To: Table of Contents

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THE RECEIPT OF EVIDENCE BY QUEENSLAND COURTS:

THE EVIDENCE OF CHILDREN

Discussion Paper
WP No 53

Queensland Law Reform Commission
December 1998

HOW TO MAKE COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues raised in this Discussion Paper.

Written comments and submissions should be sent to:

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http://www.qlrc.qld.gov.au

Oral submissions may be made by telephoning:
(07) 3247 4544

Closing date: 31 March 1999

It would be helpful if comments and submissions addressed specific issues in this Discussion Paper.

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CONTENTS

CHAPTER 6

CHAPTER 7

CHAPTER 8

CHAPTER 9

CHAPTER 10

CHAPTER 11

CHAPTER 12

CHAPTER 18

CHAPTER 19

CHAPTER 1

INTRODUCTION

1. THE TERMS OF REFERENCE

The Queensland Law Reform Commission has been asked by the Attorney-General to review the law relating to the evidence of children in Queensland. The following terms of reference were settled in April 1997:[1]

> [The Commission to review] the capacity of the judicial system, both in its criminal and civil aspects to properly receive the evidence of children.

The terms of reference will involve an examination of the factors that may currently prevent the judicial system from receiving the best possible evidence from children who are witnesses in Queensland courts.

In Australia, children appear more frequently in criminal proceedings than in civil proceedings.[2] The primary focus of this Discussion Paper will therefore be to examine the issues associated with children giving evidence as complainants in criminal proceedings.[3]

In addition to looking at factors that affect children generally, the Commission will also be considering the position of children who are under disabilities in addition to minority - such as children with physical, intellectual or developmental disabilities and children whose cultural or ethnic backgrounds or characteristics may currently make it difficult for them to give their evidence in court in the most effective way.

The project does not cover the receipt of evidence from children in Federal courts[4] such as the Family Court of Australia or Federal tribunals. Issues arising in those courts have recently been considered by the Australian Law Reform Commission and the

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1 The Attorney-General specifically requested by separate correspondence that the Commission have regard to Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985).

2 See note 7 of this Discussion Paper.

3 Subsequent chapters of this Discussion Paper provide a more detailed discussion on these issues. Many of these issues overlap with the issues associated with children giving evidence in other types of proceedings. Issues relating to children giving evidence in other types of proceedings are discussed in Chapter 17 of this Discussion Paper.

4 The role of the Commission is to make recommendations to the Queensland Attorney-General concerning possible changes to the law in Queensland. It is therefore outside the Commission's terms of reference to make recommendations about matters arising from Federal, as opposed to State, law, for example, proceedings in the Family Court.

Human Rights and Equal Opportunity Commission.[5] However, a number of preliminary submissions received by the Commission have commented on issues arising from the giving of evidence by children in the Family Court of Australia which would be relevant to the giving of evidence by children in Queensland courts. To the extent that they are relevant, the Commission has paid regard to such submissions.

2. PRELIMINARY SUBMISSIONS

In April 1997, the Commission advertised for preliminary submissions and identification of issues relevant to this reference for the Commission to consider during the preparation of this Discussion Paper. Approximately 50 submissions were received from individuals and organisations. The Commission is most grateful to those respondents for their assistance.[6]

3. CONTEXTS IN WHICH CHILDREN MAY BE WITNESSES

Children may be witnesses in a number of contexts. They may, for example, witness events which will result in their attendance in court to testify as to what they saw or observed.

In Australia children appear as witnesses in courts most frequently in criminal proceedings, often as the victim of an alleged crime or as a witness to a crime committed on another.[7]

Some children also commit crimes themselves and, if prosecuted, may elect to give evidence in defence. The problems which may arise when children give evidence in cases where they have been accused of committing a crime may be different from the problems which arise when children are witnesses in other criminal proceedings. In Queensland, the Childrens Court has been established to deal with children accused of committing crimes as well as other matters.[8]

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5 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997).

6 A list of respondents to the Call for Preliminary Submissions is set out in the Appendix to this Discussion Paper.

7 New South Wales Child Protection Council, Position Paper on *The Use of Closed Circuit Television for Child Witnesses* (Sydney, 1994) at 1. Although there are no comprehensive statistics on the level of children's involvement as witnesses in criminal proceedings, from 1 February 1994 to 1 January 1997, 1216 children gave evidence in criminal proceedings involving sexual assault charges in Queensland: letter to ALRC from S Trembath, Youth Justice Manager, Queensland Department of Families, Youth and Community Care, 21 March 1997, referred to in Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.10. See also paras 4.1 and 4.6.

8 See Chapter 17 of this Discussion Paper for a discussion of the Childrens Court.

The evidence of child witnesses to criminal offences may also be relevant in care and protection proceedings and in civil actions to recover damages or compensation for injuries sustained as a result of those offences. In 1997, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission observed that in care and protection proceedings the rules of evidence:[9]

> ... are generally relaxed and children's evidence is often heard indirectly with other witnesses telling the court what a child might have said or what injuries the child sustained. Therefore children rarely appear in these proceedings to give evidence. In Western Australia only two or three children give evidence each year in care and protection proceedings. In Tasmanian care and protection proceedings children generally do not give evidence at all in the south and north west of the State.

This appears also to be the case in Queensland.[10]

Children also appear as witnesses in civil proceedings, although less frequently than in criminal proceedings.[11]

4. FOCUS OF THIS REFERENCE

The courts

It is apparent from the preliminary submissions made to the Commission and from the Commission's initial inquiries that there is a widespread concern that Queensland law has failed to ensure that the courts are provided with the best possible evidence from child witnesses. Without the best possible evidence, it is less likely that the most just outcome will be achieved in any particular case.

The accused

The significant public interest in not convicting the innocent is reflected in a number of legal principles embodied in Queensland law and practice. These include, in the context of the criminal law: the right to silence; the privilege against self-incrimination; the presumption of innocence; the right to confront an accuser at trial; and the right to examine and cross-examine witnesses.

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9 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.12.

10 See Chapter 17 of this Discussion Paper.

11 See Chapter 17 of this Discussion Paper. Of 117 grants of legal aid to children in civil matters in Queensland in 1996-1997, 52 involved criminal injuries compensation (letter to ALRC from C Reynolds, Executive Legal Officer, Legal Aid Queensland, 25 August 1997, referred to in Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) Table 2.26). This does not necessarily indicate the extent to which children appear as witnesses.

The fact that a person has been charged with a criminal offence is potentially damaging to that person's reputation. This is particularly so in cases involving allegations of child abuse.[12] Such cases are invariably accompanied by high emotions. It is therefore understandable that, when such a matter does proceed to court, the evidence against the accused will often be tested strenuously and relentlessly, despite the fact that the only evidence may be that of a young child. It may be thought that for the court to intervene to any significant extent in the cross-examination of the child would be unfair to the accused.

The traditions associated with the receipt of evidence in court and, in particular, in the criminal courts, are also considered by some to enhance the capacity of the justice system to protect the innocent and to ensure that all parties before the courts will be treated justly. For example, it could be argued that: adherence to a traditional, formal format enhances, even with children, the sense of obligation to be truthful; and, because the immaturity of some children may lead to their yielding more readily to a temptation to lie, or at least embellish the facts, rigorous cross-examination is justified.

Recent legislation in jurisdictions implementing significant changes to the way children's evidence is received by courts has recognised the necessity to have regard to the rights of the accused. For example, in his Second Reading Speech upon the introduction of the *Acts Amendment (Evidence of Children and Others) Bill 1991* (WA) the then Attorney-General for Western Australia, the Hon Joe Berinson MLC, noted:[13]

> Particular care has also been taken in drafting the Bill to ensure that accused persons retain their rights, particularly the right to a fair trial.

The child as a witness

Although the issues covered by this Discussion Paper may be relevant to the provision of evidence by children in any setting, they are often best highlighted by instances where children give evidence against adults and, in particular, against adults accused of subjecting children to physical violence or sexual abuse.

More often than not, sexual abuse occurs with only the offender and the child present, and often with very little physical evidence of abuse having taken place. Because of this, in child sexual assault cases the child is the central, and often the only, witness.

A number of respondents to the Commission's call for preliminary submissions on this project have commented on significant difficulties faced by children giving evidence -

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12 For example, submission 6 (the wife of a person accused of sexually abusing a child). Although it is apparent that, once an allegation of child abuse has been made, it is important not only for the child, but also for the alleged perpetrator, that the matter be fully investigated before charges are laid, this is not always the case. However, it is outside the Commission's terms of reference to consider the investigation of suspected offenders generally. The Commission's primary emphasis is on the ability of courts to receive evidence - not on how that evidence is obtained.

13 Legislative Council (WA), *Debates* (Vol 298, 6 May 1992) at 1798.

difficulties which have resulted in the child being unable to give evidence at all, or as well as he or she could have done in a more conducive environment.

The Commission has been informed of numerous cases where very young children as witnesses to alleged offences have been relentlessly and often brutally questioned by defence counsel at committal proceedings[14] and at trial. Occasionally, children are so intimidated by their first experience of court at committal proceedings that they will refuse to participate or participate fully at the trial, in which case charges against the accused will invariably be abandoned.

The Commission has been informed of cases where the child appears in court with no, or no effective, support. Child witnesses, who may have been victims of serious abuse, may have to share public waiting areas with the accused and his or her legal representatives. This can be an intimidating and stressful experience for a child, and may be likely to affect his or her ability to give the best possible evidence in court.

Frequently, the child witness will have to be in direct eye contact with the accused. Where it is alleged that the accused abused the child, such contact can be a traumatic event for the child, especially if the child has been the subject of threats from the accused. Queensland courts currently have a discretion whether or not to avail themselves of technology such as closed-circuit television and screens to reduce the trauma for a child of having to testify in the presence of the accused.

An accused person who is representing himself or herself may examine and cross-examine a child witness directly. In child abuse cases, such a situation is likely to be very difficult for the child.

The language used in courts at times may be incomprehensible to lay adults, let alone to young children. Legal language is not always modified by counsel and judges or magistrates to reflect the language abilities of the child. Further, certain linguistic techniques, such as the use of double negatives, can be used intentionally or unintentionally to intimidate and confuse the child.

The formalities of court proceedings and court surroundings can be intimidating to children as well as to adults not used to appearing in court. Although there is an argument that such formalities assist in engendering respect for the legal system, for children it may result in fear and a reluctance to talk.

If a child witness is unable through trauma, intimidation or lack of appropriate facilities to provide the court with his or her best possible evidence, then the court will not be in the best possible position to dispense justice.

Of course, there will always be cases where a child who is the only or a significant witness to the alleged offence is, for example, a very young child and unable to communicate or to communicate in any meaningful way. Although the understanding

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[14] See Chapter 14 of this Discussion Paper for a discussion of committals and Chapter 4 of this Discussion Paper for a discussion of issues relating to communicating with child witnesses in court.

of child development and facilities for obtaining and presenting evidence are improving rapidly, there will always be situations where a child witness will not be able to give evidence - just as there will always be adult witnesses in that situation. Nevertheless, whereas it may have been inconceivable ten years ago for a four or five year old to be able to give evidence in court, that is now possible and in time it may be possible for even younger children, with appropriate assistance, to provide to the court a useful account of what happened to them or of what they witnessed.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission summarised the court experience of child witnesses as follows:[15]

> The legal system has traditionally given little support and preparation to child witnesses. Within the courtroom children are often subject to harassing, intimidating, confusing and misleading questioning. In addition, court buildings do not provide privacy for the child or promote the safety of the child outside the courtroom. A significant amount of evidence was presented to the [Commissions'] Inquiry that children are frequently traumatised by their court experience due to these factors. The abuse many children suffer is compounded by the abuse perpetrated by the legal system itself.

Philosophy adopted by the Commission

The Commission believes that Queensland law and practice should facilitate the receipt by the courts of the best possible relevant evidence from child witnesses.[16] It also believes that, in order to do this, the law and practice should recognise the need to protect vulnerable young people from harm, whilst at the same time respecting the rights of accused persons to a fair trial.

The purpose of this Discussion Paper is to stimulate and encourage community debate and suggestions about the need for, and most appropriate way of achieving, the best possible evidence from children, whilst at the same time respecting the rights of the accused and the need to protect vulnerable young witnesses.

The preliminary submissions received by the Commission and the submissions to be received in response to this Discussion Paper will be important sources of information upon which the Commission will develop its recommendations.

The Commission will also have regard to such matters as: relevant international instruments such as the *International Covenant on Civil and Political Rights* and the

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15 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.90. See also NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at 30, for a similar view.

16 Although it could be argued that this same philosophy should be adopted in relation to the evidence of all witness and in particular all vulnerable witnesses, the Commission's terms of reference, as set out at p 1 of this Discussion Paper, are quite particular.

Convention on the Rights of the Child; values underlying Queensland legislation,[17] common law and statutory presumptions,[18] as well as different systems of law[19] when developing its recommendations.

5. DEFINITION OF "CHILD" AND FACILITIES AVAILABLE TO CHILD WITNESSES IN AUSTRALIAN JURISDICTIONS BY AGE

(a) Definition of "child"

"Child" is defined differently in different contexts in Queensland legislation.

For example, in relation to children in need of care and/or protection, section 8 of the *Children's Services Act 1965* (Qld) defines "child" as:

> a person under or apparently under the age of 17 years, and includes where necessary a person who though not under or apparently under the age of 17 years may lawfully be dealt with by a court or has been dealt with by a court on the basis that the person is a child. [emphasis added]

In relation to juvenile offenders or alleged juvenile offenders, section 5 of the *Juvenile Justice Act 1992* (Qld) defines "child" as:

> (a) a person who has not turned 17 years; or
>
> (b) after a day fixed under section 6 [child's age regulation] - a person who has not turned 18 years. [emphasis added]

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17 A Queensland legislative standard prescribes that Queensland legislation must have sufficient regard to the rights and liberties of individuals: *Legislative Standards Act 1992* (Qld) s 4(2)(a). This, of course, includes children. Legislation conforming with these rights and liberties cannot, for instance, "reverse the onus of proof in criminal proceedings without adequate justification": s 4(3)(d).

18 The common law traditionally included the presumptions that both the evidence of children and the evidence of sexual assault victims were unreliable. Being unreliable, it was necessary that such evidence be corroborated or confirmed by independent reliable testimony. For a summary of the current law in Queensland see Chapter 2 of this Discussion Paper. Equally, at the core of our system of justice are the presumption of innocence and the emphasis on the rights of the accused. Significantly, preservation of the rights of the accused has been a constant theme underpinning legislative reform of the law relating to children's evidence, as State Parliamentary Debates at the time of the introduction of such reforms disclose.

19 The two legal systems dominating the Western world are:
- adversarial or accusatorial systems, in common law countries such as Australia and the nations of the Commonwealth;
- inquisitorial systems, in many European civil law countries.

Queensland law has its foundations in the English adversarial system. In practical effect this has meant that the reception of children's evidence was not favoured. Children were regarded as inherently unreliable yet at the same time were considered to warrant treatment as miniature adults. The consequence of this last consideration is that, in Queensland, children were, and continue to be, subjected to the same rigours of delay, multiple trial encounters, aggressive cross-examination, and face-to-face confrontation, as adults. This consequence may not facilitate the gathering and reception of the best possible evidence.

(b) Facilities available to child witness in Australian jurisdictions by age

Legislation introduced in recent years to assist the courts to receive the best possible evidence from children has tended to specify the ages at which children can be offered certain facilities. A number of the statutes also cover "special" or "vulnerable" witnesses, which may include children in other age groups provided those children fulfil the requirements of those categories.

