cross-examination and re-examination and examination through an 'intermediary' as well as other measures.

The ALRC Family Violence Report listed advantages of pre-recorded testimony:[33]

1. Improving the quality of evidence: citing reasons such as a more contemporaneous and accurate account.[34]
2. Facilitating pre-trial decisions by the prosecution and the defence;
3. Helping with the scheduling and conduct of the trial; and
4. Minimising 'system abuse' of witnesses: citing reasons such as reducing the need to repeat evidence, reduce trauma for victims in giving evidence in court and increase guilty pleas where the evidence given is compelling.[35]

The ALRC also suggested pre-recording may "lessen or eliminate" the need for complainants to give evidence in person at the trial.[36] Experience suggests this is true. Once a pre-recording is completed and no subsequent reason arises for the vulnerable witness to attend the jury component of the trial (such as an application for additional questioning), the vulnerable witness has no need to be anywhere near court; nor for that matter show any interest in the outcome or be concerned the trial is occurring. If the trial aborts there is still no reason for the vulnerable witness to return.

The ALRC listed drawbacks with pre-recorded testimony:[37]

1. It is unfair to require the defence to cross-examine the main prosecution witness before the formal trial has begun;
2. Defence lawyers are concerned that they cannot prepare to cross-examine the most important prosecution witness until shortly before the trial is scheduled;
3. Video technology lacks the immediacy and persuasiveness of a witness' live-in-court testimony;
4. There can be problems with the technology and some jurisdictions or courts within jurisdictions lack adequate AVL facilities.

It is difficult to pinpoint the reason why NSW has declined to adopt the pre-recording procedure in child sexual assault trials though, as noted above, the NSW Government

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[30] s.15YNB *Crimes Act* (Cth); s.306B, s.306I *Criminal Procedure Act* (NSW); s.21E *Evidence Act* (NT); s.106T *Evidence Act* (WA); s.21AM *Evidence Act* (Qld); s.378-381 *Criminal Procedure Act* (Vic); s.43A *Evidence (Miscellaneous Provisions) Act* (ACT).

[31] s.15YNE, s.15YQ *Crimes Act* (Cth); s.s13, 46, 70 *Evidence (Miscellaneous Provisions) Act* (ACT); s.306X, 306ZI *Criminal Procedure Act* (NSW); s.21A(8), 21AW-X *Evidence Act* (Qld); s.13(7), s.13A(12) *Evidence Act* (SA); ss.361, 375, s375A, 382 *Criminal Procedure Act* (Vic); s.106P *Evidence Act* (WA).

[32] for example, s.15YF-YG *Crimes Act* (Cth); s.306ZL *Criminal Procedure Act* (NSW); s.21N-O *Evidence Act* (Qld); s.357 *Criminal Procedure Act* (Vic).

[33] ALRC, Family Violence - A National Legal Response (ALRC Report 114) at [26.168].

[34] Corns, C, "Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models" (2001) 25 Criminal Law Journal 75, 77.

[35] Though in the writer's experience is this later reason is rarely the case.

[36] Family Violence - A National Legal Response (ALRC Report 114) 2010 at [26.154].

[37] ibid at [26.169].

has recently indicated an intention to do so. The ALRC noted that while one advantage of pre-recording evidence is to address the forensic disadvantage caused by delay between the making of the complaint and the trial[38], "one stakeholder" [cited as the NSW Public Defenders and Prosecutors][39] also noted that, where trials are held expeditiously, it may not be as worthwhile to pre-record evidence.

