

**SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
PRACTICE DIRECTION NO. 1 OF 2009**

**ARRANGEMENTS FOR WITNESSES AND THE TAKING OF EVIDENCE UNDER
THE *EVIDENCE (MISCELLANEOUS PROVISIONS) ACT 1991***

This Practice Direction sets out the procedures that are to be followed in certain criminal trial proceedings in the Supreme Court of the ACT in relation to arrangements for witnesses and the taking of evidence. This Practice Direction takes effect immediately.

1. Application

- 1.1. This Practice Direction applies to criminal proceedings in the ACT Supreme Court. The purpose of this Practice Direction is to ensure that any special arrangements for witnesses that arise under the provisions of Parts 2, 4 and 4A of the *Evidence (Miscellaneous Provisions) Act 1991* (the Act) are identified at an early stage in the proceedings to ensure compliance with the Act and to ensure appropriate court facilities are available.
- 1.2. The Act provides for the following special arrangements in relation to particular categories of witnesses:
 - (a) evidence of prosecution witnesses who are children or intellectually impaired (and some other witnesses) will be given and recorded at a pre-trial hearing in sexual offence proceedings: Division 4.2B
 - (b) audiovisual (AV) recordings of police interviews of child witnesses and intellectually impaired witnesses may be admissible as evidence in sexual and violent offence proceedings: Division 4.2A
 - (c) evidence can be given from places other than the courtroom: Part 2 (children) and Division 4.3 (other witnesses)
 - (d) the accused may be screened from certain witnesses in court: section 38C
 - (e) a self represented accused will not be permitted to cross-examine complainants and certain other prosecution witnesses in certain proceedings: section 38D
 - (f) certain witnesses may have a support person in court: sections 38E, 101
 - (g) some evidence may be given in closed court: sections 39, 102.

2. Special arrangements for witnesses

- 2.1. Where any of the arrangements mentioned in 1.2 may apply, the Director of Public Prosecutions (DPP) will file and serve on the defence a ***Special Arrangements for Witnesses*** form. This form will be filed and served with the

draft indictment and other documents required to be filed and served under rr 4733 and 4734 of the *Court Procedures Rules 2006* in accordance with the time table set by the Court at first directions. In this form, the DPP will identify each witness for which a special arrangement is required or sought, and the relevant special arrangement(s). This form will indicate for each witness listed the following information:

- (a) the type of proceeding, i.e. sexual offence, serious violent offence, less serious violent offence, or other offence
- (b) if the witness is a child, the date of birth
- (c) whether the witness is the complainant or other prosecution witness
- (d) whether the witness is a *relevant person* in relation to the accused as defined in section 38B of the Act
- (e) whether the witness is intellectually impaired, has a disability or is otherwise entitled under the Act
- (f) whether a court order is required and the sections of the Act under which the order will be sought.

2.2. A court order is required in respect of certain witnesses before they are entitled to the various special arrangements under the Act under ss. 38C(1)(c)(ii), 38D(1)(c)(ii), 38E(1)(c)(ii), 39(1)(c)(ii), 40P(1)(c), 42(1)(c)(ii) of the Act. Where a court order is required, this will be indicated on the *Special Arrangements for Witnesses* form.

2.3. The *Special Arrangements for Witnesses* form and the draft indictment and the other documents may be emailed to the Supreme Court to SCRegistry@act.gov.au.

Defence response to Special Arrangements for Witnesses form

2.4. The defence will be required to indicate on the *Special Arrangements for Witnesses* form if there is any objection to any of the special arrangements sought, and if so, the reasons for such objection and file and serve on the DPP, the form with their answers to the Pre Trial Questionnaire, in accordance with the time table set by the Supreme Court at first directions. This document may also be emailed to the Court at SCRegistry@act.gov.au.

Police interview as evidence-in-chief - section 40G Notice to be served by DPP

2.5. If the DPP intend to tender an AV recording of a police interview as evidence in chief in a sexual offence or violent offence proceeding pursuant to Division 4.2A of the Act the DPP will, in addition to indicating this on the *Special Arrangements for Witnesses* form, serve on the defence a Notice under s.40G

of the Act. This will be served at the same time as the *Special Arrangements for Witnesses* form.

Access to AV recordings of police evidence interviews

2.6. Where the defence has received a Notice under s.40G from the DPP advising that the DPP intends to tender an AV recording of a police interview with a prosecution witness as evidence and the defence wish to have access to the AV recording, the defence must give a Notice pursuant to s.40H of the Act requiring access to the AV recording, to the responsible person named in the s.40G notice.

2.7. The Australian Federal Police require 3 days minimum notice to arrange a viewing.

At the Directions Hearing

2.8. At the directions hearing before the Registrar following the filing of documents referred to in paras 2.1 and 2.4 above (the Directions Hearing), the DPP will ensure that the court file contains the completed *Special Arrangements for Witnesses* form. The defence will bring to the Court's attention any matter to which they object in relation to any of the special arrangements.

2.9. The Registrar will note any special arrangements that are required. Where an order of the court is required, (see para 2.2) or there is a factual dispute that will affect whether the special arrangements under the Act will apply, the Registrar will list the matter before a Judge.

3. Orders for editing AV recordings of police interviews – Division 4.2A

3.1. At the Directions Hearing, the DPP and defence will indicate if it is proposed to seek an order under s.40E(3)(b) of the Act that the AV recording of the police interview be edited.

3.2. If the DPP and defence agree to the proposed editing, the parties will provide the Registrar with a copy of the transcript of the AV recording indicating the agreed proposed editing for which an order is sought, marked on the transcript. This marking is to be done in such a way as to permit the court to read the parts of the transcript sought to be deleted. The Registrar will then list the matter for directions before a Judge for the order to be made.