Queensland

Children under the age of 12	expert evidence is admissible in relation to the child's intelligence for the determination of competency (*Evidence Act 1977* s 9A).
	court may make special orders relating to the giving of evidence by the child (*Evidence Act 1977* s 21A).

Western Australia

Children under the age of 16	entitlement to support person (*Evidence Act 1906* s 106E).
Children under the age of 16	assistance for communication may be provided (*Evidence Act 1906* s 106F).
Children under the age of 16	not to be directly cross-examined by unrepresented accused (*Evidence Act 1906* s 106G).
Children under the age of 16	any relevant statement made by the child before a Schedule 7 proceeding has commenced may be admissible (*Evidence Act 1906* s 106H). (Note: Schedule 7 proceedings include serious criminal offences perpetrated against children by persons closely associated with, or related to, the child. They include sexual offences against children.)
Children under the age of 16	evidence-in-chief may be recorded on videotape before the trial in Schedule 7 proceedings (*Evidence Act 1906* s 106I(1)(a)).
Children under the age of 16	evidence of child may be taken at pre-trial hearing in Schedule 7 proceedings (*Evidence Act 1906* s 106I(1)(b)).
Children under the age of 16	in Schedule 7 proceedings, closed-circuit television (CCTV) must be used if facilities are

	available, otherwise screens must be used (*Evidence Act 1906* s 106N).
Children under the age of 16	in Schedule 7 proceedings, there are limitations on when child can be in presence of the accused for identification purposes (*Evidence Act 1906* s 106Q).
South Australia	
Children of or under the age of 7	not obliged to submit to oath (*Evidence Act 1929* s 12).
Children of or under the age of 12 and of or above the age of 7	not obliged to submit to oath unless they understand the obligation imposed by an oath (*Evidence Act 1929* s 12).
Witnesses of any age	if practicable and desirable, court may order special arrangements for taking evidence to protect witness from embarrassment or distress, such as CCTV, screens, support persons (*Evidence Act 1929* s 13).
Children of or under the age of 12	entitled to support person (*Evidence Act 1929* s 12(4), (5)).
Children under the age of 18	court must be cleared of all unnecessary persons when the child is the alleged victim of a sexual offence (*Evidence Act 1929* s 69).
Tasmania	
Children under the age of 14	able to give sworn evidence (*Evidence Act 1910* s 122B).
Children under the age of 14	able to give unsworn evidence (*Evidence Act 1910* s 122C).
Children under the age of 17	entitled to support person (*Evidence Act 1910* s 122E).
Children under the age of 17 in respect of whom certain crimes are alleged to have been committed or in respect of whom certain child protection applications have been made	prior recorded statements of child admissible in certain proceedings (*Evidence Act 1910* s 122F).
Children under the age of 17 in	unless child is able and wishes to give evidence

respect of whom certain crimes are alleged to have been committed or in respect of whom certain child protection applications have been made	in the courtroom in the presence of the accused, evidence to be given via CCTV (*Evidence Act 1910* s 122G, s 122H).

Northern Territory

Children under the age of 16	CCTV may be used (*Evidence Act 1939* s 21A(2)(a), s 21C).
Children under the age of 16	screens may be used (*Evidence Act 1939* s 21A(2)(b)).
Children under the age of 16	support person may accompany the child (*Evidence Act 1939* s 21A(2)(c)).
Children under the age of 16	the court may be closed (*Evidence Act 1939* s 21A(2)(d)).
Children under the age of 16	the judge or magistrate may disallow any question put to the child that is confusing, misleading or phrased in inappropriate language (having regard to the age, culture and level of understanding of the child) (*Evidence Act 1939* s 21B).

Australian Capital Territory

Children under the age of 14	may give unsworn evidence after the court has explained to the child his/her obligation to tell the truth (*Evidence Act 1971* s 64).
Children under the age of 18	where CCTV is available, evidence is to be given by CCTV unless court otherwise directs (order not to be made unless child prefers to give evidence in courtroom, proceedings will be unreasonably delayed if order not made, or substantial risk of court being unable to ensure proceedings conducted fairly if order not made). Does not to apply to a child who is an accused (*Evidence (Closed-Circuit Television) Act 1991* s 4A).
Children under the age of 18	where CCTV to be used and child not separately represented, court may order that child be separately represented (*Evidence (Closed-Circuit Television) Act 1991* s 8).

New South Wales

Children under the age of 16	right to support person in criminal proceedings, civil proceedings arising from commission of personal assault offence, proceedings before Victims Compensation Tribunal (*Crimes Act 1900* s 405CA).
Children under the age of 16	right in specified proceedings to give evidence by CCTV or by other similar technology. Child may choose not to give evidence by such means. Child must not give evidence by such means if the court or tribunal orders that such means not be used. Court or tribunal can make such an order only if satisfied that it is not in the interests of justice for the child's evidence to be given by such means or that the urgency of the matter makes their use inappropriate. The provision does not apply to a child who is the accused or the defendant (*Crimes Act 1900* s 405D).
Children under the age of 16	court or tribunal may permit a child accused of certain offences (personal assault offences) or a child who is a defendant in certain proceedings to give evidence by means of CCTV or other similar technology if satisfied that the child may suffer mental or emotional harm if required to give evidence in the ordinary way or that the facts may be better ascertained if the child's evidence is given in accordance with such an order. A child may choose not to give evidence by such means (*Crimes Act 1900* s 405DA).
Children under the age of 16	if a child is entitled to give evidence by CCTV or other similar technology, the child may not give identification evidence by those means. Child is entitled to refuse to give identification evidence until after completion of child's other evidence (including examination-in-chief, cross-examination and re-examination). Court must ensure that the child is not in the presence of the accused for any longer than is necessary for the child to give identification evidence (*Crimes Act 1900* s 405DC).
Children under the age of 16	if a child is entitled to give evidence by CCTV or other similar technology, but does not do so because the facilities are not available or the child chooses not to use them or the court or

	tribunal orders that such means not be used, the court or tribunal must make alternative arrangements for the giving of evidence by the child in order to restrict contact (including visual contact) between the child and any other person(s). These arrangements may include the use of screens, planned seating arrangements for people who have an interest in the proceedings (including the level at which they are seated and the people in the child's line of vision), the adjournment of proceedings or any part of the proceedings to other premises. The child may choose not to use any of the alternative arrangements in which case the court or tribunal must direct that the child be permitted to give evidence in the ordinary way (*Crimes Act 1900* s 405F)
Children under the age of 16	where the accused or defendant in a civil or criminal personal assault matter is not legally represented the court may appoint a person to conduct the examination-in-chief, cross-examination, or re-examination of any witness (other than the accused or the defendant) who is a child. Such a person is to act on the instructions of the accused or the defendant. The court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so. The provision applies whether or not CCTV facilities or similar technology is used to give evidence, and whether or not alternative arrangements under s405F are used in the proceedings (*Crimes Act 1900* s 405FA).
Victoria	
Children under the age of 14	a child may give unsworn evidence if the child understands the duty to speak the truth and is capable of giving a rational response to questions relating to the facts in issue (*Evidence Act 1958* s 23).
Children under the age of 18	in a trial involving charges for sexual offences or for indictable assault, evidence-in-chief of child may be given by video-recording under certain conditions. The child must be available for cross-examination and re-examination (*Evidence Act 1958* s 37B).

Children under the age of 18	in proceedings involving charges for sexual offences or for indictable assault, a court may permit the child to given evidence by CCTV; order the use of screens; allow the child to have a support person with him or her; or order the court cleared of unnecessary persons (*Evidence Act 1958* s 37C).
Children under the age of 17	if the court is satisfied that it is in the best interests of the child and consistent with the interests of justice, the court may direct that a child give evidence in specified proceedings under the *Children and Young Persons Act 1989* provisions via visual link (*Evidence Act 1958* s 42E, s 42F).
Children under the age of 17	a child accused who is being held in custody must appear physically before the court unless the court orders otherwise (*Evidence Act 1958* s 42O).
Children under the age of 17	the court may direct that a child accused appear before it by audio-visual link where such a direction is consistent with the interests of justice and is reasonably practicable in the circumstances. An application for such a direction may be made on behalf of the child at any time up to 14 days prior to the appearance of the child. Except where the parties consent, such an application will be granted only in exceptional circumstances (*Evidence Act 1958* s 42P).
All witnesses	indecent/scandalous questions are forbidden, unless they relate to a fact in issue (*Evidence Act 1958* s 39).
All witnesses	insulting questions may be disallowed if they are intended to insult the child (*Evidence Act 1958* s 40).

6. THE INCIDENCE OF CHILD ABUSE

(a) Introduction

This Discussion Paper focuses primarily on courts receiving evidence from children who are alleged victims of child abuse. Although the term “child abuse” is not defined

in Queensland legislation, in the criminal law context, it would cover a range of activities involving children which are the subject of offences under the *Criminal Code*. Not all activities involving children which many people would refer to as "child abuse" are offences under Queensland law. For example, paedophilia (sexual attraction to pre-pubescent children) is not, of itself, criminal, although sexual activities involving children may be. Similarly, the emotional abuse of a child may be significantly detrimental to the child, but it is not the subject of the criminal law.[20]

The reporting of suspected child abuse may have two broad consequences: firstly, if an investigation substantiates the allegation of abuse, there will be an attempt to protect the child from further abuse; secondly, there may be a prosecution against the person or persons suspected of being responsible for the abuse. In the latter context, children who were the subject of the abuse may be required to provide evidence of the abuse to assist the prosecution of the person accused of abusing the child.

(b) Protection of the child

Child abuse is a very difficult phenomenon to monitor with any degree of accuracy. This is particularly so in relation to child sexual abuse. Mostly, the abuse occurs in private - with only the child and the accused present. Further, the child would rarely be in the position of being able to report the incident - particularly the younger the child is.

Often the abuse will not come to light until someone else notices signs of changed behaviour in the child or physical evidence of abuse having occurred. With sexual abuse, unlike most other forms of abuse, physical signs may not be evident. Many child victims are abused by persons in apparent authority to them and are thus easily intimidated into silence by threats or fears. Fears may include concern that the family unit will disintegrate if the truth comes out about the abuse.

In 1996 there were 9,770 notifications to the Department of Families, Youth and Community Care of child abuse in Queensland. This resulted in 15,478 cases being investigated.[21] Those cases involved 11,908 children.[22]

In 34.2% of cases (5,298) the allegation of abuse was not substantiated. Abuse or neglect was substantiated in 31.6% (4,895) of all cases. These cases involved 3,490 distinct cases. Abuse or neglect was suspected in a further 9.5% (1,470) cases.

Neglect was the most common type of abuse substantiated, particularly for children

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20 Emotional abuse may be the subject of care and protection proceedings in relation to the child. For example, a child may be considered in need of care and protection if, as a result of not having a parent who exercises proper care and guardianship over the child, the child is "neglected", "exposed to physical or moral danger", "falling in with bad associates", or "likely to fall into a life of vice or crime": *Children's Services Act 1965* (Qld) s 46(1).

21 Department of Families, Youth and Community Care, *Annual Report* 1996/1997 at 40.

22 A child who is the subject of more than one notification during the year is counted once only.

under 5 years of age.[23] Physical abuse was involved in 34.2% of all cases. The highest number of substantiated cases of physical abuse involved children aged 10 to 14 years.

Child Protection Substantiated Cases: Most Serious Type of Maltreatment, Queensland, Year Ended 31 December 1996[24]

Most serious type of substantiated abuse/neglect	males	females	persons	% of total
Physical abuse	907	765	1,672	34.2
Emotional abuse	493	469	962	19.7
Sexual abuse	58	261	319	6.5
Neglect	1,028	914	1,942	39.7
Total	**2,486**	**2,409**	**4,895**	**100.0**

(c) Prosecuting the accused

The *Criminal Code* (Qld) contains a number of offences which could be relevant to the physical or sexual assault of a child - for example: unlawful sodomy;[25] attempted sodomy;[26] indecent treatment of children under 16;[27] carnal knowledge of girls under 16;[28] procuring young person for carnal knowledge;[29] taking child for immoral purposes;[30] incest;[31] maintaining a sexual relationship with a child;[32] grievous bodily

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23 In 1996, neglect accounted for 39.7% of all cases (1,942 cases).

24 Table reproduced in part from Department of Families, Youth and Community Care, *Annual Report* 1996/97 at 41.

25 Involving persons under 18, *Criminal Code* (Qld) s 208.

26 *Criminal Code* (Qld) s 209.

27 *Criminal Code* (Qld) s 210.

28 *Criminal Code* (Qld) s 215.

29 *Criminal Code* (Qld) s 217.

30 *Criminal Code* (Qld) s 219.

31 *Criminal Code* (Qld) s 222.

32 *Criminal Code* (Qld) s 229B.

harm;[33] torture;[34] wounding;[35] failure to provide necessaries;[36] assault;[37] rape;[38] abduction of child under 16;[39] and cruelty to children under 16.[40]

For the period 30 June 1996 to 30 June 1997 there were 7,266 reported incidents[41] of "offences against the person"[42] committed on young people under the age of 19 in Queensland. Of these, 2,076 were complaints of sexual offences.[43] In relation to sexual offences, males aged between 10 and 14 are the most at risk, whereas females are more at risk between ages 10 and 19.[44] The rates for male and female complainants steadily decreases after these ages.[45]

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33 *Criminal Code* (Qld) s 320.

34 *Criminal Code* (Qld) s 320A.

35 *Criminal Code* (Qld) s 323.

36 *Criminal Code* (Qld) s 324.

37 *Criminal Code* (Qld) ss 335-346 including sexual assault (s 337).

38 *Criminal Code* (Qld) s 347.

39 *Criminal Code* (Qld) s 363A.

40 *Criminal Code* (Qld) s 364.

41 Department of Police, *Queensland Police Service Statistical Review 1996-97* at 47-53. These statistics are collected on the basis of one victim per counted offence. A victim may be counted several times if the person was a victim of more than one offence. Age refers to the age of the victim at the time the offence is reported to police.

42 "Offences against the person" include homicide, attempted murder, conspiracy to murder, driving causing death, manslaughter, minor and serious assault, rape and attempted rape, other sexual offences, robbery, extortion, kidnapping and abduction.

43 Department of Police, *Queensland Police Service Statistical Review 1996-97* at 55.

44 Ibid.

45 Ibid.

CHAPTER 2

THE LAW IN QUEENSLAND

1. INTRODUCTION

The law in Queensland applicable to children giving evidence has a number of sources. There are relevant provisions in the *Evidence Act 1977* (Qld), which are supplemented by the common law (judge-made law). Certain practices have also developed in the courts which affect the way evidence is received and witnesses are treated. Judges, defence counsel, prosecutors, police and others coming into contact with children who are potential witnesses may have developed attitudes towards children as witnesses. These attitudes may also affect the way children are treated during the investigation, committal and trial stages of criminal matters and the equivalent stages of other matters in which children are witnesses.

Effective reform in this area needs to address both the statute law and the common law, as well as practices and attitudes which affect how the evidence of children is given and received.

This chapter of the Discussion Paper gives a brief outline of the current law in Queensland. The issues referred to are dealt with in more detail in subsequent chapters. There is also a preliminary discussion of a number of matters which are not covered by the existing law. These matters are also discussed in greater depth in later chapters.