The ALRC noted the NSW DPP then opposed routine pre-recording of evidence citing delay as the reason, asserting that NSW trials proceed "expeditiously".[40] However, there is little evidence to support the assertion that trials in NSW occur in a notably more expeditious manner than other jurisdictions. The ALRC also noted that "[t]he Public Defenders Office NSW doubted whether, in NSW, cross-examination of children in advance would make any positive change to the court experience for child complainants, because all evidence of child sexual assault complainants is given from a remote location via CCTV."[41] In 2002 the Standing Committee on Law and Justice (NSW) supported the pre-recording of the entire testimony of child witnesses.[42] More recently, in evidence to the NSW Parliamentary Joint Select Committee on Sentencing of Child Sexual Assault Offenders, the NSW Director accepted that [pre-recording] is "an idea that is worth considering" as a step in reducing the stress associated with waiting to give evidence.[43]

Nevertheless, it may also be noted that the experience of practitioners in jurisdictions other than NSW suggests that where pre-recording routinely occurs, such as in Western Australia and the Northern Territory, trials usually (if not invariably) commence on the allocated trial date and there is minimal over-listing, adjournment or delay in the commencement of trials. This is primarily because the delicate, difficult and unpredictable evidence (that of the vulnerable witness) has been pre-recorded and, if necessary, edited. It is simply played before the jury. When an adjournment is necessary, there is no inconvenience to the vulnerable witness as the evidence has already been recorded. Similarly, if the commencement of the trial is delayed due to pre-trial applications and pre-trial rulings, the evidence has been pre-recorded. It is difficult to conceive how the 'experience' of the vulnerable witness could not be improved through the use of the pre-recording hearing (where the recording of the vulnerable witness is of primary importance) and is separate from the common and competing trial pressures, such as jury empanelling, openings, marshalling of witnesses; or pre-trial applications or the availability of court and judge.

It may also be noted the replaying of the recorded previous trial evidence of complainants in sexual assault trials in a second or subsequent trial is provided for in a number of jurisdictions and is not limited to child or cognitively impaired witnesses and pre-recordings at a special hearing.[44]

3. PRACTICAL CHALLENGES FOR THE DEFENCE ADVOCATE

[38] ibid at [26.176].
[39] ibid fn 243.
[40] There was no empirical support for this assertion noted by the ALRC.
[41] Op cit para [26.177].
[42] 'Report on Child Sexual Assault Prosecutions', NSW Legislative Council Standing Committee on Law and Justice, 2002, see Ch. 6 'Special Measures'.
[43] NSW Parliamentary Joint Select Committee on Sentencing of Child Sexual Assault Offenders at [5.133], evidence Lloyd Babb SC on 28/4/14.
[44] s.15YNB *Crimes Act* (Cth) – child complainants and vulnerable adult complainants; s.306B, s.306I *Criminal Procedure Act* (NSW) – the complainant in a prescribed sexual offence; s.21E *Evidence Act* (NT) – including the alleged victim of a sexual offence; s.106T *Evidence Act* (WA); s.21A, s.21AM *Evidence Act* (Qld); s.378-381 *Criminal Procedure Act* (Vic); s.43A *Evidence (Miscellaneous Provisions) Act* (ACT).

Although the pre-recorded interview and the evidence taken at the special hearing is later admitted and played as a statutory exception to the hearsay rule, the special hearing (where the pre-recorded interview will be played) should be regarded as the beginning of the trial, even though no jury has been empanelled and will not be for some time.

While stating the obvious, it is essential for defence lawyers to watch the pre-recorded interview before the special hearing. Instructions must be taken and disclosure must be complete, including from third parties by use of subpoena. The Western Australian statutory obligation of disclosure (having abolished committal hearings) has its advantages, not the least because the obligation to disclose under s.42 of the *Criminal Procedure Act* (WA) is also on the 'person' or 'organisation' investigating the offence. That is, the obligation rests with the police or investigative agency and committal for trial occurs once the Court is satisfied there is compliance with disclosure obligations.[45] Only then can an application be made in the superior court for a pre-recording special hearing.

The special hearing can be deceptive in that it *feels* like a committal or proofing session. It can lack the drama of the trial process - the jury empanelling, openings by counsel and swelling of the public gallery – and it is usually completed swiftly. However, it is plainly a critical part of the trial and must be treated with the importance it deserves.

