ANNEXURE 2: Children's Legal Service Bulletin 2016

The operation of sections 18 and 65 of the Evidence Act in children's criminal proceedings

As a children's criminal lawyer you may need to provide advice to a child defendant or to a child witness about the operation of s 18 of the Evidence Act.

There are many instances where s 18 may apply; most commonly it is where the child is a witness against a parent or the parent is a witness against a child. A parent may be a witness against a child in a variety of different offences but the most common scenarios include where the parent is

- A victim or witness of domestic violence offences;
- Provides evidence rebutting doli incapax; or
- Is a witness to whom a complainant has made a complaint (eg of familial sexual abuse by the child defendant)

Section 18

Section 18 relates to the compellability of spouses and others in criminal proceedings. The section is extracted below:

Compellability of spouses and others in criminal proceedings generally

(1) This section applies only in a criminal proceeding.

(2) A person who, when required to give evidence, is the spouse, de facto partner, parent or child of a defendant may object to being required:

(a) to give evidence, or

(b) to give evidence of a communication between the person and the defendant,

as a witness for the prosecution.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

(a) the nature and gravity of the offence for which the defendant is being prosecuted,

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,

(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,

(d) the nature of the relationship between the defendant and the person,

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

(8) If an objection under this section has been determined, the prosecutor may not comment on:

(a) the objection, or

(b) the decision of the court in relation to the objection, or

(c) the failure of the person to give evidence.

Application of s 18

The section has application if the witness is the:

- Spouse;
- De facto partner;
- Parent; or
- Child

of the defendant: s 18(2).

However, s 19 of the Evidence Act restricts the application of s 18 in certain matters:

- s 18 does not operate for *any witness* to certain offences under the Child (Care and Protection) Act 1998
- s 18 does not operate for *spouses or de facto partners* who are compellable as witnesses in domestic violence offences and certain child assault offences: see s 279 Criminal Procedure Act 1986[1].

Due to their age, many children will not have a spouse or have a child who is capable of giving evidence. Hence, the most relevant application of s 18 for children will be when parents or de facto partners are witnesses against them or vice versa.

The definitions of parent, child and de facto partner are noteworthy.

> **Evidence Act, Dictionary, Pt 2, cl 10 - References to children and parents**
>
> *(1) A reference in this Act to a child of a person includes a reference to:*
> *(a) an adopted child or ex-nuptial child of the person, or*
> *(b) a child living with the person as if the child were a member of the person's family.*
> *(2) A reference in this Act to a parent of a person includes a reference to:*
> *(a) an adoptive parent of the person, or*
> *(b) if the person is an ex-nuptial child-the person's natural father, or*
> *(c) the person with whom a child is living as if the child were a member of the person's family.*

Given cl 10(2)(c), s 18 may have application for a carer (eg foster carer, kinship carer). However, it probably would not apply to a carer in a group home, refuge, or rehabilitation centre which are not familial settings.

> **Evidence Act,Dictionary, Pt 2, cl 11- References to de facto partners**
>
> *(1) A reference in this Act to a de facto partner of a person is a reference to a person who is in a de facto relationship with the person.*
> *(2) A person is in a de facto relationship with another person if the two persons have a relationship as a couple and are not legally married.*
> *(3) In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:*
> *(a) the duration of the relationship,*
> *(b) the nature and extent of their common residence,*

[1] Section 19 does not prevent a mother from raising a s 18 objection even in a domestic violence offence: see *LS v Director of Public Prosecutions (NSW) and Anor* [2011] NSWSC 1016. Note: s 19 has been amended since *LS;* it is now more clear from s 19(b) that only spouses and de facto partners are prevented in making a s 18 objection for offences under s 279 Criminal Procedure Act.

(c) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,
(d) the ownership, use and acquisition of their property,
(e) the degree of mutual commitment to a shared life,
(f) the care and support of children,
(g) the reputation and public aspects of the relationship.

(4) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether two persons have a relationship as a couple.

(5) For the purposes of subclause (3), the following matters are irrelevant:
(a) whether the persons are different sexes or the same sex,
(b) whether either of the persons is legally married to someone else or in another de facto relationship.