2. AN INHERENT JURISDICTION IN THE COURT TO FACILITATE THE GIVING OF EVIDENCE

A judge has an inherent jurisdiction to control his or her court in a manner which promotes justice. This jurisdiction is based on the authority of the judiciary "to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner".[46] The exercise of the court's inherent jurisdiction has been described as "part of the power of the court to carry out the very role required of it by law - that is, to administer justice".[47]

The court's inherent jurisdiction "may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways".[48] Although the scope of the

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46 Jacob IH, "The Inherent Jurisdiction of the Court" [1970] *Current Legal Problems* 23 at 28.

47 de Jersey, the Hon Mr Justice P, "The Inherent Jurisdiction of the Supreme Court" (1985) 15 *Queensland Law Society Journal* 325 at 330.

48 Jacob IH, "The Inherent Jurisdiction of the Court" [1970] *Current Legal Problems* 23 at 23.

inherent jurisdiction of the court is largely undefined, one aspect has been identified as "powers exercised to ensure convenience and fairness in legal proceedings".[49] In the present context of the receipt by the courts of the evidence of children, the jurisdiction could be expected to include measures to enable a child witness to give the best possible evidence in all the circumstances by, for example: enabling support people to be present; providing a conducive physical environment for the child; or by ensuring that a witness is not intimidated by excessively aggressive cross-examination.[50]

The inherent jurisdiction of the court can be taken away by statute, but only if the statute does so expressly or by necessary implication.[51] The inherent jurisdiction is independent of any statutorily conferred power to make the same orders, and can be exercised in respect of matters which are regulated by legislation, provided that this can be done without contravening the Act in question.[52] It may therefore be possible, in some circumstances, for the court to exercise its inherent jurisdiction in relation to the giving of evidence by a child witness, provided that the court uses its powers consistently with the terms of the existing legislation.

In the New Zealand Court of Appeal case of *R v Moke and Lawrence*,[53] the question in issue was whether the court should exercise its inherent jurisdiction to admit into evidence pre-recorded videotaped interviews with each of three children in the trial of their parents who were charged with ill-treating them. New Zealand legislation did not specifically enable children in such proceedings to give evidence in this manner.[54] The Crown sought to invoke the court's inherent jurisdiction. The appellants contended that the inherent jurisdiction did not extend to a direction permitting the use of evidentiary videotapes in cases other than those falling within the specific legislative provisions.

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49 de Jersey, the Hon Mr Justice P, "The Inherent Jurisdiction of the Supreme Court" (1985) 15 *Queensland Law Society Journal* 325 at 329, citing Mason K, "The Inherent Jurisdiction of the Court" (1983) 57 *Australian Law Journal* 449. In this article, Mason QC identified four "roles" served by the inherent jurisdiction: ensuring convenience and fairness in legal proceedings; preventing steps being taken that would render judicial proceedings inefficacious; preventing abuse of process and acting in aid of superior courts and in aid or control of inferior courts and tribunals.

50 See also in this regard: Chapter 4 (Communicating with a Child Witness); Chapter 6 (The Court Environment); Chapter 13 (Support); and Chapter 18 (Children with Special Needs) of this Discussion Paper. These chapters raise issues pertaining to the court's discretion to regulate its own procedures.

51 See for example *The Minister of State for the Interior of Commonwealth of Australia & Anor v Neyens* (1964) 113 CLR 411; *Carseldine & Anor v Director of the Department of Children's Services* (1974) 133 CLR 345.

52 Jacob IH, "The Inherent Jurisdiction of the Court" [1970] *Current Legal Problems* 23 at 24.

53 *R v Moke and Lawrence* [1996] 1 NZLR 263 per Cooke P, McKay and Thomas JJ.

54 Id at 270. The court noted that s 23C et seq of the *Evidence Act 1908* (NZ) does allow complainants under the age of 17 to give evidence in this manner in relation to offences of a sexual nature.

The Court of Appeal held that the Court's inherent jurisdiction did so extend.[55]

It is not known whether a Queensland court would be willing to exercise its inherent jurisdiction to extend the existing law in this way. It is possible that, in appropriate circumstances, the courts would adopt a liberal approach to the admissibility of children's evidence of an unconventional nature, based on considerations such as expressions of legislative intention in that area.[56] Certainly, one advantage of the court's inherent jurisdiction is its flexibility and consequent ability to deal with changing needs.[57]

However, if there is a perceived need to further facilitate the giving of evidence by children in Queensland, the Commission would prefer for this to be done by way of legislation, rather than by having to rely upon the discretion of the court in exercising a largely undefined inherent jurisdiction. There has been a lack of certainty in this area of the law to date, and having to rely on the court's inherent jurisdiction in any particular set of circumstances to determine whether a child witness is able to give evidence, or to give evidence in a particular way, would hardly be conducive to certainty. The existence of enabling or facilitative legislation would serve also to alert legal practitioners, the courts and others to the existence of procedures and mechanisms appropriate to the needs of particular categories of witness.

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55 In response to a suggestion that the proposed extension of the procedure was of such significance that it should be permitted to emerge from legislative intervention rather than judicial evolution, the Court stated (at 271-272):

> It is true that judicial deference to Parliament is a wholly commendable attribute. The Courts must not trespass upon Parliament's legislative function. If they do so they aggrandise their own judicial role and prejudice the constitutional balance between the two organs of government. But that balance is most unlikely to be upset by the Courts in the exercise of their inherent jurisdiction giving effect to the stated policy of Parliament in a parallel sphere. The legislative package enacted in 1989 with the objective of providing protection for complainants in sexual cases was widely regarded as enlightened legislation. It behoves the Courts to be no less enlightened.
>
> Whether the admission of evidential videotapes in cases such as the present is perceived as a change to the rules of evidence or to the procedure of the Court does not matter. The Courts have traditionally developed the rules of evidence as part of the common law and have always exerted the right to control their own procedure. Doing so in conformity with a legislative precedent of such direct relevance is hardly an objectionable intrusion upon Parliament's domain or an abdication of the respect or restraint which the Courts demonstrate to Parliament's role.

R v Moke and Lawrence was distinguished in *R v Coleman and Others* [1996] 2 NZLR 525 on the basis that, in *Moke*'s case, admissibility (namely adducing evidence by way of the videotape interview) was in issue and therefore within the meaning of s 344A of the *Crimes Act 1961* (NZ), which provision gives a right of appeal. In *Coleman*'s case, the matters under challenge had no bearing on the contents of the evidence (the use of screens by an adult accused, ordered by the trial judge pursuant to the Court's inherent jurisdiction) and thus did not fall within s 344A.

56 See for example the discussion of s 21A of the *Evidence Act 1977* (Qld) in Chapters 11 and 13 of this Discussion Paper.

57 de Jersey, the Hon Mr Justice P, "The Inherent Jurisdiction of the Supreme Court" (1985) 15 *Queensland Law Society Journal* 325 at 329.

3. COMPETENCY

Only a person who is competent to do so is able to give evidence in court.

Generally, a person who is able to swear an oath that what he or she is about to say is the truth is competent to give "sworn evidence". The Full Court of the Supreme Court of Queensland has held in *R v Brown*[58] that an awareness of the religious consequences of lying under oath is an essential prerequisite to the swearing of a witness.

The competency of a child to give sworn evidence is covered by the common law rules established in *R v Brasier*.[59] In that case the court held that a child may take an oath in criminal proceedings provided that he or she appears, on a strict examination by the court, to possess a sufficient knowledge of the nature and consequences of the oath.

An understanding of the significance of the oath may have implied "some understanding of religious ideas and of the 'wrath of God' which may fall upon a person who swears an oath upon the Bible and then lies. This is not a test which a very young child, however intelligent and truthful, may be expected to pass".[60] Consequently, although other forms of oath and affirmation have been permitted,[61] it was difficult under the common law for the evidence of young children to be admitted.

However, in all Australian jurisdictions, including Queensland, legislation now enables children to give "unsworn" evidence in court. Although sworn evidence has traditionally been regarded as preferable to unsworn evidence, at least children who are unable to swear on the Bible may be able to present their evidence in court.

Section 9 of the *Evidence Act 1977* (Qld) provides for the situation where, in the opinion of the court, a child witness does not understand the nature of an oath. The court must explain to the child the duty of telling the truth and, whether or not the child understands that duty, admit the child's unsworn evidence unless the court considers that the child does not have sufficient intelligence to give reliable evidence. The fact that a child's evidence is unsworn is not, of itself, to diminish the probative value of the evidence. If the child fails the reliability test, then presumably he or she will be prevented from providing any evidence. The provision does not refer to a child's ability to understand a particular question put to him or her.

It would appear that a court may rule on a child's competency at any stage during the proceedings, but is more likely to do so at the outset of the child's proposed testimony.

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58 [1977] Qd R 220.

59 (1779) 1 Leach 199; 168 ER 202.

60 Law Reform Commission of Western Australia, Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1990) at para 2.10.

61 See for example ss 17-19 of the *Oaths Act 1867* (Qld), which allow certain groups such as Quakers and Moravians to make a solemn affirmation, rather than take the oath.

In Queensland, the inquiry as to competence is heard by a judge and expert evidence may be received on the issue of whether a child under the age of 12 years is competent to be sworn or to give unsworn evidence.[62] The questions relevant to the issue are asked by the trial judge. Counsel do not have a right to cross-examine the prospective witness in order to test competency to give evidence.[63] The inquiry takes place in the absence of the jury to avoid the jury hearing evidence which the judge may subsequently decide should not be before them because of his or her views as to the ability of the child to give evidence.[64]

The issue of competency of child witnesses is discussed in greater detail in Chapter 3 below.

4. SPECIAL WITNESSES

The *Evidence Act 1977* (Qld) contains provisions to assist people who are considered to be under some kind of disability or disadvantage to give their evidence.[65]

The people who are deemed by section 21A of the Act to be "special witnesses" are all children under 12 years of age, and people of any age who, in the opinion of the court, if required to give evidence in accordance with the usual rules and practice of the court would:

be likely to be disadvantaged as a witness because of intellectual impairment or cultural differences;

- be likely to be so intimidated as to be disadvantaged as a witness; or
- be likely to suffer severe emotional trauma.

Section 21A of the *Evidence Act 1977* (Qld) reads:

> (1) In this section -
>
> **"special witness"** means -
>
> (a) a child under the age of 12 years; or
>
> (b) a person who, in the court's opinion -

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62 *Evidence Act 1977* (Qld) s 9A.

63 *R v Garvey* [1987] 2 Qd R 623.

64 *R v Harding* [1989] 2 Qd R 373 per Macrossan CJ, McPherson and Derrington JJ. This decision reversed the decision in *R v Garvey* [1987] 2 Qd R 623 which held that the inquiry should take place in the presence of the jury.

65 *Evidence Act 1977* (Qld) s 21A. For a more detailed discussion of the assistance which can be given under s 21A see Chapters 11 and 13 of this Discussion Paper.

(i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness; or

(ii) would be likely to suffer severe emotional trauma; or

(iii) would be likely to be so intimidated as to be disadvantaged as a witness;

if required to give evidence in accordance with the usual rules and practice of the court.

(1A) A party to a proceeding or, in a criminal proceeding, the person charged may be a special witness.

(2) Where a special witness is to give or is giving evidence in any proceeding, the court may, of its own motion or upon application made by a party to the proceeding, make one or more of the following orders -

(a) in the case of a criminal proceeding - that the person charged be excluded from the room in which the court is sitting or be obscured from the view of the special witness while the special witness is giving evidence or is required to appear in court for any other purpose;

(b) that, while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting;

(c) that the special witness give evidence in a room -

(i) other than that in which the court is sitting; and

(ii) from which all persons other than those specified by the court are excluded;

(d) that a person approved by the court be present while the special witness is giving evidence or is required to appear in court for any other purpose in order to provide emotional support to the special witness;

(e) that a videotape of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the videotaped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness.

(3) An order shall not be made pursuant to subsection (2) if it appears to the court that the making of the order would unfairly prejudice any party to the proceeding or, in a criminal proceeding, the person charged or the prosecution.

(4) Subject to any order made pursuant to subsection (5), in any criminal proceeding an order shall not be made pursuant to subsection (2)(a), (b) or (c) excluding the person charged from the room in which a special witness is giving evidence unless provision is made, by means if an electronic device or otherwise, for that person to see and hear the special witness while the special witness is giving evidence.

(5) Where the making of a videotape of the evidence of a special witness is ordered pursuant to subsection (2)(e), the court may further order that all persons other than those specified by the court be excluded from the room in which the special witness is giving that evidence.

(5A) However, any person entitled in the proceeding to examine or cross-examine the

special witness shall be given reasonable opportunity to view any portion of the videotape of the evidence relevant to the conduct of that examination or cross-examination.

(6) A videotape, made under this section, of any portion of the evidence of a special witness shall be admissible as if the evidence were given orally on the proceeding in accordance with the usual rules and practice of the court.

(7) The room in which a special witness gives evidence pursuant to an order made pursuant to subsection (2)(c) or the room occupied by a special witness while the evidence of the witness is being videotaped shall be deemed to be part of the court in which the proceeding is held.

Clearly, a wide range of child witnesses over 12 years of age may be likely to be affected in the giving of evidence in the traditional manner by factors such as the nature of the proceedings, the relationship of a child complainant to the accused, language difficulties, cultural sensitivities or arrested development. These child witnesses may therefore be entitled to the assistance afforded by the Act to special witnesses.

5. EXPERT EVIDENCE

As previously noted,[66] section 9 of the *Evidence Act 1977* (Qld) requires the court to receive the unsworn evidence of a child witness unless it is satisfied that the child does not have sufficient intelligence to give reliable evidence. This provision imposes a duty on the court to make an assessment of the child's level of intelligence and ability to give evidence on which the court could confidently rely. Section 9A further provides:

Where in any proceeding -

(a) a court is determining whether a child under the age of 12 years has sufficient intelligence to give reliable evidence; or

(b) the evidence of a child under the age of 12 years is admitted;

expert evidence is admissible relating to the level of intelligence of the child including the child's powers of perception, memory and expression or relating to any other matter relevant to the child's ability to give reliable evidence.

It has been held that section 9A applies to two kinds of expert evidence:[67]

- expert evidence of the "powers of perception, memory and expression" of children "of a particular age and perhaps gender generally";
- expert evidence of any other matter relevant to a child's ability to give reliable evidence - for example, expert evidence in relation to the particular child and any applicable special factors.

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66 See p 21 of this Discussion Paper.

67 *R v FAR* [1996] 2 Qd R 49 per Fitzgerald P at 52.

There is no express reference in the Act to the admissibility of expert evidence in relation to whether or not a child comes within the definition of "special witness" in section 21A and therefore qualifies for the assistance available under that section. However, a member of the Queensland Court of Appeal has suggested that there is no reason why expert evidence should not be admitted in relation to the issues raised in determining whether a person is a "special witness" pursuant to section 21A(1)(b) of the *Evidence Act 1977* (Qld) - that is, where a child over 12 years is a person who would be likely to be disadvantaged as a witness as a result of intellectual impairment or cultural differences; suffer severe emotional trauma; or be so intimidated as to be disadvantaged as a witness.[68]

The admissibility of expert evidence in relation to child witnesses is discussed further in Chapter 5 below.

6. OUT-OF-COURT STATEMENTS

In relation to criminal proceedings, before the case against the accused is brought to court, a complainant or other potential witness is likely to make statements about what he or she saw or heard. These statements are often referred to as "out-of-court" statements. Obviously, it would be far less traumatic for a child witness if the child's out-of-court statements could be tendered as evidence instead of the child having to appear in court to testify in person. However, out-of-court statements are classified as "hearsay", and are therefore generally excluded from evidence.