The audio-visual interview with the complainant

A recorded audio-visual interview with a police officer or other authorised person[46] (although never a prosecutor and not contemporaneously supervised by a judicial officer) can and routinely does form a substantial part of the evidence in chief of a vulnerable witness.[47] For the defence advocate there are basic matters to attend to which will assist to make sure the special hearing proceeds as expeditiously as possible[48]:

1. The interview should be watched and the transcript checked. If, as is common with indigenous witnesses whose first language is not English, an interpreter is used, the translation should be checked. Experienced practitioners know that errors are common. This is self-evidently an issue for the accused who must respond to the specifics of the allegations but also an issue of fairness for the vulnerable witness as it would be unfair to cross-examine the witness about a previous assertion based on a translation that is inaccurate. It should be anticipated the jury would, eventually, be provided with a transcript in English as an aide-memoir.

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[45] ss.43-45 *Criminal Procedure Act* (WA).

[46] For suggestions on good practice, see "Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures", Ministry of Justice (UK), updated March 2011.

[47] ss.106HA, 106HB *Evidence Act* (WA); ss.367-368 *Criminal Procedure Act* (Vic); s.21B *Evidence Act* (NT); s.15YM *Crimes Act* (Cth); ss.306M(1), 306S, 306U *Criminal Procedure Act* (NSW).

[48] There being no practice of a 'ground rules' hearing as occurs in the UK, see *R v Barker* [2010] EWCA Crim 4 at [43]; *Criminal Procedure (Amendment) Rules 20*15 (UK); *Criminal Practice Directions* 2014 (UK); *R v Wills* [2011] EWCA Crim 1938 para [22]; http://www.theadvocatesgateway.org regarding 'ground rules hearing'. See also '*Getting to Grips with Ground Rules Hearings: a checklist for Judges, Advocates and Intermediaries to promote the fair treatment of vulnerable people in Court',* Criminal Law Review, 2015, Issue 6, p.420

2. Contact should be made with the prosecutor to ensure the vulnerable witness watches the recorded interview prior to giving a supplementary account in chief at the special hearing or being cross-examined.
3. The court may expect the recorded interview to be played during the special hearing so the vulnerable witness can view it at the same time as the court or there may be an expectation the witness has already, and hopefully recently, viewed the video before the special hearing commences. The former is preferable as:
    a. The questions and answers on the video recording will, as best can be achieved, be fresh in the memory of the witness,
    b. All parties will have seen and heard what the witness has seen and heard, including any gestures or movements of significance and any parts that are difficult to understand.
    c. It may be the first time the accused has seen the video of the questions and answers of the vulnerable witness, as there may be restrictions on the accused having access to a copy of the audio-visual recording.
4. It may be necessary to replay portions of the recorded interview with the vulnerable witness back to the witness during cross-examination regarding a prior statement. This is likely to be less confusing for a child witness than asking a child witness (whose reading skills may or may not be sound) about a specific portion of a possibly lengthy typed transcript that the witness is unlikely to have read.
5. Whether specific parts of the interview are sampled, edited and played from a separate file or can be quickly located through counter references or time stamps will probably depend on the adequacy of court electronic facilities and the skills of court staff. Some jurisdictions and localities have generally more advanced and better-equipped court facilities than others.
6. As just noted, there may be restrictions on an accused having access to the recorded interview with the complainant. This can present as a very real impediment in obtaining meaningful instructions. If possible, a copy of the video interview should be played to the accused prior to the special hearing.
7. If objection is taken to parts of the recorded interview it is preferable to deal with the objections before the special hearing as the version played at the special hearing is the edited version the jury will see and hear.[49] Editing of the recorded interview (referred to as a 'VARE' in Victoria[50]) can be by agreement or following argument. Issues such as severance, tendency and relationship evidence are better dealt with before editing of the recorded interview (and the special hearing) as they may effect what should be edited.
8. The interviewing officer will have explored with the vulnerable witness whether he or she understands the difference between the truth and a lie but the interviewing officer makes no determination as to competency. That is a matter for the Court and defence counsel has little role to play.[51] In Western Australia it has been held the competency inquiry should occur in the presence of the jury as it is relevant to the assessment of the 'weight and credibility' of the evidence,[52] which may suggest the enquiry should remain part of the pre-recorded evidence.