Where a witness is within the category of relationships listed in s 18, the court will usually satisfy itself that the witness is aware of the ability to make an objection. If the prosecution is aware that a witness objects, there is a prosecutorial duty to bring the matter to the court's attention. The court must make a ruling (if necessary) on s 18 prior to the witness giving evidence.

The test

The test of whether an objection is upheld is found in s 18(6)

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:
(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and
(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

It is a broad test. The court does not need to find that there will be harm but merely that there is a likelihood that harm would or might be caused (whether directly or indirectly). The harm can be to the the witness or to the relationship between the witness and the defendant.

Hence, evidence about the mental health of the witness and their relationship with the defendant is relevant on a voir dire considering s 18.

When considering s 18(6) the court must take into account the factors listed in s 18(7):

(a) the nature and gravity of the offence for which the defendant is being prosecuted,
(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,
(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,
(d) the nature of the relationship between the defendant and the person,
(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant

Section 65

If the court finds under s 18(6) that the witness is not required to given evidence then that is not necessarily the end of the matter.

There may be an application to admit the witness' prior statements under s 65(2) Evidence Act, because the witness is now "unavailable".

Section 65 provides:

Exception: criminal proceedings if maker not available

(1) This section applies in a criminal proceeding if a person who made a previous representation is not available to give evidence about an asserted fact.

(2) The hearsay rule does not apply to evidence of a previous representation that is given by a person who saw, heard or otherwise perceived the representation being made, if the representation:

- *(a) was made under a duty to make that representation or to make representations of that kind, or*
- *(b) was made when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a fabrication, or*
- *(c) was made in circumstances that make it highly probable that the representation is reliable, or*
- *(d) was:*
  - *(i) against the interests of the person who made it at the time it was made, and*
  - *(ii) made in circumstances that make it likely that the representation is reliable.*

Note : Section 67 imposes notice requirements relating to this subsection.

(3) The hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding if, in that proceeding, the defendant in the proceeding to which this section is being applied:

- *(a) cross-examined the person who made the representation about it, or*
- *(b) had a reasonable opportunity to cross-examine the person who made the representation about it.*

Note : Section 67 imposes notice requirements relating to this subsection.

…

Cl 4 of Dictionary defines the unavailability of persons

4 Unavailability of persons

(1) For the purposes of this Act, a person is taken not to be available to give evidence about a fact if:

- *(a) the person is dead, or*
- *(b) the person is, for any reason other than the application of section 16 (Competence and compellability: judges and jurors), not competent to give the evidence, or*
- *(c) the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability, or*
- *(d) it would be unlawful for the person to give the evidence, or*
- *(e) a provision of this Act prohibits the evidence being given, or*
- *(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or secure his or her attendance, but without success, or*
- *(g) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.*

(2) In all other cases the person is taken to be available to give evidence about the fact.

This article will examine four cases which deal with the issue of whether the evidence is admissible under s 65 following the upholding of a s 18 objection:

1) *DPP v Nicholls* [2010] VSC 397
2) *R v BO* [2012] NSWDC 195
3) *Fletcher v The Queen* [2015] VSCA 146
4) *R v A2; R v KM; R v Vaziri (No 4)* [2015] NSWSC 1306

DPP v Nicholls **[2010] VSC 397**

Ms Danielle Leckning reported an assault allegedly committed by her de facto husband, Mr Damien Nicholls. Subsequently, Mr Nicholls was charged with various offences. At hearing, Ms Leckning objected to giving evidence and the magistrate upheld her objection. The prosecution sought to tender Ms Leckning's police statement pursuant to s 65. The magistrate refused the application stating:

> The reality is section 18 is in the legislation for a reason and that reasons is to prevent both spouses and partners fro being forced or compelled to given (sic) evidence against their husbands or partners….using s 65 to circumvent that public policy consideration, is not an appropriate use for that section. And on a completely simple level the witness is available and sitting in court, and is simly refusing to give evidence.
>
> That is not a situation where she is unavailable because she is overseas, which is where that section would often apply. Public policy is, therefore, on s Leckning's side in this matter…

The DPP appealed. On appeal, Beach J of the Victorian Supreme Court allowed the admission of the statement under s 65.