To be admissible, evidence traditionally had to be direct evidence from a witness of his or her knowledge, experience or actions. The "rule against hearsay" is a common law rule of evidence that prevents a statement (whether written or oral) made by a person from being admitted as evidence of any fact or opinion contained in the statement, unless the statement was actually made by the witness in court. The rule has been traditionally justified for the reason that, because it is indirect evidence, hearsay is unreliable and remote. It is not on oath, and has not been, and cannot be, tested by cross-examination.[69]

Although some jurisdictions now have legislative provisions that detail the rule and its exceptions,[70] in Queensland the rule against hearsay retains its common law basis. However, Queensland's *Evidence Act 1977* does allow for some hearsay statements to be admitted in evidence. For example, section 93A of the Act provides some scope for the out-of-court statements of a child witness to be admitted if the child was under

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68 Ibid.

69 Australian commentators have declared it to be "one of the oldest, most complex and most confusing of the exclusionary rules of evidence": Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 31001. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.78.

70 *Evidence Act 1995* (Cth) ss 59-75; *Evidence Act 1995* (NSW) ss 59-75.

12 years of age or had an intellectual impairment at the time of making the statement and had personal knowledge of the matters dealt with by the statement.[71] The statement must be contained in a document and must have been made soon after the occurrence of the fact or made to a person investigating the matter to which the proceeding relates.[72] However, the statement will not be admitted unless direct evidence of the fact would be admissible[73] and unless the child is available to give direct evidence in the proceeding.[74]

Children's out-of-court statements and disclosures can be powerful evidence of abuse. However, they are excluded from proceedings unless they fall within recognised common law exceptions to the rule against hearsay or fall within the statutory provisions that permit the admission of what would otherwise constitute hearsay.

The use in criminal proceedings of out-of-court statements made by child witnesses is discussed in Chapter 10 below.

7. CLOSED-CIRCUIT TELEVISION AND SCREENS

Closed-circuit television and screens to assist young people in presenting their evidence and to assist the court in obtaining the best possible evidence from young witnesses have been available in most jurisdictions for some years.

In Queensland, the use of closed-circuit television, screens and possibly other aids for children giving evidence in court, although not referred to directly, is authorised by section 21A of the *Evidence Act 1977* (Qld), which provides for various kinds of assistance to be given to people who are deemed to be "special witnesses" in order to enable them to give their evidence. Section 21A, for example, allows for the accused to be obscured from the view of a special witness or be excluded from the room in which the court is sitting.[75] It also allows a special witness to give evidence in a room other than the courtroom,[76] or to give evidence by pre-recorded videotape.[77]

The use of the special facilities referred to in section 21A is at the discretion of the court.

At common law there was a power to direct an accused to be obscured from the view

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71 *Evidence Act 1977* (Qld) s 93A(1)(a).

72 *Evidence Act 1977* (Qld) s 93A(1)(b).

73 *Evidence Act 1977* (Qld) s 93A(1).

74 *Evidence Act 1977* (Qld) s 93A(1)(c).

75 *Evidence Act 1977* (Qld) s 21A(2)(a).

76 *Evidence Act 1977* (Qld) s 21A(2)(c).

77 *Evidence Act 1977* (Qld) s 21A(2)(e).

of the witness, though not out of his or her hearing, if the witness was likely to be intimidated by the presence of the accused.[78] In that respect, section 21A simply enacts the common law position.

Issues involved in the use of special facilities to assist the court to receive the evidence of child witnesses are discussed in Chapter 11 below.

8. SUPPORT

One of the forms of assistance which the *Evidence Act 1977* (Qld) enables for a "special witness" is the provision of emotional support while the witness gives his or her evidence.[79] A judge or magistrate may permit an appropriate person to be with the child witness during the child's testimony to provide emotional support.

The presence of a support person is at the discretion of the court. There is no statutory or common law requirement that such a person be made available and there are no guidelines as to what such a person is or is not permitted to do. For example, there is no direction in the legislation about where the approved person should be located in the relation to the child witness or about whether and to what extent the person may communicate with the child.

Not only is the presence of a support person left to the discretion of the court but in the exercise of that discretion for a child 12 years of age or over, the court must determine the level of trauma that the child may suffer without a support person. Making this determination may require questioning which is distressing to the child and may delay the proceedings.

These issues are discussed in greater detail in Chapter 13 below.

9. CHILDREN WITH SPECIAL NEEDS

(a) Cultural and linguistic

The special witness protections provided by section 21A of the *Evidence Act 1977* (Qld) are available to people who as a result of "cultural differences" are likely to be disadvantaged as a witness. Thus a child over 12 who cannot claim to be a special witness on the basis of age may be eligible to be a special witness on the basis of

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78 *R v Smellie* (1919) 14 Cr App R 128.

79 *Evidence Act 1977* (Qld) s 21A(2)(d). See p 22 of this Discussion Paper in relation to the definition of a "special witness".

cultural differences.[80]

The *Evidence Act 1977* (Qld) also provides for assistance to overcome language problems by the use of interpreters.[81] The Act was amended by the *Criminal Law Amendment Act 1997* (Qld)[82] to include a statutory right to an interpreter. Section 131A of the *Evidence Act 1977* (Qld) provides:

> (1) In a criminal proceeding, a court may order the State to provide an interpreter for a complainant, defendant or witness, if the court is satisfied that the interests of justice so require.
>
> (2) In deciding whether to make an order under subsection (1), the court must have regard to the fundamental principles of justice for victims of crime declared by the Criminal Offence Victims Act 1995, part 2.

For juvenile offenders the *Juvenile Justice Act 1992* (Qld) states that an interpreter may be provided to help the child and his or her parents be heard and participate in proceedings[83] and understand the purpose, nature and effect of a caution,[84] and to explain to the child the sentence imposed.[85]

(b) Other needs

Some child witnesses may need assistance to give evidence because they are affected by disabilities. Those disabilities may be as varied as intellectual disabilities, mental illness, psychological difficulties or physical disabilities. The difficulties faced by those people may vary from not being able to communicate their evidence to the court in the usual way because of a physical disability, to not being able to face the accused in court because of a morbid fear of seeing the person accused of assaulting him or her.

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80 However, the Criminal Justice Commission found that s 21A is rarely used on this basis: Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) at 88-92.

81 This area has been examined in detail in numerous reports: Commonwealth Attorney-General's Department, Report, *Access to Interpreters in the Australian Legal System* (1991); Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) at 61-62; Australian Law Reform Commission, Report, *Multi-culturalism and the law* (ALRC 57, 1992) Chapter 3; Australian Law Reform Commission, Report, *Equality Before the Law: Justice for Women* (ALRC 69, 1994) at 136-147; Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Chapter 5; Bureau of Ethnic Affairs and Department of Justice (Qld), *Interpreters and the Courts: a Report into Provision of Interpreters in Queensland's Magistrates Courts* (1997).

82 This amendment was not contained in the original Bill but was moved in the Committee stage by the opposition spokesperson for justice and was passed without the support of the Government, but with the support of the independent member. See Legislative Assembly (Qld), *Weekly Hansard* (25 March 1997) at 821-823.

83 *Juvenile Justice Act 1992* (Qld) s 58(3)(c).

84 *Juvenile Justice Act 1992* (Qld) s 15(2)(c).

85 *Juvenile Justice Act 1992* (Qld) s 118(2)(c).

In Queensland, apart from fairly wide discretionary provisions,[86] little attention has been paid by the legislature to date to the particular difficulties people with disabilities have when faced with the prospect of giving evidence in court. When a child has a disability over and above any disability associated with his or her age and level of maturity, it may be particularly difficult for courts to obtain the best possible evidence from the child without a fresh approach to the giving of evidence by such children.

These issues are discussed further in Chapter 18 below.

10. CORROBORATION AND WARNINGS.

Historically, the law has required "corroboration" of the evidence of a number of categories of witness, whose testimony was presumed to be unreliable:

- the single witness to an alleged offence;
- a witness who was presumed not to be neutral - for example, an accomplice;
- a complainant in a sexual assault case;
- a witness who was a child at the time of the alleged offence.

"Corroboration" means the confirmation of a person's testimony. Lord Morris of Borth-y-Gest in *Director of Public Prosecutions v Hester*[87] gave an example of one type of corroborative evidence:[88]

> The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said.

Until its abolition in 1989, there was a mandatory requirement in Queensland that a judge warn a jury about the danger of convicting a defendant on the basis of uncorroborated evidence.[89] A warning given to the jury by the trial judge is an example both of the operation of the "cautionary rules" of evidence, and of the exercise of judicial discretion. The cautionary rules assist the jury in determining whether the accused has been proven guilty beyond a reasonable doubt.[90] Warnings can be explained as resulting from the view that the jury - the trier of fact - had to be cautioned

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86 See for example *Evidence Act 1977* (Qld) ss 21A, 93A.

87 [1973] AC 296.

88 Id at 315.

89 The requirement was abolished by *The Criminal Code, Evidence Act and other Acts Amendment Act 1989* (Qld), which amended s 9 of the *Evidence Act 1977* (Qld).

90 South African Law Commission, Issue Paper 10, *Sexual Offences Against Children* (Project 108, 1997) at para 5.8. Available online: <http://www.law.wits.ac.za/salc/issue/ip10.html> (9 September 1998).

not to be too hasty to rely upon the evidence of certain categories of witness, and that this evidence had to be scrutinised with special care.[91]

The Law Reform Commission of Western Australia points out that corroboration was required for certain offences as certain crimes were considered to belong "to the class where charges are easily made and not easily rebutted".[92] Yet it has been recognised that the need for corroboration of children's evidence "does not lie in the nature of the offence" concerned,[93] such as a sexual offence, but in the assumption that children are unreliable as a class:[94]

> The fact that young children may be under the influence of others and are apt to allow their imaginations to run away with them and to invent untrue stories is one justification which has been advanced (R. v. Dossi (1918) 13 Cr. App. R. 158 at p. 161). Again, it has been said that the warning is required in relation to 'children who, though old enough to understand the nature of an oath and so competent to give sworn evidence, are yet so young that their comprehension of events and of questions put to them or their own powers of expression may be imperfect' (Director of Public Prosecutions v Hester [1973] AC 296 at 325).

Formerly, in a trial in any of the Australian States involving a child witness, the jury received a warning from the judge. Relevantly, this warning had two components:

- **the reliability component:** This component cautioned that, as children as a class are unreliable, the evidence of a particular child had to be treated with care;

- **the corroboration component:** This component cautioned that, as it is dangerous to convict on the child's "uncorroborated" evidence, it was necessary to have "corroborating" or confirmatory evidence.

While these two components tended to merge in the delivery of a warning, in *R v CBR*,[95] de Jersey J noted the separateness of the corroboration and reliability components. He explained that the statutory abolition in 1989 of the requirement to incorporate the corroboration component in a warning does not bear on the separate question of whether the witness's status as a child warrants the giving of a warning. His Honour there considered that a 14 year old child's "developing maturity" left the trial judge with "greater discretion to mould his 'warning' appropriately".[96]

Although the mandatory requirement to warn was abolished in 1989, a judicial

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91 Ibid.

92 Law Reform Commission of Western Australia, Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1990) at para 3.12.

93 *B v R* (1992) 175 CLR 599 per Dawson and Gaudron JJ at 616.

94 Ibid.

95 [1992] 1 Qd R 637 at 640; McPherson JA and Shepherdson J agreeing.

96 Id at 639.

discretion to warn continued.[97] Until 1 July 1997 in Queensland a judge was not prohibited by statute from warning a jury that child witnesses are inherently unreliable as a class. Amendments to the *Criminal Code*,[98] implemented on 1 July 1997, restrict both the reliability component and the corroboration component of the warning. The new section 632 (replacing the old section 632 "*Accomplices*"[99]) expressly restricts the judge when warning of the danger of convicting upon uncorroborated evidence, and expressly prohibits the judge from warning or even suggesting that the law regards any particular class of complainants as unreliable witnesses.[100] The section reads as follows:

> (1) A person may be convicted of an offence on the uncorroborated testimony of 1 witness, unless the Code expressly provides to the contrary.[101]
>
> (2) On the trial of a person for an offence, a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness.
>
> (3) Subsection (1) or (2) does not prevent a judge from making a comment on the evidence given in the trial that it is appropriate to make in the interests of justice, but the judge must not warn or suggest in any way to the jury that the law regards any class of complainants as unreliable witnesses.

In 1991 the Law Reform Commission of Western Australia[102] in its Report considered that a like provision, the then section 50(2) of the *Evidence Act 1908* (WA), abolished mandatory warnings in relation to child witnesses but did not preclude a judge from issuing a corroboration warning in particular circumstances.[103] The new section 632 in the Queensland legislation is likely to have the same effect.

11. THE COMMITTAL

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97 However, at common law failure to give the warning does not necessarily render the conviction unsafe, particularly where there is substantial corroboration or where the child is almost an adult: *K v The Queen* (1992) 34 FCR 227 at 232-233.

98 In the *Criminal Law Amendment Act 1997* (Qld).

99 The previous s 632 referred to the need for corroborative evidence for the testimony of accomplices.

100 However, s 632 must be read in conjunction with s 195 which reads:

> A person cannot be convicted of any of the offences defined in sections 193 and 194 upon the uncorroborated testimony of 1 witness.

Sections 193 and 194 refer to false declarations and false statements under oath.

101 See s 52 (Sedition), s 57 (False evidence before Parliament), s 117 (False claims), s 125 (Evidence on charge of perjury) and s 195 (Evidence of offences relating to false declarations and false statements under oath).

102 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at paras 2.53 to 2.64.

103 Id at para 2.63.

The *Justices Act 1886* (Qld)[104] provides for committal or preliminary proceedings before a magistrate or justices of the peace on charges of indictable offences.[105] The function of the committal is to ensure that no one stands trial unless a *prima facie* case has been made out. The "*prima facie* case test" has been described as follows:[106]

> [w]hether on the evidence as it stands (the accused) *could* lawfully be convicted.

To that end, the Crown has to adduce sufficient evidence at the committal to justify the defendant being directed to stand trial in a higher court at a later date. If the Crown does not adduce sufficient evidence, then the accused is discharged.[107]

Section 110A of the *Justices Act 1886* (Qld) provides for the use of tendered statements in lieu of oral testimony at committals in certain circumstances, including where the prosecution and defence agree to admission of the statements.

While it is the practice at committals for the evidence of prosecution witnesses to be tendered in the form of written statements, this is not a mandatory procedure. Where a defendant is not legally represented written statements are not admissible at the committal.[108] Child witnesses in proceedings at committal stage are normally required to attend the hearing and be examined and cross-examined either under oath (sworn evidence) or by way of unsworn evidence.

However, it would appear that the limitations placed by section 110A of the *Justices Act 1886* (Qld) on the use of written statements at committal may be qualified by the special provisions of the *Evidence Act 1977* (Qld) relating to children under 12 years of age and other special witnesses, which apply to committal proceedings.[109] Accordingly, section 93A of the *Evidence Act 1977* (Qld), enabling early out-of-court statements of the child to be admitted as evidence, would apply.

Section 21A of the *Evidence Act 1977* (Qld)[110] also would apply to committals as well

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104 In Parts IV and V.

105 An indictable offence is a criminal offence triable before a judge and a criminal jury.

106 *May v O'Sullivan* (1955) 92 CLR 654 at 658.

107 A discharge is not an acquittal and it is open to the prosecution to recommence proceedings against the accused if further evidence is obtained.

108 *Justices Act 1886* (Qld) s 110A(4).

109 Section 73 of the *Justices Act 1886* (Qld) states:

> Every witness shall be examined upon oath, or in such other manner as is prescribed or allowed by the Acts in force for the time being relating to giving evidence in courts of justice.

