

THE SPECIALIST CHILD SEXUAL ASSAULT JURISDICTION

HIS HON JUDGE ROY ELLIS*

In 1993 as a Crown Prosecutor I took my family to Victoria on Vancouver Island, British Columbia, Canada as part of a work exchange between the Office of the Director of Public Prosecutions, New South Wales and the Crown Counsel's Office for British Columbia. It was during this three month exchange that I first experienced an alternative approach to the age-old British system of prosecuting child sexual assault offences.

When I first commenced prosecuting sexual assault cases, the law provided that the evidence of a female had to be corroborated, that is, there had to be evidence independent of the female that established the commission of the offence before a jury could convict. By the time I went to Canada, the law in New South Wales had changed so that the word of a female was sufficient to sustain a conviction, but only after a warning was given that it was dangerous to convict on the uncorroborated evidence of a female complainant.

With this background the reader will no doubt appreciate the significance of my discovery that the Canadians had a working witness assistance scheme and a system for videotaping the first interview between child complainants and the authorities, and of admitting such interviews into evidence.

With some modification, the witness assistance scheme was successfully imported into the New South Wales prosecution system in the mid 1990s by the then Director of Public Prosecutions, Reg Blanch.

The progress of the reform, so far as the use of video interviews with child complainants was concerned, was reasonably sedate with legislative reform delayed until Parliament passed the *Evidence (Children) Act 1997* (NSW) ('ECA'). Part 2 of that Act provided for the recording of out of court statements and Part 3 provided for the admission of such recordings. Part 4 of the Act provided for the use of closed-circuit television ('CCTV') in conjunction with the use of out-of-court recordings.

In November 2002, the Legislative Council Standing Committee on Law and Justice released its *Report on Child Sexual Assault Prosecutions*.¹ The principle recommendation of the Standing Committee Report was that the Attorney-General establish a pilot project to trial a specialist jurisdiction for child sexual

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1 New South Wales, *Report on Child Sexual Assault Prosecutions: Standing Committee on Law and Justice*, Parl Paper No 208 (2002).

assault prosecutions. This recommendation was modelled upon a proposal by Nick Cowdery, Director of Public Prosecutions, for a specialist child sexual assault court.

The Attorney-General subsequently announced the establishment of a specialist child sexual assault jurisdiction to be trialled initially in Sydney West at courts in Parramatta, Penrith and Campbelltown. The pilot commenced at Parramatta in April 2003 and at Penrith and Campbelltown a few months later. The pilot will run until August 2005.

Initially it was agreed that all judicial officers rostered in Sydney West would take part in the pilot to avoid unnecessary disruption to the listing system. Further, the system of listing criminal cases was retained, except that child sexual assault cases were identified at an early stage to ensure that the options available to child witnesses were fully considered.

I was appointed to the District Court Bench in August 2004 and immediately commenced at Parramatta as the pilot scheme judge. The situation, so far as Parramatta is concerned, is that a case management system was implemented to ensure as far as possible that all trials are prepared as early and as well as possible. Close attention is paid to pilot scheme cases, especially to the need for pre-trial rulings on issues that may result in editing of video interviews or disruption of the evidence of the child witness. As the facilities are limited, and to some extent shared by three different court centres, accurate diarising is essential and dependent upon the provision of appropriate information in terms of the option of giving evidence selected by the child complainant and/or other witnesses. Other details, such as the need to ensure that the defence are given adequate opportunity to view all videos well before trial, are finalised during the case management process. At Parramatta the pilot scheme judge usually presides over all pilot scheme trials. However, if the pilot scheme judge is not available it is the policy to allocate judges experienced in child sexual assault trials.

A Joint Interagency Project Team was established in December 2002 and it and a number of sub-committees, covering Practice and Procedure, Education and Assets, have been meeting since that time to develop and oversee the pilot scheme. This Team is comprised of representatives from the Supreme Court, District Court, Local Court, the Attorney-General's Department (Legislative and Policy Division and the Assets Management Division), the Criminal Law Review Division, the Office of the Director of Public Prosecutions, the Judicial Commission, the Department of Community Services, the Department of Health, the Police, the Law Society, the Bar Association, the Legal Aid Commission and others. The trial project is relatively well funded and is in the process of being extended to regional country locations.

The extension of the pilot to the Dubbo region during the 2003–04 Christmas break involved the installation of new technology in both the District and Local Court courtrooms. The existing court-based remote witness suite was retained and an additional upgraded remote witness suite and waiting area were installed in a secure part of the court registry to ensure witnesses are able to avoid contact with the accused at court. A court-based facility was selected over an offsite facility in Dubbo primarily because of security concerns associated with

maintaining an offsite location in a small town. Members of the Attorney-General's Assets Management Division have provided training in the use of the new technology.

Potential problems for country areas such as Dubbo, identified by stakeholders, were:

- the fact that country courts are all serviced by circuit judges leading to a lack of continuity and difficulties in achieving effective case management; and
- the over-listing of child sexual assault matters as back-up cases to remand and death related matters resulting in witnesses being prepared for trial when there is in fact little real prospect of the matter commencing.