3.3. If the DPP and defence are not in agreement, the party seeking the editing must file an application under Pt 6.2 and Div 4.3.5 of the Rules, attaching a copy of

the transcript showing the edits that the party submits should be made. The Registrar will list the matter before a Judge for the hearing of the application.

- 3.4. The DPP are responsible for organising the editing of AV recordings of police interviews.

4. Pre trial hearings – Division 4.2B

Child witnesses and intellectually impaired witnesses

- 4.1. In sexual offence proceedings, evidence of prosecution witnesses who are children or intellectually impaired (as defined at s.40P of the Act) is to be taken at a Pre Trial Hearing by audiovisual link (CCTV) pursuant to the provisions of Division 4.2B.
- 4.2. Where there is no dispute about the applicability of the Pre Trial Hearing procedure, the Registrar will give the matter a Pre Trial Hearing date.
- 4.3. Where there is a dispute, this will have to be resolved first. The Registrar will make directions for the filing and service of the application under Pt 6.2 and Div 4.3.5 of the Rules, and list the matter for the hearing of the application. If an order is made, then the matter will be referred to the Registrar for directions at which a pre trial hearing date will be given.

Complainants who are likely to suffer trauma, be intimidated or distressed

- 4.4. Where DPP seeks a court order under s.40P(1)(c) of the Act that the complainant in a sexual offence proceeding is a person who must give evidence as soon as practicable because they are likely to suffer severe emotional trauma, or be intimidated or distressed, the DPP must indicate this on the *Special Arrangements for Witnesses* form.
- 4.5. The defence are to indicate in the *Special Arrangements for Witnesses* form lodged prior to the Directions Hearing whether the defence oppose the order being made.
- 4.6. The Registrar will make directions for the filing of documents and set the matter down for consideration by the Court. Where the application is not opposed by defence, DPP will still be required to file and serve evidence to enable the Court to give the required consideration.
- 4.7. This procedure will be followed for other similar type applications under ss. 38C(1)(c)(ii), 38D(1)(c)(ii), 38E(1)(c)(ii), 39(1)(c)(ii) and 42(1)(c)(ii) of the Act.

Editing of Pre Trial Hearing recordings

- 4.8 The recording of evidence taken at a pre trial hearing will be held by the Court.
- 4.9 Editing of the AV recording of a witness' evidence given at a pre trial hearing will only be done in accordance with a Court order.
- 4.10 The associate to the Judge conducting the pre trial hearing will order the transcript of the pre trial hearing and send a copy of the transcript to each of the parties within 14 days following the pre trial hearing.
- 4.11 At the Directions Hearing, when the Registrar gives a matter a pre trial hearing date, the Registrar will also list the matter for a directions hearing before a Judge approximately 6 weeks prior to the commencement of the criminal central listing period into which the matter will likely be listed for trial.
- 4.12 At the directions hearing before the Judge, the DPP and defence will indicate if it is proposed to seek an order that the AV recording of a witness' evidence given at a pre trial hearing be edited.
- 4.13 If the DPP and defence agree to the proposed editing, the parties will provide the Judge with a copy of the transcript of the evidence taken at the pre trial hearing, indicating the agreed proposed editing for which an order is sought, marked on the transcript. This marking is to be done in such a way as to permit the court to read the parts of the transcript sought to be deleted. The Judge will then consider making the order sought.
- 4.14 If the DPP and the defence are not in agreement, the party seeking the editing must file an application under Pt 6.2 and Div 4.3.5 of the Rules, attaching a copy of that part of the transcript showing the edits that the party submits should be made. The Judge may make directions for the filing of the application and list the matter for the hearing of the application, or may refer the matter to the Registrar for the listing of the application. The application should be filed and heard with sufficient time for the editing to be completed prior to the commencement of the next criminal central listing period.
- 4.15 Counsel for all parties are required to attend at the directions hearing before the Judge unless an agreement has been reached between the parties.
- 4.16 The court will edit pre trial hearing recordings pursuant to the orders.

5. Evidence by audiovisual link (CCTV) – Division 4.3

Giving evidence by audiovisual link (CCTV) ss.42, 43

- 5.1 The evidence of a complainant or similar act witness must be given by CCTV unless the Court otherwise orders where the proceedings are:
- (a) sexual offence proceedings (s.41(2)) or
 - (b) serious violent offence proceedings (s.37) or
 - (c) less serious violent offence proceedings (s.37) if the witness is a relevant person (s.38B) or the Court considers that the witness has a disability that affects the witness' ability to give evidence.
- 5.2 When a matter is a sexual offence proceeding or serious violent offence proceeding, or a less serious violent offence and there is no dispute that the witness is a "relevant person", the DPP will advise the Court of the requirement for CCTV facilities at the trial at the time of allocating an available trial date.
- 5.3 When a matter is a less serious violent offence and the Court needs to consider whether the witness is a "relevant person" or whether the witness has a disability that affects the witness' ability to give evidence, then the Registrar will set the matter down as soon as possible before a Judge.

Recording evidence given by audiovisual link (CCTV) in sexual offence proceedings s.43A

- 5.4 If a complainant or similar act witness gives evidence in a proceeding by CCTV under section 43, and the proceeding is a sexual offence proceeding, the evidence given by CCTV must be recorded as an audiovisual recording.
- 5.5 If the evidence is to be played at a retrial, any orders for the editing of the recording can only be made by the Court and paragraphs 4.9 – 4.16 apply in relation to the process to be adopted if any edits are sought.

By direction of the Judges

Annie Glover
Registrar
ACT Supreme Court

13 March 2015

Amendment history

13 March 2015: This Practice Direction replaces the previous version of PD 1 of 2009 that was issued on 9 June 2009