The *Evidence Act 1977* (Qld) applies to "criminal proceedings" and to "proceedings" both of which are defined in such a way as to include committal proceedings. See s 3 (definitions).

110 This section is discussed in detail in Chapters 11 and 13 of this Discussion Paper.

as trials. Thus, at the direction of a magistrate or justice, a variety of facilities could be made available to assist in the giving of evidence by children and the receipt of evidence from children. These facilities include: the use of screens; closed-circuit television; the videotaping of evidence; providing for a support person to accompany the child in court and limiting the people who are present when the child gives evidence.[111]

The court will not make orders to provide for the use of facilities if it appears to the court that the making of the order would unfairly prejudice the person charged or the prosecutor.[112]

Issues arising in relation to the receipt of evidence from child witnesses in committals are discussed in Chapter 14 below.

12. CHILDREN'S EVIDENCE IN OTHER TYPES OF PROCEEDINGS

Although the focus of this Discussion Paper centres on the evidence of child complainants in criminal proceedings, courts may receive the evidence of children in a number of other contexts. The evidence of children in other types of proceedings is dealt with in Chapter 17 below. Two of the situations considered in that chapter are criminal proceedings against a child accused and welfare proceedings.

(a) Criminal proceedings against a child accused

The general principles of juvenile justice outlined in section 4 of the *Juvenile Justice Act 1992* (Qld) include recognition that:

> (e) If a proceeding is started against a child for an offence -
>
> (i) the proceeding should be conducted in a fair and just way; and
>
> (ii) the child should be given the opportunity to participate in and understand the proceeding; ...

This concept is expanded in section 58 of the *Juvenile Justice Act 1992* (Qld) which requires a court to "take steps to ensure, as far as practicable, that the child and any parent of the child present has full opportunity to be heard and participate in the proceeding". They must understand: the nature of the alleged offence; what needs to be established before the child is found guilty; the court's procedures and the consequences of any orders made. These explanations may be made by an interpreter or person able to communicate effectively with the child. The explanations must be

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111 *Evidence Act 1977* (Qld) s 21A(2).

112 *Evidence Act 1977* (Qld) s 21A(3).

made even if the child is legally represented.[113]

Additionally, the presence of the child's parents is generally required[114] and a court may order a parent to attend.[115]

These provisions apply in all courts dealing with children, which includes the Childrens Court of Queensland, as well as the District Court and the Supreme Court. In Queensland the Childrens Court was given criminal jurisdiction in 1992 by the *Juvenile Justice Act 1992* (Qld). However, this jurisdiction is in most cases not exclusive. For Supreme Court offences,[116] namely offences with a maximum penalty of more than 14 years imprisonment, a Childrens Court Magistrate conducts a committal[117] and, if there is sufficient evidence, the child is tried or sentenced before the Supreme Court.[118] In the case of serious offences other than Supreme Court offences, the Childrens Court Magistrate conducts a committal.[119] If committed for trial the child can elect to be either committed to a court of competent jurisdiction (other than a Childrens Court judge) for trial by judge and jury or committed for trial before a Childrens Court judge sitting without a jury.[120] If a child does not consent to the Childrens Court hearing the matter or is not legally represented, the child must be committed for trial before a court other than the Childrens Court.[121]

The major difference between proceedings in the Childrens Court and those in the District Court or the Supreme Court is that there is no jury in Childrens Court proceedings.[122]

The *Childrens Court Act 1992* (Qld) restricts the people who may be present in court, although this does not apply to the court hearing a charge on indictment.[123]

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113 *Juvenile Justice Act 1992* (Qld) s 59.

114 *Juvenile Justice Act 1992* (Qld) s 56.

115 *Juvenile Justice Act 1992* (Qld) s 56A.

116 *Juvenile Justice Act 1992* (Qld) s 69.

117 *Juvenile Justice Act 1992* (Qld) s 69A.

118 *Juvenile Justice Act 1992* (Qld) s 69C.

119 *Juvenile Justice Act 1992* (Qld) s 69D and s 69E.

120 *Juvenile Justice Act 1992* (Qld) s 70.

121 *Juvenile Justice Act 1992* (Qld) s 70(6).

122 In a press release dated 21 September 1997 the Attorney-General and Minister for Justice announced a review of the *Juvenile Justice Act 1992* (Qld) and included the "opening up of the Childrens Court to hold jury trials" as one of the issues to be examined. This may relate to calls by the President of the Childrens Court, Judge McGuire, to abolish the right to elect to be tried in the District Court with a jury rather than by the Childrens Court without a jury.

123 *Childrens Court Act 1992* (Qld) s 20(5).

The provisions of the *Evidence Act 1977* (Qld) relating to the evidence of special witnesses may be used by a person charged with a criminal offence.[124]

(b) Welfare proceedings

As a rule, the courts involved in welfare and family matters discourage children from giving evidence at trial.

An alternative way to allow a child's voice to be heard at a trial without the child appearing as a witness is by admitting evidence of a third party as to statements made by the child. Such statements would generally be inadmissible as being hearsay.

Although the situation in Queensland is currently governed by the common law with respect to hearsay, the Childrens Court is flexible when hearing care and protection matters. Section 52(2) of the *Children's Services Act 1965* (Qld) provides:

> Upon every application made to the Childrens Court under this part the court shall determine the matter in the manner which appears to the court to be in the best interests of the child or child in care concerned. [emphasis added]

In *Re K (Infants)*,[125] the House of Lords recognised that in wardship cases the procedure and rules of evidence adopted by a court must serve the welfare of the child.

Section 93(3) of the *Children's Services Act 1986* (ACT) provides that in relation to care proceedings:

> The Court is not bound by the rules of evidence and may inform itself in any manner it thinks fit.

There is some doubt whether such a provision allows hearsay to be admitted in all cases. For instance, Higgins J of the Supreme Court of the Australian Capital Territory stated in relation to this provision that:[126]

> ... it should be recognised that such provisions do not render the rules of evidence irrelevant. They should still be applied unless, for sound reason, their application is dispensed with.

Issues involved in the receipt of evidence from child witnesses in contexts other than criminal proceedings are discussed in Chapter 17 below.

13. SIMILAR FACT EVIDENCE, SEPARATE TRIALS AND MULTIPLE OFFENCES

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124 *Evidence Act 1977* (Qld) s 21A(1A).

125 [1965] AC 201 per Lord Evershed at 218-219.

126 *A and B v Director of Family Services* (1996) 132 FLR 172 at 177.

Sometimes, a person who is charged with an offence involving a child will already have a conviction for a similar offence. Alternatively, a person may be the subject of similar allegations by more than one complainant. In such circumstances, the court must determine whether evidence of the prior conviction or of the other allegations should be admitted into evidence as proof of the offence with which the accused is charged. If a number of complaints are made against the accused, the court must also determine whether those charges should be dealt with in one trial, or whether there should be separate trials for each charge.

The question of the admissibility of evidence which discloses the commission of offences other than those with which the accused is charged gives rise to two major issues.

Firstly, evidence of convictions for similar offences or of allegations of other similar conduct, if admitted, must inevitably strengthen the prosecution's case by bolstering the credibility of the child witness. In some cases, where a child is too young to give evidence, the admission of such evidence could constitute important circumstantial evidence tending to prove the guilt of the accused. The admission of this type of evidence is therefore likely to be sought by the prosecution and resisted by the defence.

Secondly, if it is not possible for the complaints of a number of children against the one person to be heard in the one trial, it will be necessary for a child who is a complainant in respect of one charge and a witness in respect of a second charge involving a different child to give evidence at both trials.

These issues are discussed in Chapter 19 below.

14. OTHER ISSUES

There are several issues which are relevant to the ability of a court to receive the best possible evidence from a child witness but which, in Queensland, are not dealt with by the existing legislation.

(a) Communicating with a child witness

When a child witness gives evidence, he or she is not likely to be familiar with the kind of legal language used in courtroom communication. A child witness may be confused by complex linguistic structures and is particularly vulnerable to aggressive cross-examination techniques which may be adopted as a tactic by some legal counsel in an adversarial setting.

If the child is not able to communicate effectively, the court may be deprived of important information about the case, especially if the child is a significant or perhaps the only witness.

For a child witness to be able to give meaningful evidence to the court, the child must be able to comprehend the questions put to him or her and to respond to those questions in a manner which the court is able to comprehend.

In a number of jurisdictions in Australia and overseas, special measures for facilitating communication with child witnesses have been proposed or implemented.

The kinds of problems which may prevent effective communication with a child witness and ways of overcoming these problems are discussed in Chapter 4 below.

(b) The court environment

A traditional courtroom is not a "child friendly" environment. Courts are generally designed with adults in mind.

In addition to difficulties such as inappropriate seating and acoustic problems, there is likely to be a lack of suitable waiting areas and toilet facilities for child witnesses. The design of the courthouse may mean that a child who is a witness for the prosecution in criminal proceedings may have to share facilities with the accused and the accused's legal representatives.

If a child is intimidated by the court environment, it is unlikely that he or she will be able to give evidence as effectively as he or she would otherwise be capable of doing.

Chapter 6 below discusses the problems which may be caused by the physical design of court facilities, and raises some ideas for overcoming these problems.

(c) Professional education and awareness

Children involved in the litigation process face a number of obstacles which are unlikely to confront adult witnesses to nearly the same extent. However, unless the legal professionals who participate in cases involving child witnesses are aware of the issues which may adversely affect the ability of children to give evidence, the evidence may not be forthcoming or may be given in such a way that its value is significantly compromised.

Since it is the judge or magistrate hearing the case who controls the way in which it is conducted, and has the responsibility of ensuring that the court receives the best possible evidence in a way which is fair to all the parties involved, it is particularly important for judicial officers to be aware of issues affecting the way in which children give evidence.

The need for professional legal education and awareness of the issues concerning the ability of children to give evidence is discussed in Chapter 7 below.

(d) Delays

There is considerable opportunity for delays to occur during the process of litigation. In the criminal justice system, for example, there may be a delay between the making of a complaint and the laying of a charge; between a charge being laid and, in the case of an indictable offence, the committal taking place; and, if the accused is committed for trial, between the committal and the trial being heard. Delays may also occur during the hearing of proceedings.

Research indicates that although children, including very young children, are able to remember and retrieve large amounts of information from memory (especially when the events are personally experienced and highly meaningful), children (and adults to a lesser degree) have a significant memory loss after long delays. Children recall less correct information over time "while maintaining as a constant the inaccurate information".[127]

Delay may result in an adverse and perhaps unnecessary impression of children's credibility, and possibly in an actual effect on their reliability as witnesses. It may expose a child witness to more rigorous cross-examination and, in some cases where the child witness is the complainant, the child may feel that he or she is being re-victimised by the legal system.

In order for the court to be able to receive the best possible evidence from a child witness, particularly a very young child witness, it is important to minimise the delays which occur before the child gives evidence, while at the same time ensuring that the accused is given sufficient to time to prepare a defence.

A number of proposals for achieving this objective are discussed in Chapter 8 below.

(e) Treatment before committal or trial

A child witness who is a complainant in an abuse case may need psychological or psychiatric treatment to effectively deal with the abuse and its effects. It will often be in the child's best interests for treatment to commence as soon as possible. Any delay in bringing the case to committal or trial may mean that treatment should be given before the matter comes to court.

However, concerns have been raised that early intervention and treatment may taint the evidence of a child witness because the child may be susceptible to suggestive counselling techniques.

These concerns and possible solutions are discussed in Chapter 9 below.

(f) Identification of the accused

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[127] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.20.

It is standard procedure for a complainant in a criminal proceeding to be required to identify the accused for the court. This requirement is a fundamental aspect of the presumption of innocence. The most common form of identification is visual.

However, it may be a traumatic experience for a child complainant to have to identify the accused in person.

Issues raised by the need for a child witness to identify the accused are discussed in Chapter 12 below.

(g) Pre-trial hearings

In this Discussion Paper, consideration is given to facilities which might be used to enable a child witness to give the best evidence of which he or she is capable. A further issue raised by the availability of these facilities is the question of when a ruling as to their use should be made.

Where child witnesses are involved, there are at least two potential advantages in disposing of as many procedural issues as possible in a preliminary hearing prior to trial. One advantage is that pre-trial resolution of such matters may help reduce the possibly detrimental effect of delays during the trial on the quality of the child's evidence. The second advantage is that it is desirable for a child witness to know in advance what special facilities will be available so that the child has the opportunity to become familiar with those facilities.

However, there is some doubt about the extent to which, in criminal proceedings, binding orders as to the admissibility, or form, of evidence to be given at trial can be made prior to the commencement of a trial on indictment.

These issues are discussed further in Chapter 15 below.

(h) The unrepresented accused

An essential element of the presumption of innocence is the right of an accused person to have the prosecution evidence against the accused tested by cross-examination. The cross-examination, which may be rigorous, is usually carried out by the accused's legal representative.

However, the accused is not obliged to engage a legal representative. He or she may not be able to afford representation, or may choose to represent himself or herself.

For a child witness, particularly a complainant in a criminal proceeding, cross-examination is likely to be a distressing experience. Sometimes there appears to be a fine line between acceptable questioning in cross-examination and harassment of the witness. It may be even more traumatic for a child witness to be cross-examined by an unrepresented accused.

If an accused is unrepresented the court must try to maintain a balance between ensuring that the accused receives a fair trial and preventing the accused abusing the court process by overly aggressive cross-examination.

In a number of Australian and overseas jurisdictions, alternative approaches to personal cross-examination of a child complainant by an unrepresented accused have been proposed or implemented.

These issues are discussed further in Chapter 16 below.

(i) Post-trial use of evidence

In the course of preparing for a criminal trial or an appeal against conviction, an accused may obtain items of evidence which are of a personal nature in relation to a complainant.

Concerns have been expressed about the possible misuse of evidence tendered in court proceedings involving child witnesses, particularly by paedophile networks.

It would be possible for an application to be made under the *Freedom of Information Act 1992* (Qld) for access to material such as photographs or videotapes which have been used as evidence. Although it seems that, where a child is involved, the Information Commissioner is reluctant to find an overriding public interest in disclosure of such material, it may be that evidence which has been tendered in court and is therefore a matter of public record would lose its "personal affairs" exemption from disclosure under the *Freedom of Information Act 1992* (Qld).

Possible solutions to the issue of misuse of this type of material are discussed in Chapter 20 below.

(j) Evaluation of legislative reform

If legislative reform of the law relating to the receipt by courts of the evidence of child witnesses is implemented, it may be thought desirable for information to be collected which would allow a subsequent evaluation to be carried out of the success or otherwise of that reform. Such an evaluation could contribute to the continued development and improvement of legislative reform.

The need for evaluation and possible models for an evaluation mechanism are discussed in Chapter 21 below.

CHAPTER 3

COMPETENCY

1. INTRODUCTION

Courts are able to receive evidence only from witnesses who are competent to give that evidence. All questions as to the competency of a witness are to be determined by a judge or magistrate.[128] It is unlikely that an appellate court would allow a conviction to stand if it had resulted from the evidence of a witness who was incompetent at the time.[129]

Stephens has observed:[130]

> Numerous ... cases have made it clear beyond doubt that at common law courts have a duty to ensure that any prospective witness is competent to give evidence. Before that duty will arise, and in absence of litigation on the point, the existence of grounds warranting an inquiry into competence must be apparent or have been specifically identified by one of the parties. Even in Canada, where legislation requires an inquiry into the competence of a person under 14 years of age, it is not necessary to conduct an inquiry where counsel implicitly agrees that the witness is competent to be sworn. There is, of course, no discretion to admit or to exclude the evidence of a witness ruled to be incompetent and the evidence of such a witness is simply inadmissible. [notes omitted]

Most people who have relevant evidence to offer to the court are "competent" to give that evidence - the general rule being that anyone may be called to give evidence unless subject to a specific exception. Exceptions which currently exist or which have existed in the past have related to such groups of people as children, persons with "defective intellect", the accused and the accused's spouse.[131] The exceptions are based primarily on the belief that members of such groups are generally unreliable witnesses.