The initial account in the recorded interview is untested by cross-examination and the manner of the interviewer is likely to be sympathetic which may impact on a jury. There

[49] Examples of a specific power to edit: ss.40V(3) *Evidence (Miscellaneous Provisions) Act* (ACT); s.306V(4) *Criminal Procedure Act* (NSW); s.21B(4) *Evidence Act* (NT); s.356(3) *Criminal Procedure Act* 2009 (Vic); s.106HB(5) Evidence Act (WA).
[50] Video Audio Recording of Evidence ('VARE').
[51] *R v RAG* [2006] NSWCCA 343 at [46]; *R v Caine* (1993) 68 A Crim R 233 at 238.
[52] *Lau v R* (1991) 58 A Crim R 390.

may be multiple interviews of the vulnerable witness. The closer in time the interview is conducted to the alleged offences, the less chance for "contamination" of the evidence (or so it is assumed). However the fact that the complainant is interviewed a number of times over a period of time does not, of itself, impact on the admissibility of the interviews in the way later complaint can tend to lack probative value. Rather, each and every recorded interview is admissible (as a statutory exception to the hearsay rule) as a mechanism that facilitates the account of the vulnerable witness.

The initial interview will likely be soon after the initial complaint. Subsequent interviews, either in the following days or weeks or months later, can be to clarify issues or to question about related enquiries. In some cases, the interview may also be very close to the trial.[53]

The pre-recording special hearing

Again, it is important to remember that, in practical terms, the pre-recording is the start of the trial. If, as it commonly is, the pre-recording is of a child complainant in sexual assault proceedings, the vulnerable witness may be the primary witness the prosecution relies on. Cross-examination should be conducted *as if it is before a jury*.

It may be necessary to think carefully about how the defence case is *put* to the witness and what facts or assertions need to be disclosed in cross-examination. It is possible the prosecution will investigate the reliability of assertions raised in cross-examination or seek to bolster the witness's credit. New evidence may emerge; the prosecution has the opportunity to tune or adjust its case.

Basic preparation for the special hearing may include: the testing of the audio-visual link to the remote room; the adequacy and size of the picture of the vulnerable witness[54]; what other persons are present in support in the remote room; how will the support persons identify themselves[55]; the availability of an interpreter if necessary; whether the accused has a video screen available to him or her in the dock to see the witness and to ensure the accused cannot be seen by the witness. Some courts can be poorly equipped with audio-visual facilities with cameras that do not pan. In some cases, it will be necessary for the questioning counsel to move to a specific location in court to be seen by the vulnerable witness which, while not an inconvenience in a special hearing as there is no jury, can prove frustrating during a live CCTV link.

More frequent breaks may be required for a vulnerable witness. If the vulnerable witness requires an unscheduled or toilet break, the witness should know how to make the request without embarrassment.

If the witness is to be questioned about documents or photos is there a separate marked bundle available in the remote room?[56] Will the witness be asked to examine or mark documents such as body diagram or map or asked to draw a picture? If so, how will this be communicated to the court? By being held up to the camera or hand-delivered to the courtroom? It is important to remember that documents or photos that are identified, displayed, marked or tendered are not being done so before the jury. This will be done

[53] *Ferris v R* [2015] NSWCCA 35 although this was in NSW where there is no special hearing procedure.
[54] An example being a white background for an indigenous witness may tend to cause the face of the witness to appear too dark.
[55] Hopefully not, "the *victim* support officer" which is, as practitioners know, is a conclusion rather than function.
[56] *R v C, S* [2011] SADC 194 at [17].

later after the jury is empanelled. It will be necessary to ensure that the tender of documents is methodical and can be reproduced before the jury panel.