<u>Witnesses who are not compellable under s 18 are unavailable</u>

Beach J considered the meaning of the words "not available to give evidence about an asserted fact" in s 65(1). The appellant relied upon cl 4(1)(f) of the Dictionary definition of "unavailability of persons", which is now cl 4(1)(g)[2], namely:

> *all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the person to give the evidence, but without success.*

Beach J referred to decisions which found that a witness who simply refused to answer questions was taken to not be available due to cl 4(1)(f). In *Mindshare Communications Limited Taiwan Branch v Orleans Investments Pty Ltd* [2007] NSWSC 976, Hamilton J accepted that the purpose of cl 4(1)(f) was "to deal with the situation where the attendance of the witness has been secured, but it is impossible to obtain the evidence, because, for instances, the witness declines to give it on the ground of privilege or simply refuses to give it, whatever threats are made concerning the consequences arising out of a contempt of court".

The respondent, Nicholls, argued that this was distinguishable from where the witness is excused from giving evidence under s 18. Reference was made to the second reading speech. However, Beach J held:

[2] The current cl 4(1)(c) did not previously exist

> 21. In my view, nothing in s 18 (or the policy underlying it) operates to limit the application of s 6 or the operation of cl 4 of Pt 2 of the Dictionary. Section 18 permits a family member to be relieved of the obligation of giving evidence because of a possible likelihood that harm would be caused to the family member or the relationship between that person and the defendant. However, the section says nothing about the use by the prosecution of a statement already given by the family member. The resolution of this appeal falls to be determined by construing the terms of clause 4 or Pt 2 of the Dictionary.
>
> 22. …. There is no relevant difference, for the purposes of s 65, between a refusal to give evidence that is without legal foundation and refusal to give evidence that is authorised by an order of the Court. Further, in Mindshare, Hamilton J specifically accepted the possibility that cl 4(1)(f) had operation where a witness declined to give evidence on the ground of privelege.

Beach J also found [at 23] that the absence of an equivalent of s 19 of the Evidence Act in the Victorian Act did not alter the construction or operation to be given to s 65 and cl 4.

It was also argued that the Act could have put the question beyond doubt by simply inserting a paragraph into cl 4 declaring persons who were not compellable due to s 18 to be unavailable, similar to paragraph (b). However, Beach J stated that the fact that cl 4 did contain such a specific paragraph did not affect the construction of cl 4(1)(f)- ie that such persons fell within the ambit of cl 4(1)(f).

R v BO [2012] NSWDC 195

BO was charged with the manslaughter of his partner's 11 month old child, M, who died of head injuries. BO's two sons, D and J (7 and 11 years old) were interviewed by police. Their evidence was important to establish that M was in good health prior to them leaving home for school and to rebut a suggestion made by the accused that it was possible that one of the sons had been responsible for M's injuries.

J gave evidence at the first trial. He did not object under s 18.

At the second trial, both D and J objected. Haesler J upheld their objection.
Pursuant to s 65, the Crown sought to tender the JIRT interviews of both boys and the transcript of J's evidence in the first trial.

<u>Section 18 still has work to do</u>

Haesler J found that the witnesses were unavailable:

> 18. I accept that a reason for including cl 4(1)(g) in the definition of "unavailable witness" is to cover a situation where the witness is present but refuses or declines to give evidence: an example can be found in *R v Suteski (No 4)* [2002] NSWSC 218. I also accept that the word "compel" in the clause is of wider import than that in s 18 and that it does include a situation where an order is made pursuant to s 18 that a witness will not be compelled to give evidence.

He agreed that the children's prior representations could be put into evidence under s 65. However, "s 18 still had important work to do". The objection could extend to evidence admitted under s 65.

Evidence tendered under s 65 is still evidence given by the witness

The Crown contended that to tender a witnesses' prior representation as evidence does not involve the *giving* of evidence by that witness. However, Haseler J did not agree. He noted the words of cl 4 and s 65:

- Cl 4: a person is "taken not to be available to give evidence about a fact"
- 65(1): A person who "made a previous representation is not available to give evidence about an asserted fact"
- s 65(2): "the hearsay rule does not apply to evidence of a previous representation that is given by a person…if certain conditions are met".