2. SWORN EVIDENCE[132]

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128 *R v Peters* (1882) 3 NSWR 455 per Faucett J at 457; per Windeyer J at 459.

129 *Jacobs v Layborn* (1843) 11 M & W 685 at 691; 152 ER 980 at 983. See also Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 130.

130 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 131.

131 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 13001. Historically, the exceptions have concerned: incompetence due to youth, or defective intellect; non Christians; convicts; and persons interested in the outcome of proceedings.

132 In Queensland, the law in this area is found in the *Oaths Act 1867* and in the common law.

The common law test of competency in relation to the giving of evidence was traditionally based upon the person's ability to swear an oath on the Bible that what he or she was about to say was the truth. In *R v Brasier*,[133] twelve judges considered whether a child under 7 years of age was competent to give evidence for the prosecution. The judges held that no testimony could be legally received unless upon oath - that is, sworn testimony. They also held that, even though under 7 years of age, a child may be sworn provided that he or she appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath:[134]

> There is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court.

A person who had no religious belief or held a belief that prevented an oath from being binding on his or her conscience was incompetent to testify.[135]

Reform by way of legislation permitted certain prospective witnesses to give evidence by way of affirmation. However, the legislation required the witness to have a conscientious motive for objecting to take the oath before being able to affirm.[136] Consequently, the reform did not affect the issue of the competency of a child witness to give evidence.

Although in Queensland there is no age limit to the ability of a witness to give sworn evidence - that is, competency is a matter of understanding, not age - the Full Court of the Supreme Court of Queensland in *R v Brown*[137] has confirmed that an awareness of the divine sanction attending a breach of the oath is an essential prerequisite in this State to the swearing of a witness.[138] In *R v Brown*, Wanstall ACJ stated that the test

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133 (1779) 1 Leach 199 at 200; 168 ER 202 (KB) at 203.

134 Ibid.

135 *R v Brasier* (1779) 1 Leach 199 at 200; 168 ER 202 (KB) at 203; *R v Brown* [1977] Qd R 220 per Williams J at 232 citing *Halsbury's Laws of England* (3rd ed, Vol 15) at 436 and *R v Lewis* (1877) Knox (NSW) 8 as authority. See also *Attorney-General's Reference (No 2 of 1993)* (1994) 4 Tas R 26 per Cox J at 29.

136 Early reform in England enabled Quakers and Moravians to make a solemn affirmation in lieu of an oath: *Quakers and Moravians Act 1833* (UK) (3 Wm. IV. c. 49). Subsequent legislation extended this possibility to Separatists and people who, while ceasing to be Quakers or Moravians, continued to object to taking the oath (see Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 135 and commentary by Dixon J in *Cheers v Parker* (1931) 46 CLR 521 at 528). See s 37 of the *Oaths Act 1867* (Qld) at note 146 of this Discussion Paper.

137 [1977] Qd R 220, a case involving the question of whether the trial judge had erred in allowing two children (11 years 9 months and 12 years of age at the time of trial) to give sworn evidence.

138 In South Australia, a child may take the oath if he or she is of or over 7 years of age and understands the obligation of the oath: *Evidence Act 1929* (SA) s 12(1). In Tasmania, a child under 14 years of age is competent to give evidence on oath or affirmation if the judge is satisfied that the child understands that, in giving evidence, there is an obligation to tell the truth

is "belief in a God and expectation that He will reward or punish in this world or the next".[139] Thus, once the question of competence is raised, a witness cannot be sworn unless he or she has a religious belief in God or a Supreme Being which would bind the conscience of the witness.[140] Also in *R v Brown*, DM Campbell J affirmed:[141]

> ... it is proper to ask a witness, whose competency to take an oath is in question, whether he believes in God, in the obligation of an oath, in a future state of rewards and punishments*: R*. v. *Taylor* (1790) Peake 15; 170 E.R. 62.

As a result of this statement of the law, Stephens observes:[142]

> ... under the common law where the competence of a prospective witness to take an oath is in doubt each of the above three questions should be asked. The answers given to those questions will dictate whether additional questions need to be asked. A lack of belief in any of the above matters would, in the absence of legislation on the point, prevent a witness from taking the oath.
>
> The requirement at common law for a witness to have a belief in God applied to all witnesses and not just children. However, because of concerns that children of "tender years" might not have been exposed to sufficient religious instruction to develop the required belief it became the rule that children were questioned on this issue prior to being sworn.[143] [original note substituted]

Tuition of the child

Cross notes that if the court decides that a child does not understand the nature and consequences of the oath:[144]

> ... the evidence must be rejected unless it is considered to be worthwhile to adjourn the case so as to instruct the proposed witness in these matters or unless the relevant statute permits the witness to give unsworn evidence.

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that is over and above the ordinary duty to tell the truth and that he or she can understand and respond rationally to questions put to him or her in a manner and language appropriate to the age and understanding of the child: *Evidence Act 1910* (Tas) s 122B. Both the *Evidence Act 1995* (Cth) s 13 and *Evidence Act 1995* (NSW) s 13 provide that a "person" (whether a child or not), incapable of understanding that in giving evidence he or she is under an obligation to give truthful evidence, is not competent to give sworn evidence though the person may be competent to give unsworn evidence.

139 [1977] Qd R 220 at 221-222.

140 Id per Williams J at 237-238.

141 Id at 226.

142 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 137.

143 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at note 73 refers to *Attorney-General's Reference (No 2 of 1993)* (1994) 4 Tas R 26 at 42; (1994) 73 A Crim R 567 per Crawford J at 581.

144 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 13050.

After examining cases dating back to 1786 in England as well as more recent Canadian and Australian cases, Stephens expresses the following opinion:[145]

> It seems that the weight of authority, and certainly the more recent authority, supports the view that a prospective witness can receive tuition in relation to the nature and obligations of taking an oath and for this purpose a case can either be adjourned to allow this to occur or alternatively the trial judge or magistrate can provide the tuition prior to finally determining the competence of the witness to take the oath. It would seem to follow that tuition should also be permitted to instruct a child on the duty to tell the truth in order for the child to give unsworn evidence.

3. DUTY TO ADMINISTER OATH

There is a view that the court, once a witness is competent to give evidence, is under a duty to administer the oath.

4. THE EVIDENCE OF A CHILD INCOMPETENT TO SWEAR OATH

(a) Section 37 *Oaths Act 1867* (Qld)[146]

In Queensland, a prospective witness who appears incapable of comprehending the nature of an oath can give evidence in the manner declared by the judge upon the judge being satisfied that the witness understands that he or she will be liable to punishment if the evidence is untruthful, "and such evidence so taken in such manner as aforesaid shall be valid as if an oath had been administered in the ordinary manner".[147] The trial judge has a duty in this regard. There is no age limit to the application of this provision.

(b) Unsworn evidence

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145 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 142.

146 Section 37 reads:

> If any person tendered for the purpose of giving evidence in respect of any civil or criminal proceeding before a court of justice, or any officer thereof, or on any commission issued out of the court, objects to take an oath, or by reason of any defect of religious knowledge or belief or other cause, appears incapable of comprehending the nature of an oath, it shall be the duty of the judge or person authorised to administer the oath, if satisfied that the taking of an oath would have no binding effect on the conscience of such person and that the person understands that he or she will be liable to punishment if the evidence is untruthful, to declare in what manner the evidence of such person shall be taken, and such evidence so taken in such manner as aforesaid shall be valid as if an oath had been administered in the ordinary manner.

147 *Oaths Act 1867* (Qld) s 37.

Although evidence received in court is usually by sworn or affirmed testimony,[148] more recently in all Australian jurisdictions children are now able to give unsworn evidence. Allowing children to give unsworn evidence overcomes the difficulty of requiring children to understand the oath and its obligations. In Queensland, legislation has been introduced, by way of section 9 of the *Evidence Act 1977* (Qld), to enable children to give unsworn evidence.[149]

Section 9 reads:

> (1) Where in any proceeding a child called as a witness does not in the opinion of the court understand the nature of an oath, the court -
>
> (a) shall explain to the child the duty of speaking the truth; and
>
> (b) whether or not the child understands that duty, shall receive the evidence of the child though not given on oath unless satisfied that the child does not have sufficient intelligence to give reliable evidence.
>
> (2) A person charged with an offence may be convicted upon evidence admitted by virtue of this section.
>
> (3) The fact that the evidence of a child in any proceeding is not given on oath shall not of itself diminish the probative value of the evidence.
>
> (4) A child whose evidence has been received by virtue of this section is liable to be convicted of perjury in all respects as if the child had given the evidence on oath.
>
> (5) The evidence of a child, though not given upon oath, but otherwise taken and reduced into writing as a deposition, shall be deemed to be a deposition to all intents and purposes.

Section 9 enables children to give unsworn evidence provided certain conditions are fulfilled. Firstly, the court is to explain to the child the duty of speaking the truth.[150] Secondly, even if the child does not understand the duty to speak the truth, the court is to receive the evidence unless satisfied that the child does not "have sufficient intelligence to give reliable evidence".[151]

Sections 9(3) and 9(4) are an attempt to address the possibility that unsworn evidence is not regarded as highly as sworn evidence, although the weight given to unsworn evidence will of course depend on the particular circumstances of each case and the reliability that can be attached to each item of evidence.

It is important that the judge or magistrate ensures that any pre-condition to the giving of unsworn evidence is satisfied. Otherwise, any subsequent conviction may be

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148 *Oaths Act 1867* (Qld) s 32.

149 In other jurisdictions see: *Evidence Act 1995* (Cth) s 13; *Evidence Act 1995* (NSW) s 13; *Oaths Act 1939* (NT) s 25A(1); *Evidence Act 1929* (SA) s 12; *Evidence Act 1910* (Tas) s 122C; *Evidence Act 1958* (Vic) s 23; *Evidence Act 1906* (WA) s 106C.

150 *Evidence Act 1977* (Qld) s 9(1)(a).

151 *Evidence Act 1977* (Qld) s 9(1)(b).

quashed on appeal on the basis that the failure to do so constituted a fundamental error.
Although no age is specified below which children cannot give unsworn evidence, expert evidence is allowed on the issue of whether a child under 12 years of age can give reliable evidence - which "suggests that the legislature envisaged an inquiry being held with respect to the competence of children under this age".[152]

It is unclear how section 37 of the *Oaths Act 1867* (Qld)[153] and section 9 of the *Evidence Act 1977* (Qld) work together.

In other Australian jurisdictions, the provisions enabling children to give unsworn evidence contain differences in the prescribed conditions for that to happen. For example, in New South Wales[154] and South Australia[155] the witness must, in effect, indicate that he or she will not tell lies in the proceedings. In South Australia the child must also appear to understand the obligations entailed by the promise to tell the truth and must be able to give an "intelligible account of his or her experiences".[156] In Tasmania[157] and Western Australia[158] the child must be able to give an "intelligible account of events which he or she has observed or experienced". In Victoria the child must be capable of responding rationally to questions about the facts in issue.[159] The age at which a child witness is entitled to the benefit of such procedures also varies between jurisdictions.

The age of the witness

Stephens suggests that, although it is a relatively simple task to identify a suitable parameter to assist in determining whether a person should be presumed competent to take an oath, "the task is much more difficult when determining at what point a prospective witness is simply too young to give evidence irrespective of whether that evidence is to be on oath or not on oath".[160]

In a number of reported cases the courts have been receptive to the suggestion that very young children be permitted to give unsworn evidence. For example:

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152 See s 9A of the *Evidence Act 1997* (Qld) as an example of this. See also Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 149.

153 See note 146 of this Discussion Paper.

154 *Evidence Act 1995* (NSW) s 13(2); also see *Evidence Act 1995* (Cth) s13(2).

155 *Evidence Act 1929* (SA) s 12(2)(b) casts this as "the child promises to tell the truth".

156 *Evidence Act 1929* (SA) s 12(2)(b).

157 *Evidence Act 1910* (Tas) s 122C.

158 *Evidence Act 1906* (WA) s 106C.

159 *Evidence Act 1958* (Vic) s 23(1)(b).

160 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 151.

- In *Wilkshire v R*,[161] the female complainant was 4 years and 11 months at the time of the alleged offence and was permitted by the judge to give unsworn evidence in the prosecution of the person accused of abusing her. On appeal to the High Court, the Court held that the fact that the trial judge failed to explain to the child that she was required to tell truthfully what she knew, as required by the relevant Northern Territory statutory provision, was not a matter which was likely to lead to any substantial miscarriage of justice.[162] Although the young age of the child was raised as a ground of appeal, it did not attract any adverse comments.

- In the Canadian case of *R v Khan*,[163] the Ontario Court of Appeal considered that a child of 4 years and 8 months at the time of giving evidence could have given unsworn evidence at trial. The court stressed that there was no arbitrary age imposed by legislation at which a child was too young to give evidence.[164] The Supreme Court of Canada, when determining the appeal from this decision, agreed with the conclusion reached in the Court of Appeal that the trial judge had erred in concentrating on the young age of the child.[165] The Supreme Court noted that, if the very young age of the witness was determinative of the question of competence, offences against very young children might never be prosecuted.[166]

- In *R v P(J)*,[167] the Quebec Court of Appeal was required to consider a case in which the prosecution made a decision not to call a child complainant who was 2 years and 3½ months of age at the time of the alleged offence and 3 years and 9½ months at the time of the court case. The evidence of what the child had said to her mother was nevertheless received in evidence at the trial on the basis that it formed part of the *res gestae*.[168] By the time of the appeal the prosecution accepted that, as a result of the Supreme Court of Canada decision in *R v Khan*,[169] the basis for the inclusion of the mother's evidence of the child's statement was no longer tenable. In support of the admissibility of the mother's hearsay evidence the prosecution relied on another part of the decision in *R v*

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161 (1961) 106 CLR 200.

162 Id at 203-204.

163 (1988) 42 CCC (3d) 197.

164 Id at 207.

165 *R v Khan* [1990] 2 SCR 531 at 538- 539; (1990) 59 CCC (3d) 92 at 98-99.

166 Ibid.

167 (1992) 74 CCC (3d) 276.

168 The *res gestae* are all the facts so connected with a fact in issue as to introduce it, explain its nature, or form in connection with it, one continuous transaction. Evidence of words used by a person may be admissible on the basis that the words are part of the *res gestae*, even though the evidence might otherwise be inadmissible as hearsay.

169 [1990] 2 SCR 531; (1990) 59 CCC (3d) 92.

Khan which held that the evidence of what the child had said could be given by another witness, notwithstanding the rule against hearsay, where the circumstances necessitated the receipt of the evidence and the evidence was considered to be reliable.[170] Stephens believes that "the decision should, however, be considered in the light of the very special circumstances of that case and it is doubtful that it should be regarded as authority for the proposition that a child of three years and nine months is, as a matter of course, incompetent to give evidence".[171]

- Stephens considers that, in the Canadian case of *R v W(R)*,[172] the Supreme Court of Canada "has made it clear that there is no longer any assumption in that 'jurisdiction that children's evidence is always less reliable than the evidence of adults'".[173] That Court has also expressed the view that, in light of the fact that an appeal lies against an acquittal in Canada, the automatic exclusion of the evidence of a child witness without consideration of the circumstances would amount to an appellable error.[174]

- In the English case of *R v Z*,[175] where the complainant was 5 at the time of the alleged offence and 6 at trial, Lord Lane concluded that the attitude against allowing young children to be called to give evidence was no longer appropriate in light of modern technology and legislative indications to the contrary (although the younger the child, the greater the care to be taken before admitting evidence).

