EXPERT EVIDENCE, SELF-REPRESENTED LITIGANTS AND THE EVIDENCE OF CHILDREN

Address to Queensland Industrial Relations Commission

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(Prepared by Justice Wilson and Sarah Keenan, her Associate)

Introduction

What do non-legal experts, lay people and children have in common? They are all strangers to law courts, commissions and tribunals. When non-lawyers walk into a courtroom for the first time, it can be an intimidating and often stressful experience. There is etiquette to be obeyed, different language to be used, a style of dress to be observed, and an atmosphere of respect and solemnity that many lay people may never have experienced before. It is, understandably, enough to make anyone feel uncertain. And those of us who constitute the law courts, commissions and tribunals are not necessarily as adept as we should be in dealing with non-lawyers. Judges, commissioners and tribunal members are appointed precisely because they are experts in the relevant legal or quasi-legal field. The etiquette, language, dress and atmosphere so foreign to non-lawyers become normal for those of us who work there every day, and complex rules of evidence and procedure have

traditionally added to the difficulties faced by non-lawyers in their attempts to be heard by the courts, and by the courts in their attempts to ensure a fair trial where non-lawyers are involved. In our common law adversarial system, the goal is not, as it is in the civil inquisitorial system, to find the ever-elusive truth, but rather to adjudicate on facts and law presented by opposing parties, and to ensure fairness to both sides and an outcome according to law. The system assumes that opposing parties are equally competently represented, and courts are not well-equipped to deal with cases presented by people who are not trained lawyers.

However, as we progress further into the 21st century, both the diversity of people coming into contact with the courts, and the diversity of evidence being presented by those people, are increasing. New and increasingly complex fields of expertise are constantly arising as technology continues to develop in extensive areas; increased access to the internet and the strong presence of the courtroom as a setting in popular culture mean that lay people are at least superficially more familiar with courtroom practices than before. As society changes, so too must the court system.

Today I will be exploring the three areas of expert evidence, self-represented litigants and evidence from children, looking at trends and responses in each, and suggesting ways forward, so that courts, commissions and tribunals can continue to ensure that parties receive both a fair adjudication and a just outcome.

Forgive me if I seem to concentrate on experiences in the courts rather than the Commission. That is where my experience lies, and I hope that you will find what I say applicable also to your work.

Expert Evidence

Expanding fields of expertise

Looking first at expert evidence, Freckleton and Selby, in their text on the subject,[1] have described the rules that control the admissibility of expert opinion evidence at common law as follows:

- **the field of expertise rule**: that the claimed knowledge or expertise should be recognised as credible by others capable of evaluating its theoretical and experiential foundations;
- **the expertise rule**: that the witness should have sufficient knowledge and experience to entitle him or her to be held out as an expert who can assist the court;
- **the common knowledge rule**: that the information sought to be elicited from the expert should be something upon which the court needs the help of a third party, as opposed to relying upon its general knowledge and common sense;
- **the ultimate issue rule**: that the expert's contribution should not have the effect of supplanting the function of the court in deciding the issue before it; and

[1] Ian Freckleton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Pyrmont: Lawbook, 2002).

- **the basis rule**: that the admissibility of expert opinion evidence depends on proper disclosure and evidence of the factual basis of the opinion.

With new areas of expert knowledge emerging at a rapid rate, there has been concern expressed over the possible need to enact additional statutory criteria dealing with permissible fields of expertise. The leading case on the issue is *HG v The Queen*[2], in which Justice Gaudron referred to the need, at common law, for the expert's knowledge or experience to be in an area "sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience". The recent case of *Chiropractors Association of Australia (South Australia) Ltd v WorkCover Corp of South Australia*[3] illustrates the issue. Chiropractors sought recognition as recognised medical experts under the *Workers Rehabilitation and Compensation Act* 1986 (SA). The Full Court of the South Australian Supreme Court considered that WorkCover was entitled to go further than matters referred to in the statutory definition of 'recognised medical expert', and that it was inappropriate to specify or map out the precise scope of a statutory discretion. The Australian Law Reform Commission came to a similar conclusion in its recent Review of the Uniform Evidence Acts, concluding that to attempt to enact criteria for permissible fields of expertise may simply introduce new uncertainties.