He held:

> "26. the clear words of the sections…mean that when evidence is allowed pursuant to the exception in s 65 it is still evidence *given* by the witness whose prior representation it is.
>
> 27. The point becomes even plainer when applied to evidence from the previous trial by J. The words of s 65(3) are clear: "..evidence of a previous representation made in the course of giving evidence in an Australian or overseas proceeding…"

Purposive approach

Haesler J went on to find that the purposive approach to interpretation of s 18 would also compel an interpretation which would allow the section work to do whenever a child's evidence was sought to be given, no matter the form it took or whether as direct or hearsay evidence. This is because "the community interest in full exposition of available evidence may not be worth the risk to the relationship between a parent and a child should they believe their evidence brought punishment upon their parent [at 28]".

Consideration of s 18 again

When s 18 is considered again at the stage where evidence is sought to be tendered under s 65, separate consideration needs to be given to the balancing process under s 18(6) and different weight given to the s 18(7) factors. One example is that the child would not be subject to cross examination or having to appear in court. Nevertheless, Haesler J upheld the s 18 objection again.

Consideration of DPP v Nicholls

Haesler J noted that Beach J in *Nicholls* did not deal with the point about the continued operation of s 18 and thus Haesler J did not believe he was bound to follow a decision that did not address the specific point he was raising in *BO.*

Fletcher v The Queen [2015] VSCA 146

The applicant, Mr Fletcher was convicted of intentionally causing serious injury, namely shooting Mr McGill who had visited his house to argue about a drug debt. Mr Fletcher's de facto partner, Ms Imogen Li, was present in the house and did a police statement. She successfully objected to giving evidence at trial and the Crown sought to admit her statement under s 65(2). Ms Li alleged police impropriety in the taking of the statement. Nevertheless, the trial judge allowed the statement. The applicant withdrew his counsel's instructions. The new counsel did not seek to re-open the s 65 application but instead conceded the tender of a redacted statement. Subsequently, other objections were made to the unfairness in tendering the statement.

Following conviction, Mr Fletcher appealed to the Victorian Supreme Court on the grounds that the statement should not have been admitted because of a number of issues, including the question of whether the witness was unavailable.

BO distinguished

Whilst the trial counsel and judge had conceded that Ms Li was unavailable, (presumably following *Nicholls*) the applicant sought to overturn *Nicholls* and adopted the arguments of Haesler J in *BO*: ie that s 18 'still had work to do'. However, Dixon JA (with whom Weinberg JA and Priest JA agreed) rejected this submission and noted:

> "58…the form of the evidence considered in *BO* may explain the result in that decision, particularly the video recorded evidence given by the elder boy at an earlier trial

The tendering of a witness' statement is not the witness giving evidence

Dixon went on to find that the tendering of a witness' statement does not constitute the witness giving evidence:

> "58… the rules in respect of competence and compellability of witnesses to give evidence at a trial do not govern criminal investigation processes. Absent special arrangements, evidence that is 'given' is received by the court by being seen and heard from the witness box. That evidence does not exist until it is given. A document, such as a statement, may be tendered as an exhibit. An exhibit is also evidence in a trial, but while tendered is a process of adducing evidence in a criminal proceeding, the process of creating the document tendered – in this case making a statement – is not. Making a statement to police is neither a process of 'giving' evidence, nor a process in a criminal proceeding as that term is defined by the Act….
>
> 59...when a statement is admitted under s 65 the maker of the statement is not 'required to give evidence'….Ms Li did not give evidence. The police officer who took her statement gave evidence to the jury of her previous representations. The prosecutor tendered the statement and read it to the jury. It is untenable to contend that in such circumstances Ms Li gave evidence.
>
> 60. Neither did Ms Li give evidence when she made her statement to police. Section 18 applies only in a criminal proceeding. It has no application in criminal investigation and does not operate to permit [someone] to object to being required to make a statement to police.

Section 18 has no ongoing application

The court clearly stated [at 60 and 61] that:

> "60…section 18 has no ongoing application after successful objection by the maker of the statement to the evidence of an investigator permitted under s 65 to produce that statement….
>
> 61. Nothing in s 18 (or the policy underlying it) or in s 65 or in cl 4 of Pt 2 of the Dictionary operated to limit the application of s 65 or the operation of cl 4 of pt 2 of the Dictionary in the manner suggested by the applicant. The applicants submission that 's 18 has work to do' was misconceived

The appeal was refused.