There is often delay between the pre-recording hearing and the trial. Continuity of representation is important but not always possible.

The cross-examination of a vulnerable witness is not the topic under consideration but care is always required in questioning a vulnerable witness, such as child. Some suggestions on the framing of questions to children were made by a specially constituted Court of Appeal in *R v Barker* [2010] EWCA Crim 4[57] where the Lord Chief Justice said at [42]:

> The trial process must, of course, and increasingly has, catered for the needs of child witnesses, as indeed it has increasingly catered for the use of adult witnesses whose evidence in former years would not have been heard, by, for example, the now well understood and valuable use of intermediaries. In short, the competency test is not failed because the forensic techniques of the advocate (in particular in relation to cross-examination) or the processes of the court (for example, in relation to the patient expenditure of time) have to be adapted to enable the child to give the best evidence of which he or she is capable. At the same time the right of the defendant to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken in claiming that the defendant behaved indecently towards him or her, it should not be over-problematic for the advocate to formulate short, simple questions which put the essential elements of the defendant's case to the witness, and fully to ventilate before the jury the areas of evidence which bear on the child's credibility. Aspects of evidence which undermine or are believed to undermine the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child and the advocate may have to forego much of the kind of contemporary cross-examination which consists of no more than comment on matters which will be before the jury in any event from different sources. Notwithstanding some of the difficulties, when all is said and done, the witness whose cross-examination is in contemplation is a child, sometimes very young, and it should not take very lengthy cross-examination to demonstrate, when it is the case, that the child may indeed be fabricating, or fantasising, or imagining, or reciting a well rehearsed untruthful script, learned by rote, or simply just suggestible, or contaminated by or in collusion with others to make false allegations, or making assertions in language which is beyond his or her level of comprehension, and therefore likely to be derived from another source. Comment on the evidence, including comment on evidence which may bear adversely on the credibility of the child, should be addressed after the child has finished giving evidence.

There should be structure to the questioning, the questions should be fair and simple[58], and negative or 'tag' questions which typically require a yes/no response with bias towards the 'yes' response can be confusing.[59] Thought might be given to the utility of

[57] Cited with approval in *R v Lubemba* [2014] EWCA Crim 2064.

[58] for example see Henderson E, "All the Proper Protections – the Court of Appeal rewrites the rules for cross examination of vulnerable witnesses" [2014] Crim LR 93; Cossins A, "Cross Examination in child sexual assault trials: evidentiary safeguard or an opportunity to confuse" [2009] Melb Uni Law Review 68; Bowden, Henning, Plater, "Balancing Fairness to victims, society and defendants in cross examination of vulnerable witnesses: an impossible triangulation?" [2014] Melb Uni Law Review 539.

[59] see Mildren, D. "Redressing the imbalance against Aboriginals in the criminal justice system" (1997) 21 Criminal Law Journal 7.

leading questions,[60] noting that what is or is not an impermissible leading question depends on the context.[61] Leading questions that elicit little more than an affirmative answer can lack weight.[62] It may be useful to raise with the presiding Judge how to avoid repetitious questioning where there are multiple and separately represented accused.

The pre-recording is not a 'proofing session'. An accused is entitled to know the case he or she has to answer. Though an indictment need not specify particulars[63] an accused is entitled to know details of the act or words that are the basis of a charge.[64] Particularising the prosecution case can present challenges prior to and in a special hearing. In Western Australia prosecutors have, in the writer's experience, been known to say, "lets see what the situation is at the end of the pre-record".