Perceived bias, communication and cost

[2] (1999)197 CLR 414.
[3] (1999) 75 SASR 374.

Traditionally, the greatest concern among judges in relation to expert evidence is a tendency on the part of expert witnesses to lack objectivity. An expert hired by a particular party to the litigation is potentially susceptible to leaning towards a view which favours the party who has paid for his or her services, and with whom he or she has had personal contact, instead of giving a completely independent opinion.

Judges have also been concerned about the comprehensibility of expert evidence; a report on "Australian Judicial Perspectives on Expert Evidence", prepared for the Australian Institute of Judicial Administration in 1999[4], found strong support amongst judges for training for expert witnesses, to assist them to communicate their views better and to fulfil their role as forensic witnesses more professionally, as well as for lawyers to discharge their roles as examiners and cross-examiners more effectively. At the same time, there was also a call from expert witnesses for guidelines from the courts as to how they might best perform their role.

Under the *Supreme Court of Queensland Act* 1991, there is a Rules Committee, consisting of members of each level of the State judiciary. Its meetings are attended also by the Principal Registrar and a representative of the Justice and Attorney-General's Department. It has recently focussed on the increasing use of expert evidence and the problems associated with it. The Rules Committee attempted to address the concerns of bias, communication and cost by the introduction of Chapter 11 Part 5 of the

[4] Ian Freckelton, Prasuna Reddy and Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (Melbourne: Australian Institute of Judicial Administration, 1999).

Uniform Civil Procedure Rules, which commenced in July 2004. As the Chief Justice explained in his speech to the Personal Injury Queensland conference earlier this year, Part 5 established three directions:

1. declaring the obligation of an expert witness;
2. encouraging the appointment of a sole expert, by agreement or court order; and
3. contemplating the appointment of an intended sole expert before litigation is commenced.

These directions are clearly in line with explicit purpose of the Rules, as set out in rule 423:

> (a) to declare the duty of an expert witness in relation to the court and the parties; and
>
> (b) to ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue in a proceeding by a single expert agreed to by the parties or appointed by the court; and
>
> (c) to avoid unnecessary costs associated with the parties retaining different experts; and
>
> (d) to allow, if necessary to ensure a fair trial of a proceeding, for more than 1 expert to give evidence on an issue in the proceeding.

The rules are designed to enhance the credibility of expert evidence and overcome the suspicion that expert witnesses are influenced both psychologically and financially by the parties who hire them (or their lawyers), and to minimise the expense involved in using expert witnesses.

Rule 426 makes it clear that the duty of an expert witness is to assist the court, and that that duty overrides any obligation the expert may have to any party to the proceedings or to any person who is liable for his or her fee or expenses. While the Rules do not provide for a specific sanction for breach of that duty, the court is likely to criticise an expert witness lacking objectivity, and, of course, Court criticism is a very real and unwelcome chastisement for experts in any field, especially those who may have hoped to give expert evidence in other cases. Further, an expert witness must confirm understanding of his or her duty to the court, and compliance with it, in his or her written report (r428(3)). By ensuring that witnesses are forced to reflect on their ultimate duty to the court, it is hoped that the new rules will assuage the historic judicial suspicion of biased expert witnesses.

Not only do the new rules provide for expert witnesses to affirm their ultimate duty to the Court, but they also allow for an expert to be appointed jointly by the parties, or by the Court (under r429G) – again affirming the importance of an expert's impartiality. Should the court appoint an expert, it must have regard to the complexity of the issue, the impact on costs, issues of expedition or delay, and the interests of justice generally (s429K(1)). The court appointed expert furnishes the report to the Registrar, who passes on copies to the parties (s429L).

Another problem commonly associated with expert witnesses is that they are often asked to provide an opinion without any clear indication of the facts of the case. Documents provided to the expert when the report is commissioned

by a party are inevitably somewhat one-eyed and the expert does not know what conflicting facts the Court will eventually hear. The new rules deal with this problem in two ways:

(i) by requiring the expert to set out in his or her report a statement of all material facts, whether written or oral, on which the report is based; and

(ii) in the case of a jointly appointed expert, by requiring the parties to agree in writing on the issue to be put to the expert and to provide the expert with an agreed statement of facts on which to base the report. If the parties do not agree on a statement of facts, then, unless the Court directs otherwise, each of them must give the expert a statement of facts, and the Court may give directions about the form and content of the statement of facts. An expert faced with competing versions of the facts should set out both versions, and express an opinion on each scenario. If the competing versions turn on credibility, the expert should not try to choose between them, although there may be cases where the expert can use his or her expertise and experience to express an opinion on which sequence of events is the more likely – for example, the lead up to an explosion or its sequelae.