In my view, *Fletcher* did no fully grapple with *BO*. *BO* was not only concerned with the tender of evidence from an earlier trial but also with witness' statements (eg JIRT interviews). Whilst the Victorian Court in *Fletcher* arrived at a different view about what constituted the "giving of evidence" it did not explicitly address the reasons that Haesler J gave for his different interpretation of the "giving of evidence".

Post *Fletcher*, the state of the law in NSW was left somewhat unclear: whether to follow Victorian Supreme Court authority or a NSW District Court decision. However, the NSW Supreme Court has now turned the tide in favour of the Victorian position.

R v A2; R v KM; R v Vaziri (No 4) **[2015] NSWSC 1306 (8 September 2015)**
A2 was charged with the female genital mutilation of her two young daughters, C1 and C2. KM was a retired midwife who alleged performed the operation in the presence of A2. Mr Vaziri was a Dawoodi Bohra (a subsect of Shia Islam) authority who allegedly encouraged witnesses to lie to the police concerning the practice of female genital mutilation. Asides from the police interviews with C1 and C2 the police also had evidence of telephone intercepts where A2, KM and Vaziri variously discuss lying to the police. The issues at trial were to be limited and it was not expected that the girl's credibility would be challenged.

After considering s 18(6) and 18(7), Johnson J did not uphold the objections to giving evidence. As such, he did not need to rule on the issue of whether to allow a Crown application under s 65 which the Crown had indicated they would make if the s 18 objection was allowed. Nevertheless, having considered the issue, Johnson went on to make obiter remarks.

<u>Obiter remarks about s 65 – witnesses unavailable</u>
He found that if the witnesses were not compellable for the purpose of s 18, each of them would be unavailable to give evidence for the purpose of s 65. They would fall within cl 4(1)(g).

He rejected the argument that the presence of cl 4(1)(b) meant that witnesses held not to be compellable under s 18 are not capable of being unavailable. I am unclear whether this argument is the same argument that was raised and rejected in *Nicholls*.

In relation to finding the witnesses to be unavailable, Johnson J specifically followed *Nicholls*, referred to Hamilton J in *Mindshare* and also noted a similar conclusion was reached by Riley CJ in *Sanderson v Rabuntja*[2014] NTSC 13 at [25]-[27].

<u>Consideration of *Fletcher* and *BO*</u>
The accused relied on the decision in *BO.* However, Johnson J referred to *Fletcher* and how it distinguished *BO.* He cited Dixon AJA in *Fletcher* [at 58] with approval, stating that he would have applied the Victorian decisions [at 181-184].

He rejected the submission that a distinction could be made between written statement of a witness [as in *Fletcher]* and a recorded interview of a witness [ie C1 and C2's JIRT interviews]. "The recorded interview is obtained during the investigatory stage. It will become evidence if admitted at the trial" [at 182].

Conclusion

The issue of whether a witness' statement can be tendered under s 65 after a successful s 18 objection, and whether s 18 'still has work to do' is not completely resolved within NSW. Johnson J's comments on the issue in *R v A2* are only obiter. However, with respect, the NSW Supreme Court decision combined with the Victorian Supreme Court of Appeal decision of *Fletcher* is probably more persuasive than a single NSW District Court decision.

The difficulty that lawyers now face will be what advice to give to child defendants or to child witnesses where a s 18 objection is applicable.

A child witness may not wish to give evidence but, on the other hand, they may not wish to raise the objection if they know that by doing so their statement will be tendered unchallenged under s 65, making it easier to convict their parent.

Similarly, a child defendant may have to consider whether to oppose a s 18 objection if its success means that the witness' statement is tendered unchallenged under s 65.

Consideration may even have to be given to seeking an advance ruling on the s 65 issue prior to determination of the s 18 objection.

These are difficult questions that legal practitioners on both sides as well as the court will need to grapple with, especially given the 'residual' uncertainty in the law in NSW and given the vulnerability of children and their relationships.

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