- In *R v David James N*,[176] where the complainant was 6 at the time of trial, the English Court of Appeal confirmed that there was no arbitrary lower age limit governing when a child can give unsworn evidence.

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170 (1992) 74 CCC (3d) 276 at 280-282 in a majority judgment. Tyndale JA, in a dissenting judgment, took the view that the prosecution had not proved necessity because that was not a factor relevant to having the evidence admitted as part of the *res gestae* (at 279-280). However, Mailhot JA was of the opinion that the very young age of the child meant that her testimony could not be given any weight (at 280). Brossard JA reached the same conclusion (at 282).

171 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 153.

172 [1992] 2 SCR 122; (1992) 74 CCC (3d) 134.

173 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 153.

174 *R v W(R)* [1992] 2 SCR 122 at 132-133; (1992) 74 CCC (3d) 134 at 142-143.

175 [1990] 2 QB 355 at 361; [1990] 2 All ER 971 at 974.

176 (1992) 95 Cr App R 256 at 260-262.

5. THE INQUIRY AS TO THE CHILD WITNESS'S COMPETENCY

The court should undertake an examination of the competence of a child witness as soon as it is raised as an issue. This will ideally be at the commencement of the trial and at the very least before the witness gives evidence. It should not be during or after the witness's evidence.[177]

6. ALTERNATIVES TO THE COMPETENCY REQUIREMENT

Abolition of the competency requirement would mean that all child witnesses of any age would be able to testify subject only to the general provisions concerning admissibility of evidence. Abolition then would draw attention away from the previously central focus of the oath.

As the authors of a text on the law and psychology of children's evidence, Spencer and Flin, have noted:[178]

> If a child is too immature to understand the difference between truth and falsehood, or to explain it, common sense suggests that we should be cautious in believing anything that the child tells us. But it does not suggest that we should simply refuse to listen altogether, particularly if the child appears to be the victim of a criminal offence and is the only witness except for the offender. Yet that is exactly the effect of the competency requirement.

Spencer and Flin believe that the practical consequences of the competency requirements, particularly as applied until recently in the United Kingdom, were often disastrous, and particularly so in sexual cases:[179]

> Here the prosecution often have no medical evidence at all, and where they do have any, it will usually show no more than that someone committed the offence, and will rarely point unequivocally to the defendant as the culprit. ... By disqualifying the child as a witness the competency requirement often deprived the prosecution of their only clear piece of evidence. The result, as Jeremy Bentham explained as long ago as 1827, was that:
>
> ... the child may have been abused and mangled [but] the malefactor goes unpunished, laughing at the sage from whose zeal, so little according to knowledge, he has obtained a licence. [notes omitted]

A similar situation appears to exist in Queensland. For example, in *R v Williams*,[180] a child who was 8 years old at the time of the trial (5 or 6 years old at the time of the alleged offence) was held to be not competent to give unsworn evidence because when

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177 See *R v Hampshire* [1995] 2 All ER 1019 at 1029 and *R v Lee* [1988] Crim LR 525.

178 Spencer JR and Flin R, *Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 54.

179 Id at 54-55.

180 [1989] 1 Qd R 601.

questioned by the trial judge he could not give his home address, nor the names of two of his teachers in years 1 and 2. Nor did he display any real understanding of sexual matters. The trial judge, Williams J, observed:[181]

> ... the evidence in question here would be the only evidence against the accused and that fact cannot be ignored when its reception on an unsworn basis is being considered.
>
> From the depositions and the opening it appears that the critical statement would be to the effect that he saw the accused lying on top of the complainant in the bushes, that the accused's bum was bare, that the complainant's knickers were down her legs, and the accused was going up and down. Even if all that was accepted it would still not necessarily establish rape, because it does not necessarily establish penetration. That indicates the importance of accuracy and detail in the evidence of the child ... The child may now understand the duty of speaking the truth whilst in the witness box, but even that is by no means clear. But in my view his power of recollection and capacity to express himself accurately and precisely in giving an account of an alleged incident are such that he does not have "sufficient intelligence to justify reception of the evidence" not under oath. ... [The child] does not understand the nature of an oath and his evidence ought not to be received unsworn.

Nevertheless, it might have been worthwhile for the court to have heard the evidence and attach whatever weight was considered appropriate.

A preliminary submission to the Commission noted the following perceived limitations to the current Queensland competency requirements:[182]

> [an] issue for consideration is what, in practice, [do] current competency assessments by the Court actually achieve. Section 9(1) of the Evidence Act 1977 would seem to require the Court to perform the following tasks:
>
> (a) to establish if the child does "understand the nature of an oath";
>
> (b) if necessary, "explain to the child the duty of speaking the truth"; and
>
> (c) establish if the child "does not have sufficient intelligence to give reliable evidence".
>
> On the face of it, a child is only barred from testifying if point (c) cannot be satisfied. Current Judicial practice does at times struggle in its inquiries in relation to the matter of "sufficient intelligence". The majority of questions asked upon a voir dire relate to putting the child at ease, gaining knowledge of their demographics, or establishing whether or not they understand the importance of telling the truth in Court. Whilst it could be construed that such questioning, as a whole, goes to the issue of ascertaining levels of intelligence, there is room for debate on the matter.
>
> There is, in fact, little direct questioning aimed at establishing whether the child does have "sufficient intelligence". However, it does need to be noted that there is good reason for this - how does one define, and then measure, "sufficient intelligence"? As Fitzgerald J. noted in a recent judgement by the Queensland Court of Appeal [*R v FAR* [1996] 2 Qd R 49] ... , the current law in Queensland "left large areas for judicial resolution, notwithstanding that the judiciary lacks the expertise necessary to formulate or develop suitable rules concerning children's testimony and its reliability".

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181 Id at 602-603.

182 Submission 8.

> Furthermore, whilst S9A of the Evidence Act 1977 does allow for expert evidence to be put before the Court in relation to a child's level of intelligence, there is no standard by which to judge "how much" intelligence is enough.
>
> Therefore, if competency testing is retained, consideration needs to be given for the provision of guidelines/training for the Judiciary to assist them with this difficult task.

The same respondent also questioned whether what makes a child "competent" is closely linked to how an individual judge views the credibility and reliability of an individual child witness and of children in general. Hence, consideration needs to be given to the means of informing the judiciary and legal profession as to the cognitive abilities and limitations of children.

In 1989 a United Kingdom committee, which examined certain aspects of children's evidence, suggested that the competency requirement should be abolished:[183]

> In principle it seems wrong to us that our courts should refuse to consider any relevant understandable evidence. If a child's account is available it should be heard. We have already looked at ways in which video recording could be used to obtain such evidence where this might now present insuperable difficulties. Once this evidence is admitted juries will obviously weigh matters such as the demeanour of the witness, his or her maturity and understanding and the coherence and consistency of the testimony, in deciding how much reliance to place upon it. We think that this would be a much more satisfactory proceeding and one far better attuned to the principle of trial by jury, modern psychological research and the practice in other jurisdictions than the present approach which appears to us to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all.
>
> It follows that we believe the competence requirement which is applied to potential child witnesses should be dispensed with and that it should not be replaced. ...

The Committee also recommended that all children under the age of 14 years should give evidence unsworn.[184]

The *Criminal Justice Act 1988* (UK) was amended in 1992 to implement the Pigot Committee's recommendation to abolish the competency requirement for child witnesses in criminal proceedings. Section 33A of that Act provides:

> **Evidence given by children**
>
> (1) A child's evidence in criminal proceedings shall be given unsworn.
>
> (2) A deposition of a child's unsworn evidence may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.
>
> (2A) A child's evidence shall be received unless it appears to the court that the child is incapable of giving intelligible testimony.
>
> (3) In this section "child" means a person under fourteen years of age.

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183 Home Office (UK), *Report of the Advisory Group on Video Evidence* (The Pigot Committee, 1989) at paras 5.12 and 5.13.

184 Id at para 5.14.

This attempt to implement the Pigot Committee recommendation has been criticised on at least two grounds.[185] First, it deals only with competency issues in criminal proceedings. Second, the provision is not well drafted in that it may not even succeed in its intended aim of abolishing the competency requirement in criminal proceedings.[186]

The force of these criticisms can be balanced against the decision of *Director of Public Prosecutions v M*.[187] The case involved an indecent assault upon a 4 year old child. The child was aged 5 at the time of trial. The prosecution appealed by way of case stated against a Crown Court decision to exclude the child complainant's evidence on the grounds of her age alone, without viewing the child's videotaped evidence. The Queen's Bench Division held that, under subsection 33A(2A), it was not open to the Crown Court to exclude the child's evidence on the basis of the child complainant's age alone. The Court held:[188]

> The words of that subsection [s 33A(2A)] are mandatory. Care must always be taken where a question is raised as to whether a young child is capable of giving intelligible testimony. But where the child is so capable, the court does not enjoy some wider discretion to refuse to permit the child's evidence to be given, subject of course to rules of evidence, ... which apply to all witnesses. A child will be capable of giving intelligible testimony if he or she is able to understand questions and to answer them in a manner which is coherent and comprehensible.

The Court went on to note that the appropriate course in determining whether the child is competent to give evidence is for the court to assess any videotaped evidence or to question the child or both.[189]

The New Zealand Law Commission has also considered the possibility of abolishing the competency requirement for children.[190] Among the possible benefits identified were:

- Every child would be regarded as competent to testify and a child's evidence would be admissible. The cogency of a child's testimony would be a matter of weight to be determined by the jury, not a matter of inadmissibility for the judge to determine.

- Standards of mental capacity have proved elusive in actual application. A witness wholly without capacity is difficult to imagine apart from a baby or very

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185 Spencer JR and Flin R, *Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 58.

186 For detailed criticisms, see Spencer JR and Flin R, *Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 62-65.

187 [1997] 2 All ER 749.

188 Id at 753.

189 Id at 754.

190 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at 12-17.

young child. The question of mental capacity is one particularly suited to juries as one of weight and credibility because of the impossibility of stating and applying a standard of mental incapacity that renders a witness incompetent to testify. It seems preferable simply to let the trier of fact take into account any such incapacity in assessing the weight to be given to the testimony.

- Simplicity and consistency with the purposes of the law of evidence:[191]

> Abolishing the competence requirement would ensure that an increased amount of relevant evidence is made available to fact-finders for their assessment of reliability and weight. No person - child or adult - would be required to be tested for competence in order to give evidence, and the judge would have no duty to test the competence of any prospective witness.

- Although problems may arise with the evidence of some witnesses, due to difficulties with communication and accurate perception and recall, the differences between adult witnesses generally and vulnerable witnesses may have been exaggerated. Where difficulties do exist, they may be more appropriately addressed by ensuring that procedures for giving evidence enhance reliability and effective communication, rather than simply excluding the evidence.

Two objections to the possibility of abolishing an assessment of a child witness's competency were noted by the Irish Law Reform Commission:[192]

> In the first place, where the trial is before a jury, the witness may already have recounted some of his or her "evidence" before it becomes apparent that he or she, by reason of age or mental impairment, is not a witness on whom reliance should be placed. In that event, the jury would have to be discharged or the risk taken that a judicial warning to disregard this evidence would be sufficient protection to the accused. In the second place, it would be impossible, on any view, to operate in practice on the assumption that all children are competent to give evidence. If that were so, to take an extreme example, a day old baby would have to be presumed to be competent. Less fancifully, a two year old would be presumed to be competent, although in many cases he or she would not have begun to talk. Even when a child begins to talk, he or she has some distance to travel before he or she can give anything amounting to a comprehensible account of a particular experience upon which a court could safely act. [emphasis added]

7. RETENTION OF A MODIFIED COMPETENCY REQUIREMENT

There have been a number of suggestions made for a modification of the competency requirement for the giving of unsworn evidence by children. For example, in one preliminary submission to the Commission, the question was raised whether the

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191 Id at 13.

192 The Law Reform Commission (Ireland), *Report on Child Sexual Abuse* (LRC 32, 1990) at para 5.13.

competency threshold for children should continue to be a question of law:[193]

> There is a large body of thought which argues that competency (or perhaps "reliability") should not be a question of "law", but rather one of "fact" for the jury alone to consider.

In his 1985 Report, Sturgess QC,[194] the then Director of Prosecutions for Queensland, recommended the retention of the competency requirement but also recommended the strengthening of the presumption of competency:[195]

> (1) the rules relating to the competence of child witnesses [should] be revised;
>
> (2) prima facie, all children ... [should] be regarded as competent to give evidence;
>
> (3) a child should be disqualified if it is shown he or she does not have the ability to give reliable evidence with respect to the matters to which the evidence relates;
>
> (4) children who understand the nature of an oath or declaration and wish to take or make it should be allowed to swear or declare as in the case of adults.

Sturgess recognised that item (2) "would require the appearance of some feature casting doubt upon the fitness of the witness to give evidence before there would be any inquiry; and, in conducting such an inquiry, the presumption of competence would have to be rebutted before there was a disqualification".[196]

Sturgess believed that his recommendations, particularly item (3), would allow the court to approach things, once an inquiry was started, in an entirely different way:[197]

> First, it would free the court from the task of conducting an inquiry into infantile theology and ethical standards; secondly, it would concentrate its attention on an examination of the ability of the witness to be reliable with respect to the evidence tendered which question could be looked at in the light of other evidence received. ... Thirdly, scientific and other evidence as to the capacity of the young child could be given; finally, it would achieve what was seen by the Australian Law Reform Commission to be desirable in this area, namely, "a young child could be permitted to answer simple factual questions, but be ruled to be not competent to answer abstract or inferential questions".

The Irish Commission, while not believing that it could be assumed that all children under a specified age are incompetent to give evidence, was of the opinion that the law should recognise that in some instances, usually confined to cases of very young children, the court may need to satisfy itself as to their competence.[198]

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193 Submission 8.

194 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985).

195 Id at para 7.82.

196 Id at para 7.83.

197 Ibid.

198 The Law Reform Commission (Ireland), *Report on Child Sexual Abuse* (LRC 32, 1990) at para 5.13.

The Irish Commission considered various options for the form of an appropriate competency test. For example, it considered the Australian Law Reform Commission's formulation of a general competency test:[199]

> A person who is incapable of understanding that, in giving evidence, he or she is under an obligation to give truthful evidence is not competent to give evidence.
>
> A person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact.

The Irish Commission concluded that, "[s]ince there is universal acceptance of the necessity to have at least some test of competency in the case of very young children, even if it is confined to the minimum verbal skills ... the test should be framed as the Australian Law Reform Commission suggest, in terms of the child's cognitive development".[200]

However, the Irish Commission conceded that reservations might exist about the first limb of the Australian Law Reform Commission's formulation "since it involves the court in what might be a difficult exercise in establishing whether the child understands that he or she is under an obligation to tell the truth".[201]

The Irish Commission was impressed by:[202]

> ... the force of the contention that the account of the victim of an offence, even where he or she is too young to understand the concept of being under an obligation to tell the truth, should at least be heard during the course of the trial.