On one view, this is a misunderstanding of the obligation of the prosecution to provide particulars of the case to be answered. An alternate view is that it is an acknowledgment of the unpredictable way the evidence of a vulnerable witness, such as a child sexual assault complainant, can evolve and it is difficult to expect a prosecutor to conference or 'proof' a vulnerable witness in a detailed way prior to the pre-recording as the very act of proofing may impact on the evidence in uncertain ways.

It may simply be a matter of asking the presiding judge for time to get instructions regarding the supplementary evidence in chief during the special hearing.

One advantage of the pre-recording is that if a jury is discharged for any reason an effective cross-examination is preserved and simply replayed to the new jury. As defence advocates know, cross-examining a complainant (who is prepared, able to anticipate issues and aware of inconsistencies previously identified) a second time is a challenging proposition. Trial counsel can sometimes be faced with the forensic dilemma of having to decide whether to make an application for discharge (for a reason unrelated to the pre-recording) when the cross-examination of the complainant has been effective. A discharge application can more safely be made as the pre-recorded evidence of the complainant can be replayed to the second jury.

<u>The rule in Brown v Dunn and the special hearing</u>

The extent to which an accused is required to 'put' his or her case in a special hearing is not defined but the 'rule in *Brown v Dunn'*[65] is "alive and well" under the Uniform Evidence Act(s)[66]. It applies in criminal trials[67] and if a positive defence case is called –

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[60] *Stack v SOWA* [2004] WASCA 300 at [28] where Murray J said, "In my view, there is no statutory or common law right to cross-examine by asking leading questions. Indeed, on the contrary, it seems to me that, as it was put in *Mooney v James*, a trial judge has the right, in the exercise of discretion, to control the form in which questions may be put in examination-in-chief and in cross-examination: *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 3)* (1990) 20 NSWLR 15, 22-3. The guiding principle will be the performance of the judge's duty to ensure that the trial is conducted in a way which is fair to both prosecution and defence."; cf s.42 of the *UEA*.

[61] *Martin v The Queen* [2013] VSCA 377 at [34]-[40].

[62] *Morgan -v- WA* [2011] WASCA 185 at [109].

[63] *R v Buckett* (1995) 79 A Crim R 302 at 305.

[64] *Johnson v Miller* (1937) 59 CLR 467; *R v S* (1998) 102 A Crim R 418; *Stanton v Abernathy* (1990) 19 NSWLR 656; 48 A Crim R 16 .

[65] (1893) 6 R 67.

[66] *Heaton v Luczka* [1998] NSWCA 104.

[67] *MWJ v The Queen* (2005) 80 ALJR 329; [2005] HCA 74 at [18] – [19], t [38] – [41]; *R v Ferguson* [2009] VSCA 198 at [273]; *R v Arnott* [2009] 214 A Crim R 500 at [105]; *K v WA* [2010] WASCA 157; *Khamis v R* [2010] 203 A Crim R 121 at [36] and to the prosecution, *Smith v R* [2012] VSCA 187 at [49] – [51].

such as an accused's evidence – the rule may be breached by a failure to 'put' or raise an issue.[68]

This rule of 'basic fairness'[69] requires an accused to 'put [the] witness on notice that [their] account will be challenged'[70] though compliance requires "only that the substance of the contrary version is put to the witness, and not every detail of the challenge"[71]. In *MWJ v The Queen*[72] Gummow, Kirby and Callinan JJ said at [38]:

> The rule is essentially that a party is obliged to give appropriate notice to the other party, and any of that person's witnesses, of any imputation that the former intends to make against either of the latter about his or her conduct relevant to the case, or a party's or a witness's credit. [73]

In a practical sense, a common alleged breach is where an accused in his or her evidence describes a significant event that was not raised with a complainant witness. Recalling the witness is possible; so too is exclusion - but as a last resort.[74] However, recall would be undesirable with a vulnerable witness who has long since been recorded and defeat one of the purposes of the pre-recording. An accused may be cross-examined on differences between his evidence and the case put to the complainant vulnerable witness [75] and the drawing of an adverse inference requires particular caution.[76]

This rule of *basic fairness* can require an accused to put his or her case at the special hearing many months before the trial. Intervening events can occur: further investigation; additional evidence or witnesses, third party disclosure or medical records or expert opinion. It is open to the prosecution to consider and adjust its case or strategy. Given this passage of time, fairness may dictate that some latitude is given to an accused in his or her obligation to put the detail of the defence case. [77]

Can the prosecution pick and choose which evidence to replay after the special hearing?