So far as the pilot scheme is concerned, its scope is determined by the *ECA*. This effectively means that the scheme is concerned with cases involving a 'personal assault offence' where children under the age of 16 years are witnesses. Personal assault offences are defined by s 3 to include all offences against the person under Part 3 of the *ECA*, stalking and intimidation offences under s 562AB and contraventions of apprehended violence orders under s 561I of the *Crimes Act 1900* (NSW).

The practical impact of the *ECA* is that trained investigators interview child complainants and child witnesses and the video or audio recording of such interviews is admitted into evidence as part of that child's evidence in chief.² In the situation where vision is lost from a video, the audio record is still admissible. A conference must be undertaken with every child witness so that these children understand the available options and have the opportunity, if they so wish, to indicate what option they prefer for the purpose of giving their evidence. Clearly, the wishes of any child need to be considered in light of a number of factors including, but not limited to, the child's age and understanding.³

The video interviews are very important, as the jury is able to see and hear the child witness' first account of their complaint or what it was they claim to have seen and heard. A jury is able to see the child, hear the questions that are asked and the answers that are given and just as importantly the manner in which they are asked and answered. The video allows a jury to better determine such issues as physical, emotional and intellectual maturity. Aspects of demeanour or character, such as whether a child is naive or worldly wise, are more readily apparent. The evidentiary value of any video interview depends upon the quality of the questioning, the quality of the sound and the quality of the visual recording. It often involves very practical considerations such as an interviewer not sitting between the camera and the child (it has happened) and not interviewing in areas with high levels of background noise.

In addition to the use of video recorded interviews, a child can give evidence by means of CCTV.⁴ This is, in fact, the preferred method for the taking of evidence from a child witness, especially when combined with the utilisation of

2 *Evidence (Children) Act 1997* (NSW) pt 3.

3 *Evidence (Children) Act 1997* (NSW) s 10.

4 *Evidence (Children) Act 1997* (NSW) pt 4.

the remote facility. When CCTV was first introduced as an option in child sexual assault prosecutions, a room within the court complex was used. As a consequence of negative feedback about this practice – such as the sharing of waiting areas with the general public, the accused and his family – a child-friendly remote witness facility was established to service the Sydney west courts. It is situated in the western Sydney area and has two evidence rooms and a child-friendly reception area. This means it is possible to have at least two such trials or cases running simultaneously. It is staffed by sheriff's officers and/or registry staff when in use and is well-furnished and appropriately sized.

The procedure is that the child witness is administered the oath (either an oath or a promise to tell the truth) by a court officer in the remote location with their support person sitting nearby and the jury watching via the closed circuit television facility. Evidence is then led from the child regarding their video interview with authorities and the video tendered and played. The child witness watches the video in the remote facility as the jury watches it in court. The jury or court cannot see the child witness during this process.

The quality of the pictures in the court is very good, following the installation of new equipment. There are two 40-inch plasma screens in the court with a 'touch' panel operating facility for both the court officer and judge. Generally speaking, it is very user-friendly, although it is still usual practice to have a trained operator present to sort out any problems that do still arise from time to time. One unique feature of the system is the presence of two screens that allows a head and shoulders view of the child and a long-shot view of the room to be shown simultaneously, thus allowing the judge, jury and legal representatives to know exactly who is present in the room and what is occurring at all times. The system includes a document camera in the courtroom to enable transmission of documents or photographs to the witness to avoid the need to tender such documents physically. A fax machine is available in the courtroom and in the remote witness room so that maps or plans can be forwarded, marked if necessary, and returned. These pieces of equipment operate reasonably well but, nevertheless, have their limits. Accordingly, with appropriate forethought, copy documentation can be provided within the remote witness room before the trial commences. It is part of the case management process to identify when that is necessary.

The Bureau of Crime Statistics and Research is formally evaluating the pilot project with judges and jurors being asked for their comments. After verdict, jurors are asked to complete a survey and it appears that all have, so far, been happy to do so. Representatives of the Bureau were recently permitted to sit in court (including while the court was closed to the public) as part of this evaluation process.

The *ECA* provides for warnings to be given to the jury that they should not draw any inference adverse to the accused or give any greater or lesser weight to the content of the video recorded interview simply because the evidence is led by means of the tendering and playing of the video⁵ or because the evidence is given

5 *Evidence (Children) Act 1997* (NSW) s 14.

from a remote location by means of CCTV.⁶ Juries are told that the procedure has been adopted within the New South Wales court system to facilitate trials involving evidence from children and that no accused should be prejudiced by these new procedures.

Child sexual assault cases, more than any other, stretch to the limit, both legally and emotionally, those who are professionally and personally involved. Clearly, these cases are highly emotionally charged from the point of view of the accused, the complainant and the relatives of both (too often the same relatives). Remaining free of emotional entanglement is not easy for prosecutor and defender alike, but it is essential that cases of this type be conducted with the highest degree of professionalism. The system used in the pilot scheme has proven to be an excellent procedure that, although perhaps not without its faults and detractors, provides a far more equitable system for child complainants or witnesses to give evidence than previously existed. The new procedure lessens the significance of the personal approach of the Crown and defence counsel. Further, it provides a jury with a greater and better opportunity to evaluate the honesty and accuracy of the evidence of children. Used properly and with appropriate warnings, no prejudice flows to an accused and it is transparently fairer to child witnesses.

6 *Evidence (Children) Act 1997* (NSW) s 25.