At any stage of a proceeding the Court may direct the expert witnesses to meet to identify matters of agreement and matters of disagreement, and to attempt to resolve matters of disagreement. The advantages of the experts' meeting are obvious – speedy and cost effective resolution of issues, if not of the proceeding as a whole; the identification and narrowing of remaining issues; binding the experts to their positions; and reducing if not avoiding the need for the experts to attend the trial to be examined orally. An agenda for

the meeting is vital, and if the parties cannot agree on it, the Court can set the agenda. It should be resolved in advance whether the parties and their legal representatives will also attend the meeting. Having the parties present may be helpful for clarifying facts, but may also lead to the meeting being bogged down in argument between the parties. If legal representatives are present, they should not be allowed to intervene except to answer questions put to them by the experts or to advise the experts on the law. Sometimes the complexity of the issues to be discussed by the experts, the nature of their difference and how much is at stake in the case may warrant the appointment of an independent person to chair the meeting, though this will of course add to the cost. It is important that points of agreement and disagreement be noted as the discussions proceed, and that at the end of the meeting the experts countersign a report detailing matters on which they are agreed, matters on which they are in disagreement, and why.

The Federal Court has devised a different approach to procure the best evidence from expert witnesses. Known as the “hot tub”, each expert is sworn in and gives evidence immediately after another expert. Each expert is able to ask questions of the others and to comment on the other opinions, followed by cross-examination by counsel for each party. The hot tub approach allows the decision-maker to compare and consider competing opinions at the same time, and it moves the expert away from a position as a member of the side of the party who called him or her. The hot tub method is also used in the New South Wales Land and Environment Court where it is known as “concurrent evidence”. As with any move away from the traditional adversarial approach

to the presentation of evidence, the hot tub must be approached with caution, though if successful it may in time come to be accepted practice. There have been concerns expressed that the hot tub procedure may sometimes be cumbersome and time-consuming. As yet it has not been trialled by the Queensland Supreme Court.

In the industrial context, issues concerning expert evidence are most likely to arise in cases concerning injuries at work. With people's livelihoods at stake, the prospect of significant awards of compensation against the employer, and complex medical evidence involved, tension is likely to be high for everyone in the room. Establishing a framework which clarifies the role of the expert witness, minimises expense for the parties, and ensures the best possible communication between the expert and the Commission, can only advance the Commission's task of deciding the dispute and doing justice between the parties.

Self-represented Parties

A Growing Trend

Both anecdotal evidence and a number of reports indicate that the incidence of self-representation is growing across the spectrum of courts and tribunals, though it has been most pronounced in the Family Court. In their comprehensive article on "Self-Represented Litigants in Queensland",[5] John Dewar, Bronwyn Jerrard and Fiona Bowd offer four possible explanations for this trend:

[5] John Dewar, Bronwyn Jerrard and Fiona Bowd, "Self-representing Litigants: A Queensland Perspective" 23 *The Queensland Lawyer* (December 2002) 65.

- reduced availability of legal aid;
- perceived high cost of lawyers' fees;
- extended reach of law and litigation; and
- demystification of law and the growth in a self-help culture through information kits, internet sites and clinics.

There may also be cases where legal representatives are unwilling to act for a party because of perceived difficulties with the litigant's personal conduct or behaviour, difficulties which may be the result of a disability, mental illness or an inability to communicate effectively in English.

Striking a Balance

Studies confirm that self-represented parties are less likely to be successful than represented ones; that registry staff spend significantly longer on matters involving self-represented litigants than on matters where parties are represented, and that self-represented parties tend not to understand the concept of settlement with the consequence that their matters tend therefore to proceed all the way to trial, or to collapse early for technical reasons. A study by the Supreme Court of QLD in 2001 found that self-represented litigants tended to use forms incorrectly, to engage in detailed correspondence with the Registry, to misdirect correspondence containing formal submissions and requests, to ask for extensions of time, and to incorrectly frame requests for relief, particularly judicial review.