The prosecutor decides whether or not to call a particular witness, not the Court, and the prosecution should not decline to call a witness simply because the witness' account does not support the prosecution theory.[78]

In a special hearing there may be multiple vulnerable witnesses who are pre-recorded, not all of who are complainants. A recorded interview may be played. Each one is

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[68] *R v Ferguson* [2009] VSCA 198 at [273]; *Khamis v R* [2010] NSWCCA 179 at [36]; *KC v The Queen* [2011] 207 A Crim R 241 at [53]; *Buchwald v The Queen* [2011] VSCA 445 at [157] – [161]; *R v Orchard* [2013] NSWCCA 342 at [43]; *Llewellyn v The Queen* [2011] NSWCCA 66.

[69] *Jardein Pty Ltd v Stathakis* [2007] FCAFC 148 at [27]; *Allied Pastoral Holdings Pty Ltd v ATO* [1983] 1 NSWLR 1 per Hunt J.

[70] *Jardein Pty Ltd v Stathakis* at [27].

[71] *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169 at 217 per Goldberg J; *Buchwald v R* [2011] VSCA 445 at [12] per Redlich JA.

[72] (2005) 80 ALJR 329; [2005] HCA 74.

[73] However, Odgers comments that "the formulation in *MWJ* appears too narrow", *Uniform Evidence Law*, 11th ed, [1.2.4440].

[74] s.46 UEA; *Khamis v R* [2010] NSWCCA 179 at [42].

[75] *R v Scott* [2004] NSWCCA 254 at [60]-[62]; *Paterson v R* [2004] WASCA 63; *Oldfield v R* (2006) 163 A Crim R 242; [2006] NSWCCA 219 at [40] – [45]. It has been said that in a criminal trial it should be 'rare', in *Llewellyn v R* [2011] NSWCCA 6 per Garling J though in *Lysle v R* [2012] NSWCCA 20 Hulme J went to some trouble to disagree at [40]-[44] with Garling J.

[76] *R v Manunta* (1989) 54 SASR 17 at 23 per King CJ; *R v Birks* (1990) 19 NSWLR 677 at 691 per Gleeson CJ.

[77] Or perhaps there is, in such as case, no obligation at all: see *R v Liritsis* (2004) 146 A Crim R 547 at [73]-[79] per Kirby J.

[78] *R v Apostilides* (1984) 154 CLR 563.

examined and cross-examined at the special hearing, a video of the evidence is recorded and in time a transcript produced. It may be the case that one or more vulnerable witness contradicts and discredits the complainant vulnerable witness.

It is not open to the prosecutor to later consider which part or which witness the prosecution will rely on. The prosecution should not 'pick and choose' which evidence will be played to the jury. In the Northern Territory it has been held prosecution loses the right to select which witnesses to rely on. That is, the prosecutorial discretion effectively extinguishes.[79]

Issues that surface after the recorded cross-examination at a special hearing

Additional relevant material may be disclosed after the special hearing or may arise due to subsequent investigation. In a conventional trial if the need arises a witness can be recalled. Section 46 of the UEA anticipates the need for this.

As every trial advocate knows, late service of relevant material is not uncommon, even occurring mid-trial. This is notwithstanding the duty to disclose which exists at law[80] and is also in the various DPP guidelines.

