

CHANGING THE WAY VULNERABLE WITNESSES GIVE EVIDENCE

WHAT'S THE ISSUE?

The Royal Commission into Institutional Responses to Child Sexual Abuse made a number of recommendations to ensure that all people are able to participate in the criminal justice system fairly. The recommendations about evidence, and the trial process, are based on the premise that procedures should be adjusted to recognise and respond to the vulnerabilities of children, survivors, and others who are involved in a court response to sexual abuse.

These changes will have an impact on the way people who are accused of sexual offences defend themselves in court, and that impact will largely be to constrain and manage some of the avenues that have traditionally been open to test evidence and cross-examine witnesses.

The Royal Commission's work is aimed at creating a justice system that ensures the vulnerabilities that survivors, children, and others do not become an avenue for further trauma, or a barrier to achieving a just court outcome.

EXTENDING THE USE OF PRE-RECORDED EVIDENCE

Pre-trial hearings are a special measure that are available to all child witnesses (including complainants) in sexual offence proceedings. These child witnesses can have their evidence pre-recorded at a pre-trial hearing and then played at the trial.

The Royal Commission found that prerecording a witness's evidence is likely to have clear benefits such as obtaining evidence earlier, avoiding stressful delays for vulnerable witnesses, and being able to use the evidence again in any retrials without re-traumatising the witness. For that reason, the Royal Commission proposed that those survivors should be eligible for a pre-trial hearing.

The advantages that exist for the child prerecording their evidence may be missed if other witnesses are not able to also prerecord evidence. Carers and family members are told not to discuss the abuse with their child until the court proceedings are finished, to ensure that there is no contamination of the evidence. However, this means that the discussion of the abuse, which may be essential to the child's recovery, currently cannot take place until after the child's parents have given evidence at the trial.

GROUND RULES HEARINGS

A ground rules hearing is a pre-trial proceeding where rules for questioning vulnerable witnesses are established. Examples can include rules about the way questions are asked, what sorts of things need to be put to a witness, and whether breaks or other support measures are necessary for the witness. This is fundamentally about ensuring that the Court process is sensitive to the vulnerabilities of people giving testimony in a sexual offence case. Ground rules provide for a less stressful experience for the witness, and may narrow the issues to be taken by the parties, thus improving the efficiency of the trial.¹

The Royal Commission recommended that state and territory governments, in conjunction with courts administration, should ensure that ground rules hearings are held in order to discuss how prosecution witnesses will be questioned.² This should occur at a pre-trial stage in proceedings.

There are significant implications in changes to trial proceedings for the rights of people to mount a defence against sexual offence charges, and it is important to recognise that people accused can also be vulnerable. One suggestion put to the Royal Commission was that ground rules hearings be available in relation to the questioning of a vulnerable accused.³ The principle behind the ACT's consideration of these changes will be to ensure that the Court process is focused on a fair and truthful outcome, and that necessarily requires measures to ensure that a defence can be heard.

¹ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 99.

² Recommendation 60, Royal Commission, *Criminal Justice Report*.

³ Victoria Legal Aid, *Submission to the Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation paper: Criminal justice, 2016*, p 10.

WHAT'S THE CURRENT LAW IN THE ACT?

To reduce trauma and to capture quality evidence for the court, the ACT has a broad range of 'special measures' to support victims and witnesses. Pre-recorded evidence can be used in sexual offence, domestic and family violence cases and the ACT has been a leader in that respect. The foundations of using pre-recorded evidence were introduced in the ACT in 2008.

Another example of support for vulnerable people is the ACT's system of permitting all complainants of sexual offences and children to give evidence from a remote room, to have the police interview played as the evidence instead of having to give evidence again, and to have a support person with them in the remote room or in court.

Adopting the Royal Commission's recommendations about pre-trial procedures would take the ACT further in terms of protections for vulnerable witnesses, and it would place further restrictions on the way criminal defences are conducted.

WHAT'S THE POSITION IN OTHER JURISDICTIONS?

The special measures available in other jurisdictions vary, and are under development. The Royal Commission looked closely at models in England and Wales, and there are evaluations underway across Australia that will offer an evidence base for future reforms. New South Wales, for example, is conducting a child sex offence pilot program that tests many procedures considered by the Royal Commission, including "ground rules" hearings. The Child Sexual Offence Evidence Pilot in NSW began in 2016 for a 3 year term, and while still underway, submissions to the Royal Commission about its beneficial impact on children in the court process show promise for broader adoption. Further detail can be found in the fact sheet on Intermediaries.

WHAT THE ROYAL COMMISSION RECOMMENDS

The Royal Commission recommends that the availability of pre-trial hearings should be extended to adult victims of historic child sexual abuse and to other witnesses as the prosecution considers necessary, such as family members⁴.

The Royal Commission also recommends that where the prerecording of cross-examination is used, it should be accompanied by ground rules hearings to maximise the benefits of such a procedure.⁵

WHAT THE ACT GOVERNMENT NEEDS TO CONSIDER

Should the ACT introduce new legislation on pre-trial hearings and evidence, as part of an effort to strengthen protections for vulnerable witnesses and others in the criminal justice system?

How should the Royal Commission's evidence about vulnerable people be extended to vulnerable people who are accused of a crime?

⁴ Royal Commission, *Criminal Justice Report, Parts VII - X and Appendices (2017)* 90. .

⁵ Recommendation 54, Royal Commission, *Criminal Justice Report*.

SEND US YOUR FEEDBACK

Help the ACT Government consider the questions above by sending your feedback to:

▷ Email: JACSLPP@act.gov.au (with the subject “**Criminal justice reform**”)

▷ Post:

Child sexual abuse reform options – Submissions

Legislation, Policy & Programs

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Submissions must be received by close of business on **27 April 2018**. All submissions and comments will be treated as public, and may be published, unless the author indicates that it is to be treated as confidential. All requests for the submission to be treated confidentially will be respected and dealt with in accordance with any applicable laws, including freedom of information legislation.



**Justice and Community
Safety Directorate**

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