However while there is no doubt that self-represented litigants do consume court resources and often pose challenges for the judge handling the case,

they also have a right to appear in court without a lawyer. All parties have a right to a fair trial in both criminal and civil matters.[6] However, no party has an outright entitlement to legal representation, and there is no assumption that a trial is unfair simply because a party lacks representation – each case must turn on its own facts. As explained by the Federal Court in *Abram v Bank of New Zealand*[7], what is required to conduct a fair civil trial involving a self-represented litigant will vary according to the nature of the case, the litigant and his or her intelligence and understanding of the case. A Family Court Report in 2000 found that self represented litigants are more likely than the population as a whole to have limited formal education, limited income and assets and to have no paid employment.

There is a very wide range of judicial approaches to self-represented litigants. The minimalist position taken by Samuels JA in *Rasjki v Scitec Corp Pty Ltd*[8] and cited with approval in *Minogue v HREOC*[9], is that

"the advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which our adversary procedure offers to the unwary and untutored. But the court should be astute to see that it does not extend its auxiliary role so as to confer upon a litigant in person a positive advantage over the represented opponent…At all

[6] *Dietrich v The Queen* (1992) 177 CLR 292; *Minogue v HREOC* (1999) 84 FCR 438.
[7] [1996] ATPR 41-507.
[8] (unreported, Court of Appeal, NSW (FC), CA, 146 of 1986, 16 June 1986).
[9] (1999) 84 FCR 438.

events, the absence of legal representation on one side ought not to induce a court to deprive the other side of one jot of its lawful entitlement…An unrepresented party is as much subject to the rules as any other litigant. The court must be patient in explaining them and may be lenient in the standard of compliance which it exacts. But it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a litigant in person as enjoying a privileged status, would be quite unfair to the represented opponent".

At the other end of the spectrum, the Full Court of the Family Court introduced a set of nine guidelines for cases involving self-represented litigants,[10] and these guidelines have been adopted as being applicable to proceedings in the Federal Court.[11] In summary, the guidelines provide:

1. A judge should ensure as far as possible that procedural fairness is afforded to all parties;
2. A judge should inform the self-represented litigant of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses;
3. A judge should explain to the self-represented litigant any relevant procedures;
4. A judge should generally assist the self-represented litigant by taking basic information from witnesses called, such as name, address and occupation;

[10] *In Marriage of F* (2001) 161 FLR 189.
[11] *Brehoi v Minister for Immigration & Multicultural Affairs* [2001] FCA 931.

5. If a change in the normal procedure is requested by the other parties, such as the calling of witnesses out of turn, the judge may, if he or she considers that there is any serious possibility of such a change causing any injustice to a self-represented litigant, explain the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course;
6. A judge may provide general advice to a self-represented litigant that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects.
7. If a question is asked, or evidence is sought to be tendered in respect of which the self-represented litigant has a possible claim of privilege, a judge should inform the litigant of his or her rights.
8. A judge should attempt to clarify the substance of the submissions of the self-represented litigant, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated[12].
9. Where the interests of justice and the circumstances of the case require it, a judge may:
    a. draw attention to the law applied by the court in determining issues before it;
    b. question witnesses;
    c. identify applications or submissions which ought to be put to the court;
    d. suggest procedural steps that may be taken by a party;

[12] *Neil v Nott* (1994) 68 ALR 509.

e. clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

As noted by Dewar, Jerrard and Bowd, the last two guidelines in particular seem to entail an interventionist approach by the judge. And in the decision setting out the guidelines, the Full Court actually commented that the requirement that a judge ensure a fair trial may mean giving legal assistance to a self-represented litigant that may risk compromising the appearance of impartiality and neutrality from the opposing side's perspective.

These guidelines have been cited with approval in the Federal Court, the Federal Magistrates' Court, and various State Supreme Courts. While this approach may seem interventionist, it must be emphasised again that the fundamental guiding principle for judges hearing cases involving self-represented litigants is that all parties have the right to a fair hearing. In certain cases this will involve significant intervention by the judge, while in others it may involve very little.