If this occurs after the pre-recording has been completed it may be necessary for the vulnerable witness to be questioned further. As best can be achieved the risk of a failure to disclose must be assuaged with adequate preparation and subpoenas.

It may be necessary to apply for the vulnerable witness to attend court for the purposes of giving further evidence and cross-examination. This may be at a supplementary special hearing or at the time the jury is summoned.

For example s.106T(3) *Evidence Act* (WA) provides the vulnerable witness may "attend the court for the purposes of giving further evidence in clarification of the evidence on the visual recording". Section 106K(5) contemplates more than one special hearing.

In Victoria, following a special hearing, further cross-examination or re-examination is possible but requires leave.[81] Leave cannot be granted unless[82]:

> (a) the accused is seeking leave because of becoming aware of a matter of which the accused could not reasonably have been aware at the time of the recording; or
> (b) if the complainant were giving direct testimony in the proceeding, the complainant could be recalled, in the interests of justice, to give further evidence; or
> (c) it is otherwise in the interests of justice to permit the complainant to be cross-examined or re-examined.

In South Australia, the requirements for 'special arrangements' for taking evidence under s.13A(1) of the *Evidence Act* (SA) are cumulative and appear to accommodate a second or supplementary application if circumstances require, such as the disclosure of

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[79] *R v SG* [2011] NTSC 44. Compare *R v Chimirri* [2010] VSCA 57 at [61]; *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563; *R v Kneebone* [1999] NSWCCA 279; (1999) 47 NSWLR 450; *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657 at 674 – 675.
[80] eg *R v Reardon* (2004) 146 A Crim R 475.
[81] s.376 *Criminal Procedure Act* (Vic).
[82] s.376(2) *Criminal Procedure Act* (Vic).

new and significant material.[83] The special arrangements can also be limited in application – for instance, as to cross-examination or re-examination.[84]

In Queensland, s.21AN of the *Evidence Act* (Qld) contemplates either "another preliminary hearing" or requiring the attendance of the vulnerable witness to attend at the trial to give evidence if the court is satisfied it is in the interests of justice.

In the Northern Territory, the court is invested with a discretion[85] to hold a special sitting to conduct 'examination' (defined to include cross examination and re-examination[86]) of a vulnerable witness which should include an application for a further or supplementary special sitting should the need arise.

One way to reduce the risk of issues arising between pre-recording and the trial maybe to conduct the special hearing close to, if not immediately before, the trial, as often occurs in Victoria. This can prove more problematic in circuit sittings and the delay between the pre-recording and the trial will depend on the availability of court resources and the parties. It has the advantage of the (likely) continuity of Judge and counsel and, from the point of view of defence counsel, avoids inheriting the pre-recording conducted by a different counsel, which may or may not have been conducted to the latter counsel's satisfaction. Also avoided is the possible dissatisfaction of the trial Judge with the earlier Judge's pre-trial rulings.

CONCLUSION

It is surprising that NSW has not yet adopted a regime of pre-recording the evidence of vulnerable witnesses. Pre-recording offers tangible benefits to vulnerable witnesses and promotes the reliable commencement of the jury-phase of trials. The practice is commonplace in other jurisdictions in Australia. The explanation may be little more than judicial and professional inertia in NSW and the situation may soon change. Whatever the reason, defence lawyers in NSW should embrace the prospect of a regime that makes the experience of vulnerable witnesses in court less unpleasant and, if the pre-recording procedure is to be adopted in NSW, advocate for a regime that ensures fairness to the accused.

[83] albeit s.13A(6) provides that an 'application' must be made by the party calling the vulnerable witness, that is, the prosecution in almost all cases. It would be open to any party to apply under s.13A(13) to vary an order and, presumably, extend the special arrangements to include a second or supplement recording of evidence if the circumstances require.
[84] s.13A(3) *Evidence Act* (SA).
[85] s.21B(2) *Evidence Act* (NT).
[86] s.21A *Evidence Act* (NT).