



Victorian Aboriginal Legal Service Co-operative Ltd.

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Mr Greg Byrne
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Re: Remaking of the Evidence (Recorded Evidence) Regulations 1994

The Victorian Aboriginal Legal Service (VALS) welcomes the opportunity to comment on the effectiveness of the Evidence (Recorded Evidence) Regulations 1994 in relation to the use of recorded evidence-in-chief of children and people with a mental impairment.

VALS is aware of the following issues with the use of recorded evidence:

1a) VALS Concern:

VALS welcomes the fact that recorded evidence, used during the examination in chief stage of a Court case, minimises the trauma of testifying. Given the history of Australia, and Indigenous Australian's negative experience of the law, reducing the formality and threat of the judicial system is positive. However, VALS is concerned that the goal of reducing the trauma associated with testifying is only partly met, because the giver of recorded evidence in chief must be available for cross-examination at a later stage.¹

According to Eileen Vizard, a child psychiatrist: '...there is not the slightest chance of a traumatised sexually abused child surviving cross-examination by an experienced barrister'.² A Canadian Supreme Court judge commented in a slightly different context that: "where trauma to the child is at issue, there would be little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination' (R v Khan (1990) 59 CCC (3d) 92,105, McLachlin J).³

¹ Flin Rhona H, 'Hearing and Testing children's Evidence' as in Goodman G S, Bottoms Bette L (eds), *Child Victims, Child witnesses: understanding and improving testimony*, The Guifford Press, New York (1993), 290, 291

² Flin Rhona H, 'Hearing and Testing children's Evidence' as in Goodman G S, Bottoms Bette L (eds), *Child Victims, Child witnesses: understanding and improving testimony*, The Guifford Press, New York (1993), 290, 291

³ Palmer, Andrew, (1997) 23 Monash Law Review 171, 197

1b) VALS Suggestion:

VALS notes the Government proposal to implement legislation consistent with the Commonwealth and NSW Evidence Acts (both 1995) and adapted to the needs of Victorian Courts. VALS welcomes this proposal, as such legislation is arguably progressive.

VALS notes that the Evidence Act (NSW) 1995 is under review of the NSW Law Reform Commission (report no later than 5 December 2005). VALS encourages the Government to consider the outcomes of the report in deciding to alter Victorian legislation/regulation. VALS notes that the Evaluation Report of the NSW Specialist Child Sexual Assault Jurisdiction Pilot will be released in May 2005 (Attorney General, Criminal Law Review Division, Bureau of Crime Statistics and Research). The legislation relating to the pilot is the Evidence (Children) Act NSW 1997 and the Victorian Government should also consider such legislation.

VALS also encourages the Government to refer to the website of the Australian Institute of Judicial Administration Incorporated (www.aija.org.au) which contains papers presented at the 'Child Witnesses – Best Practice For Courts' Conference (30 July 2004).

VALS notes that there are other jurisdictions in Australia that the Victorian Government should take into consideration because they go further than NSW legislation (ie Western Australia, Queensland)⁴. In Western Australia, examination in chief, cross-examination, re-examination occurs early in the Court process with the assistance of a 'communicator' or 'intermediary'.⁵ VALS argues that the intermediary should be independent of the case (ie officer of the court). In Western Australia, is it common for children not to step foot in a court room (ie: remote witness room).

2a) VALS Concern:

The standard (ie: image, sound etc) of video/audio recordings is not consistent, which is a technological, training and funding issue.

2b) VALS Suggestion

The Regulations should speak to the standard expected of the video/audio recording.

3a) VALS Concern:

Recorded evidence that is available is not utilised enough, as some recorded evidence is not introduced in the Court room.

3b) VALS Suggestion

VALS argues that the use of special measures in relation to the evidence of children/people with a mental impairment (ie: recorded evidence, support person) should become standard practice or the norm. VALS agrees with recommendation 43 of the Legislative Standing Committee on Law and Justice, 'Report on Child Sexual Assault

⁴ *Evidence (Protection of Children) Amendment Act 2003 QLD*

⁵ Palmer, Andrew, (1997) 23 Monash Law Review 171, 198

Prosecutions', Parliamentary Paper Number 208, November 2002: presumption that a child witness will have his or her entire evidence pre-recorded (not implemented in NSW).⁶ There should be a presumption in favour of the use of recorded evidence, as opposed to considering recording of evidence a mandatory requirement.

Recorded evidence may not be utilized because it is not effective as testimony in a Court room. VALS agrees with the argument of Palmer that in light of the advantages of recorded evidence (ie: less stressful environment, story captured while the events are still fresh in memory) the reduced impact of recorded evidence on jury/judge is a "trade-off worth making".⁷

Thank you for considering the comments of VALS in relation to the remaking of the Evidence (Recorded Evidence) Regulations 1994. If you have any questions, please do not hesitate to contact VALS.

Yours Sincerely,

Greta Jubb

Research Officer

⁶ Nicholas Cowdery AM QC, 'Pre-Recording Of Evidence The Practising Profession's Perspective' presented at Australian Institute of Judicial Administration: Child Witnesses – Best Practice For Courts 30 July 2004 as at <http://www.aija.org.au/child/Cowdery.rtf>

⁷ Palmer, Andrew, (1997) 23 Monash Law Review 171, 188