Practical Measures

A practical measure which many self-represented litigants might seek to take themselves is to request the assistance of a lay person in court – this might be a friend, a relative or another lay person who has taken interest in the self-litigant's case. That a party in court may receive such assistance has been recognised since the early 19th century, with Chief Justice Tenterden saying in

Collier v Hicks[13] that any person may attend as a friend of either party to take notes and "to quietly make suggestions and give advice". Such a person has been known as a "McKenzie friend" since the English case of *McKenzie v McKenzie,*[14] a matrimonial case involving charges of cruelty and adultery. At trial, the husband (against whom the charges were alleged) had lost legal aid funding; however a young Australian barrister who had been doing some work at one of the London firms that had acted for the husband prior to legal aid being withdrawn, voluntarily accompanied Mr McKenzie to court in order to assist him in the trial, which was complicated and lasted some ten days. That barrister is well known to many of you – Ian Hanger QC. Upon learning that the young lawyer's firm was no longer on the record, the trial judge refused to allow him to sit and prompt Mr McKenzie. On appeal, the Court of Appeal unanimously held that the trial judge had erred in that ruling. It ordered a new trial.

While English courts tend to look at such assistance as an entitlement, Australian courts have tended to the view that it is more of an indulgence of the court, at least in criminal cases.[15] In Queensland it is regarded as an entitlement in civil cases, though the practice of seeking the leave of the court as a matter of courtesy has developed.[16] Ultimately, whether to allow a McKenzie friend is a matter for the judge's discretion, but the guiding principle must be one of fairness to all the parties in all the circumstances. The discretion will not usually be exercised favourably where the self-represented

[13] (1831) 2 B & Ad 663.
[14] [1970] All ER 1034.
[15] *R v Smith* (1985) 159 ALR 532; *R v Bourke* [1993] 1 Qd R 166.
[16] *Brooks v Krosch* [1997] QSC 171.

litigant has not even tried to apply for legal assistance, or has been offered but chosen to refuse it. There are at least 6 principles relevant to the exercise of the court's discretion regarding the granting of leave for a McKenzie friend, and they are (1) the complexity of the case, (2) the difficulties faced by the unrepresented party; (3) the absence of a disciplinary code for non-lawyers; (4) the protection of both parties; (5) whether the matter is heard in a higher or lower court; (6) the interests of justice.[17]

Under s 209(1) of the *Supreme Court Act* 1995, a party may appear in person, by a lawyer or by any person allowed by special leave of the judge. This section provides for the possibility of a non-legally trained person appearing as an advocate rather than as a prompter or McKenzie friend. Section 209(2) specifically prohibits such a person who is given special leave from charging for the appearance. Such leave is given sparingly, for example, to a woman to appear on behalf of herself and her husband. There have been some attempts to appear by persons claiming relevant expertise, such as town planning, but leave is usually refused. At any rate, most persons are dissuaded from appearing because they are not allowed to charge. In particular, the cases emphasise that lay advocates do not have the duty of absolute probity owed by a legal practitioner to the Court and to his/her legal opponent; they do not have the training, qualifications and experience of a legal practitioner; and they are uninsured, placing their clients at considerable risk.

[17] *Damjanovic v Maley* [2002] NSWCA 230.

Looking at practical measures that the court itself can take to strike a balance between assisting the self-represented litigant and protecting the interests of both the represented opponent and the court file management system, there is considerable merit in the suggestion that all courts should have a self-represented litigant plan that deals with every stage in the process, from filing through to enforcement, or the equivalent in criminal matters.[18]

I note that the QIRC produces an information sheet titled "Guide for Unrepresented Parties in the QIRC". It encourages parties to attempt to settle the dispute themselves; lists possible sources of representation and support (a lawyer, an industrial advocate, an organisation such as a union, a friend or relative); explains that if language is a difficulty for the unrepresented party, she or he may bring along an interpreter or request the Commission to provide one at no cost; and sets out procedures to be observed in the conference and at the trial. This is an excellent start, and it should help to minimise the occurrence of difficulties often faced in matters involving self-represented litigants.

Once the matter is before the court, there are dicta suggesting that a judge should object to inadmissible evidence on behalf of a self-represented litigant,[19] and that a judge may call witnesses of his or her own motion.[20] It has also been suggested that a court should adopt a lenient approach when considering whether to strike out a self-represented litigant's statement of claim or other initiating document. Courts should be careful to ensure that

[18] Professor Stephen Parker, *Courts and the Public* (AIJA Report, 1998).
[19] *National Australia Bank Ltd v Rusu* (1999) 47 NSWLR 309.
[20] *Obacelo v Taveraft Pty Ltd* (1986) 10 FCR 518.

"within the possibly ill-expressed and unstructured statement of the legal claims sought to be ventilated there is no viable cause of action which, with appropriate amendment of the pleading and a little assistance from the court, could be put into proper form".[21] Judges should ensure that a self represented party leaves a directions hearing appreciating exactly what is required of him or her. Language should be kept simple and clear throughout.

Dewar, Jerrard and Bowd observe that there is a seemingly close correlation between self-representation and the use of statutory powers to control vexatious litigants.[22] All reported cases in Queensland on the *Vexatious Litigants Act* 1981 (Qld) have involved self-represented parties. A vexatious litigant so declared is prevented from instituting proceedings without leave of the court.

Dr Grant Lester, from the Victorian Institute of Forensic Mental Health, offers ten guidelines for judicial officers when dealing with what psychiatrists term "querulous litigants" – those who have psychiatric conditions which cause them to lack perspective into their perceived loss or injustice.[23] They are as follows:

1. "First: Do No Harm". A medical aphorism which highlights your goals, which should be safety and containment rather than completion and satisfaction.

[21] *Wentworth v Rogers [No 5]* (1986) 6 NSWLR 534.
[22] Dewar, Jerrard and Brown, *op. cit.*, 66.
[23] Grant Lester, "The Vexatious Litigant" *Judicial Officers' Bulletin* April 2005, Volume 17 No 3.

2. Recognition via the 6 Vs – they display *volatile* emotions, feel *victimised*, seek *vindication*, produce *voluminous* and *vague* communications, and *vary* their demands.
3. Maintain rigorous boundaries. They will rapidly form attachments to those they feel are "favouring" them and feel catastrophically betrayed if the favourable treatment is not maintained.
4. They are responsive to hierarchy and the formality of court must be maintained.
5. While they appear legally hyper-competent, they have a very shallow knowledge of the law. All communication with them should be simple, repetitive, and there should be recognition that their understanding of the law is generally no deeper than that of the average citizen.
6. It is important to clearly and repetitively maintain their focus on what the court is able to offer in terms of outcomes.
7. More time granted will lead to more confusion. They are disorganised and overwhelmed, and more time rarely changes this.
8. Take all threats seriously and be aware of the psychological, as well as physical, safety of self and court staff.
9. Any recommendation that they seek psychiatric support or evaluation will lead to extremely angry and potentially threatening responses. The role of psychiatry is generally limited. However, for those individuals who threaten self harm or harm to others or carry out aggressive behaviour, mandated treatment is important.

10. Never seek to specialise in an individual. Always seek to share the load with others.

While these guidelines are useful for the genuinely mentally ill vexatious litigant, care should be taken not to apply them indiscriminately to ordinary self-represented litigants, who must be given a fair trial.

Evidence from Children

Courtrooms are intimidating places even for the most robust of adults, and it is unsurprising that child witnesses can become frightened and non-communicative in the face of any kind of courtroom examination. While traditionally there has been judicial concern over the quality of children's evidence, psychological and other scientific tests demonstrate that even very young children are capable of giving reliable evidence.[24] Queensland, along with most Australian jurisdictions, has undertaken significant reform in this area. Following the *Evidence (Protection of Children) Amendment Act* 2003, Section 9 of the *Evidence Act* 1977 now provides that every witness, including a child, is presumed to be competent to give evidence in a proceeding, and competent to give that evidence on oath. Section 9A establishes the test to determine competency to give evidence – it is whether "the person is able to give an intelligible account of events which he or she has observed or experienced". The new s9B provides that a person "is competent to give evidence on oath if the person understands that: (a) the giving of evidence is a serious matter; and (b) in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth". There is no

[24] *Seen and Not Heard: Priority for Children in the Legal Process* (ALRC/HREOC Report, 1997).

longer a rule of practice that obliges a trial judge to warn a jury that a child's evidence should be scrutinised with care simply because he or she is a child.

The judge has a responsibility to ensure that witnesses give their best evidence, and to that end to ensure that barristers do not use unnecessarily aggressive and intimidating questioning techniques. As with self-represented litigants, Judges and barristers should be careful to use language that the child witness can understand. In particular, they should be wary of the following a linguistic style which embraces the use of the negative, juxtaposition of unrelated topics, unduly long and complex questions, specific and difficult vocabulary, and repetition of questions.

The *Evidence Act* 1977 confirms that it is the Parliament's intention that a child who is a witness in a proceeding should be given the benefit of special measures when giving evidence, and it sets out general principles to apply when dealing with a child witness in a proceeding –

> (a) the child is to be treated with dignity, respect and compassion;
>
> (b) measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;
>
> (c) the child should not be intimated in cross-examination;
>
> (d) the proceeding should be resolved as quickly as possible.[25]

[25] Section 9E.

The *Evidence (Protection of Children) Amendment Act* also extended the definition of "special witness" to include children under 16, replacing the previous definition which included children under 12. A court may direct that the questioning of a special witness be limited by time or by the number of questions asked on a given issue. Special witnesses may have their evidence video-tape recorded, so as to avoid coming to court to give evidence where confrontation would be particularly traumatic, and such a recording is, unless the relevant court otherwise orders, now admissible in a retrial or a rehearing, or appeal from the proceedings; or, if the evidence was given for a criminal proceeding, admissible in another proceeding arising in the same court for the relevant charge or for a civil proceeding arising from the commission of the offence. Along with special measures that may be taken to protect child witnesses under the *Evidence Act* 1977, there is also a power at common law to obscure an accused person from a witness' view, if the witness is likely to be intimidated by the presence of the accused.[26]

There are also community-based organisations which provide support for children involved in traumatic situations such as those leading to court proceedings. It is prudent for judges and commissioners to be aware of their existence and purpose. One such organisation is Protect All Children Today, or PACT, as it is colloquially known. PACT is a community-based organisation supported by the Department of Families. It offers a child witness support program which provides support for children and young people who are required to give evidence in criminal courts, either as victims of, or witnesses to, a crime. The witness support workers are trained and

[26] *R v Zoneff (No 2)* [2000] SASC 70.

accredited volunteers. Their function is to provide information to the child/young person witness and his/her caregiver about criminal court proceedings; to prepare child/young person witnesses for the court room; to explain the court system and the role of the court room players; to visit the court room with the child/young person prior to commencement of court proceedings; to support and reassure the child/young person during his/her waiting time in the court building; to accompany the child/young person into the court room whilst they give evidence, if appropriate, and to maintain appropriate contact with the child/young person and his/her caregiver for the duration of the court process. PACT also provides a counselling service to assist client children/young people and non-offending family members to deal with stress and trauma related to incident(s) of abuse, and/or involvement in the criminal justice system.

Most community organisations such as PACT are run on very small budgets and rely on volunteers; they may not always be able to meet the needs of every potential client. And some child witnesses may prefer to be supported by family members, social workers and friends than by community volunteers.

Generally, bailiffs should be instructed to allow accompanied child witnesses into the courtroom before proceedings begin to familiarise themselves with the environment. They should ensure there is an appropriate seat for the child in court: it may need to be higher than the chair usually in the witness box. It is advisable that systems be in place to make the receipt of evidence of child witnesses a priority, in order to ensure minimal waiting periods for the child. Where it is known that there are to be child witnesses in a matter, preliminary

hearings should be held so as to arrange for these matters to be taken care of.

Conclusion

Whereas once children, lay people and non-legal experts were strangers in courtrooms, changing social conditions, technologies and practices mean that their presence in the legal system is increasing. Courts, tribunals and commissions must adapt to meet these challenges in their ongoing quest to deliver fairness and justice according to law. I am confident that the challenges will be met with innovation, open-mindedness, and the firm commitment to an impartial, accessible and efficient justice system that is the foundation of our free society.