The Irish Commission recognised that a potential danger of adopting this approach would be the conviction of an innocent person on the uncorroborated testimony of an immature child who does not understand the difference between truth and falsehood. However, the Commission was of the view that, on balance, the competency test should be a limited one:[203]

> The Commission accepts that this is not an easy area in which to arrive at a solution which will command universal acceptance. We think that the balance of the argument is, on the whole, in favour of confining the test to one limited to ascertaining whether the child has the necessary verbal skills to give an account of the relevant events which is intelligible to the Tribunal. We have carefully weighed the risk that innocent people may be convicted on the uncorroborated testimony of immature children. We are, however, satisfied that, given the inherent safeguards of the criminal justice process itself, tilted as sharply as it is in favour of the accused, the possibility of any serious miscarriage of justice occurring is so remote that it can reasonably be discounted.

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199 Id at para 5.14 quoting from Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) at 150.

200 Ibid.

201 Id at para 5.15.

202 Id at para 5.16.

203 Id at para 5.17.

The Irish Commission recommended that:[204]

> ... the court should continue to make the ultimate decision as to the competence of children to give evidence. The test of competency of children should be the capacity of the child to give an intelligible account of events which he or she has observed. [italics omitted]

In 1991, the Law Reform Commission of Western Australia agreed with the Irish Commission that a test for competency should be retained on the basis that a presumption that very young children are competent to give evidence does not seem workable or appropriate:[205]

> The court should make an assessment in each case, though in practice the assessment process will be progressively easier as the age of the child increases.

The Law Reform Commission of Western Australia also agreed with the Irish Commission that the test of competency should be whether or not the child is able to give "an intelligible account of events which he or she has observed or experienced".[206]

Section 13(4) of the *Evidence Act 1995* (Cth)[207] reflects a similar approach. It provides that a person is not competent to give evidence about a fact if the person is incapable of hearing or understanding or of communicating a reply to a question about a fact and the incapacity cannot be overcome.[208]

8. QUESTIONS FOR DISCUSSION

(1) How frequently are children sworn to give evidence in Queensland?

(2) What, if any, problems have been experienced with child witnesses giving sworn evidence in Queensland courts under the *Oaths Act 1867* (Qld)?

(3) Would there be any advantage in specifying in Queensland legislation that children who are competent to take the oath are able to give sworn evidence in Queensland courts?

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204 Id at para 5.18.

205 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project 87, 1991) at para 2.30.

206 Id at paras 2.34-2.35.

207 *Evidence Act 1995* (NSW) s 13(3) is in identical terms.

208 The *Evidence Act 1995* (Cth) s 13(3) and the *Evidence Act (NSW)* s 13(3) provide that a person who is incapable of giving a rational reply to a question about a fact is not competent to give evidence about the fact but may be competent to give evidence about other facts.

(4) **What, if any, problems have been experienced with child witnesses giving unsworn evidence in Queensland courts under section 9 of the *Evidence Act 1977* (Qld)?**

(5) **What is the relationship between section 37 of the *Oaths Act 1867* (Qld) and section 9 of the *Evidence Act 1977* (Qld)?**

(6) **What Queensland cases are you aware of in which very young children were able to give unsworn evidence?**

(7) **At what point during the proceedings is the question of a potential child witness's competency raised in Queensland courts?**

(8) **How and when should the competency of a child to provide his or her evidence prior to trial[209] be raised and determined?**

(9) **Is it necessary to retain a competency requirement for children's unsworn evidence?**

(10) **Is the determination of a potential child witness's intelligence an appropriate test of competence for a child to be able to provide unsworn evidence in Queensland courts? If not, why not?**

(11) **If a competency requirement is retained, what is an appropriate test of competence for a child to provide unsworn evidence:**

- **(a)** **The current test under section 9 of the *Evidence Act 1977* (Qld)?**
- **(b)** **A presumption in favour of competency of young people?**
- **(c)** **The capacity of the child to give an "intelligible account" of what he or she observed?**
- **(d)** **Another and, if so, what test?**

(12) **If a competency requirement is to be retained, should the young person be tested only:**

- **(a)** **If the issue is raised?**

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209 See Chapter 10 of this Discussion Paper for a discussion of the admissibility of out-of-court statements.

(b) If the judge is of the view that it is necessary?

(c) At a pre-trial hearing?

(d) At any time?

(13) Is there a need for current awareness strategies for judges and the legal profession to cover such issues as the cognitive abilities and limitations of children?[210]

[210] See Chapter 7 of this Discussion Paper which deals with professional education and awareness.

CHAPTER 4

COMMUNICATING WITH A CHILD WITNESS

1. INTRODUCTION

At various stages of the legal process, a child witness will need to communicate with other parties involved in the process. A number of the preliminary submissions received by the Commission have suggested that one of the failings of the legal system in Queensland is a lack of effective communication between child witnesses and the various players in the justice system.[211]

For example, the jargon ("legalese") used by counsel and judges in court could easily be incomprehensible to lay adults, let alone to children. Further, the use of complex and confusing sentence structures, particularly in cross-examination, may be inappropriate for children as would aggressive cross-examination which, a number of preliminary submissions have suggested, is a common tactic adopted by some legal counsel in adversarial settings. As an example of the type of questioning which children can be exposed to, set out below is an extract from the cross-examination of a 7 year old boy, the alleged victim of sexual abuse by an adult male family friend, during a committal before a Queensland magistrate.[212]

X: You can't remember now. But you just said you could remember this, J. What is it, J?
J: I can't remember.
X: You can't remember what he did. Well, if I said to you then that have any other men done anything to you the same as what C has done, you wouldn't be able to tell me, would you?
J: I would say no.
X: You would say no because you don't know what C did to you, is that right? You don't remember what C did to you, do you?
J: Yes.
X: You do now?
J: No.
X: NO! J, would you make up your mind? What is it? Do you, or do you not, remember what C did to you?!
J: No.
X: NO! Alright, so if I put to you, if I said to you, J, have other men ever done anything the same as what C's done to you, you wouldn't be able to tell me, would you? Because you couldn't remember, could you? You can't remember anything about what C's done to you, is that right? Nothing at all?
J: I've only told you what I can remember.
X: You've only told me what you can remember. I suggest to you you've only told me what you've been told to tell me. Do you understand what I'm saying to you?
J: My mum didn't tell me anything about that.
X: Mum didn't tell you! Now I didn't say mum. Why do you say mum didn't tell me?

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211 For example, submissions 15, 22, 29, 34, 40, 41, 43.

212 'J' is the 7 year old complainant. 'C' is the defendant. 'X' is the defence lawyer. 'Mag' is the magistrate. 'Y' is the prosecutor.

Why do you say mum - mum has told you, hasn't she, J?

J: She hasn't told me.

X: J, J! You are here to tell the truth!

J: I am! (crying)

X: You are, aren't you?

J: Yes (crying)

X: Mmm!

...

X: J, you had lunch, did you have a talk to mum over lunch?

J: (inaudible)

X: And what did you talk to her about? [pause] You must remember what you talked to mum about? Did you tell her how the case was going?

Mag: J, you'll have to answer. It's no good nodding your head or shaking your head because someone has to type this later, you see. So they have to have a sound. So what do you mean when you nod your head?

J: Yes.

Mag: Okay, well just say yes or no. Just remember that to shake a head or a nod of a head doesn't mean anything, okay?

X: Thank you. J what did you say to your mum?

J: I said ...

X: Did you tell her what I'd asked you about?

J: Yes.

X: Yes. Right. And what did she say to that?

J: She said to tell the truth.

X: She said tell the truth, did she? Okay, did you tell your dad?

J: [inaudible]

X: What did he say?

J: He said tell the truth, too.

X: He said that, too, did he? Alright. Why did you tell them about what had gone on in here?

J: I don't know why I told them.

X: You don't know why you told them. Was it because you wanted to let them know how well it was going? Was it?

J: Yes.

X: Yes. Alright. Was it because mum had previously said to you, mum had said to you before, you let me know how its going later on?

J: No, she didn't say that.

X: Alright. When we stopped before, you said mummy didn't tell me anything. Can you remember saying that?

J: [inaudible]

X: And you remember my questions didn't nominate, or didn't identify any person at all. In other words, I didn't nominate your mummy as being a person you told anything to. Do you remember that?

J: She didn't tell me anything.

X: Mmmm! So why did you say mummy didn't tell me anything before, because I didn't ask you anything at all about your mummy. Why did you say that before?

J: I don't know.

X: Yes you do, don't you? Isn't it the case, J, that your mummy has been telling you all sorts of things to say about C? Isn't it? Answer me truthfully?

J: [inaudible]

X: Yes, it is isn't it? Yes. See, I can stand here all afternoon and I can ask you all sorts of questions, and until you tell me the truth, I won't stop. You understand that, don't you? Alright. What has your mummy said to say about C?

J: I don't know.

X: Yes you do. You just said yes, you told me. Mummy's not in here, she can't hear a thing that's being said in here. Did she say for you to say these nasty things about C?

J: No.

X: You love C, don't you?

J: [inaudible]
X: You did love C, didn't you? Mmm.
Mag: J, you'll have to answer.
J: Yes.
Mag: Thank you.
X: Yes, right. J, I'll ask you that again. Your mummy said, didn't she, to say a lot of nasty things about C, didn't she?
J: No.
X: Are you telling the truth, J?
J: Yes.
X: You know you can get into trouble if you're not telling the truth, don't you? Do you understand me?
J: [inaudible]
X: Well, I'll ask you that question again. Would you like me to ask you the question again, J?
J: [inaudible]
X: Did your mummy tell you to say a lot of nasty things about C?
J: No.
X: No! You're saying no is the truth?
J: Yes.
X: What did your mummy say?
J: To tell the truth.
X: Yeah, but beforehand, you just said that your mummy told you certain things about C. What did she tell you certain things - what certain things did she tell you about C?
J: I don't know what you mean.
X: Yes you do, don't you J?
J: I don't.
X: You don't. Alright. What did your mummy say that you had to tell all of us in here today about C?
J: Mum said nothing, she just said tell the truth [crying].
X: Tell the truth, alright. When was the last time your mummy told you to tell the truth?
J: Yesterday.
X: Yesterday, right. So you'd been talking about the case yesterday, had you?
J: Yes [still crying].
X: Do you want a drink of water?
J: Yes please.
X: Okay, are you okay now? Alright, I have to ask you these questions. Now, you said before that you did love C, remember that?
Mag: Does that mean yes?
J: Yes.
Mag: Thank you.
X: You did love C?
J: Yes.
X: Did you love C because you'd been over to his place a lot of times?
J: I haven't.
X: How many times?
J: Three.
X: Three times. Did mummy tell you to say three times, J?
J: No.
X: Who told you to say three times?
J: No one, but I -
X: No one told you.
J: But I've been there three times.
X: You've been there three times. And you still say that you were only speaking to the police officer on one time?
Mag: What do you mean?
J: Yes.
Mag: Thank you.

X: Please say yes or please say no. This microphone here records what you say, you've got to talk to it, okay? You can't nod. Now, so if I said to you that you'd been over to C's place so often that C and his wife kept a spare set of clothes for you and your sister there, you wouldn't understand what I meant, is that right?

J: Yes.

X: Well? Am I correct or am I not? Am I right or am I wrong?

J: You were right.

X: I'm right. And there was a spare set of clothes kept over there? Do you remember all that? And you went over there a lot of times to play, because mummy was at work, wasn't she? And B just didn't want to look after you, did he?

J: No.

X: Do you remember that? Well B was staying home, wasn't he? B wasn't working, was he? Didn't have a job? Didn't want to look after you?

Mag: Just a moment.

...

Mag: You'll have to answer these questions, J. It's no good, I appreciate sometimes you forget, but just think about answering the questions, not by shaking your head or nodding your head.

...

X: You've told me all you can remember, have you? Okay. J, you said before that you knew what C did to you was wrong, remember that? And you also said you didn't like it, you do you remember that?

Mag: Does that mean yes?

X: Does that mean yes?

J: Yes.

X: Okay. How did you know it was wrong?

J: Because it's bad.

X: Well how do you know it's bad?

J: Because it's not very nice.

X: It's not very nice. And how do you know it's not very nice.

J: Because it's rude.

X: And how do you know it's rude?!

J: I don't know how.

X: Yes you do. Did somebody tell you it was rude?

J: I told you that.

X: You told me it was rude, but somebody must have told you it was rude. Who told you it was rude?

J: Mum.

X: Mum! When did mum tell you it was rude?

J: Yesterday.

X: Oh J! She must have told you it was rude a long time ago, didn't she?

J: Yeah, and she told me yesterday.

X: And she told you again yesterday. She told you a long time ago, didn't she, that people shouldn't do naughty things to little boys and little girls? Do you remember her telling you that?

J: [inaudible]

X: Mmmm. And do you remember her, when do you remember her telling you that? Before you went to C's place?

J: Yes.

X: Why did she tell you that?

J: I don't know.

X: Didn't you think it was a bit funny that she would tell you that?

J: No.

X: Did you ask her what she meant?

J: No.

X: Did you understand what she meant?

J: I don't know.

X: Well, did you say mummy I don't know what you mean? Or did you say, yes I know what you mean, mum. People should not touch little boys and little girls that

way. Do you know what that meant? Do you know what she meant?

J: Mmm hmm.

X: Well, do you now know that to touch little boys and little girls in a particular way is wrong?

J: Yes.

X: To touch them around their wee-wee or their willy is wrong?

J: Yes.

X: Okay, well I'll start again! When did you first find out it was wrong?

J: Before I went over to C's house.

X: Before you went over to C's house! Now why did mum tell you before you went over to C's house it was wrong?

Y: Your worship, I object. How can the witness possibly tell why -

Mag: It's not a fair question to a child of this age ...

X: Yeah thank you. Had anybody been doing these things to you before you went over to C's house?

J: No.

X: Did you ask mummy why she told you these things?

J: No.

X: You just believed what she said?

J: [inaudible]

X: Did you say to mummy what's my willy for?

J: No.

X: Did mummy say to you people shouldn't touch your willy?

J: Yes.

X: When did she say that?

J: A long time ago.

X: A long time ago. How long ago, before you went to C's house?

J: Yes.

X: Alright. What were you doing when she said that?

J: Listening to her.

X: Sorry?

J: Listening to her.

X: You were listening to her, were you? Okay. What were you doing before she told you that?

J: I don't know.

X: Did she tell you why she was telling you this?

Y: Your worship, I again have to object on the grounds of repetition. We're going over the same ground a number of times.

X: With respect, your worship, what I'm doing is, I'm not asking the witness to presuppose what his mother thought, I'm just asking for a (inaudible) of what she actually said to him.

Mag: But I think we have been through this a couple of times before.

X: Well I'll wait until she returns ... Alright. Now did your mummy say that it was wrong for a man to put his willy in somebody here?

J: No.

X: She didn't? Did your mummy say that it was wrong for a man to ask a little boy and a little girl to touch one another's willy?

J: No.

X: What did she say?

J: Don't know, but she didn't say that.

X: She didn't say that. So you knew it was wrong and you <u>can't</u> remember everything that happened? Not only did you know it was wrong, but you didn't like it.

Mag: Just a moment. ... J is not answering the questions.

X: Could you answer the question yes or no. Was it the worst thing that ever happened to you?

J: Yes.

X: Yes. So therefore, you wouldn't forget it would you, because it was the worst thing that ever happened to you.

J: No I wouldn't forget.

X: Well why can't you tell us what happened to you?
J: I don't know.
X: Because it didn't happen to you, did it J?
J: [no answer]
X: Did it? J? Did it?
J: What didn't happen?
X: You know what I'm talking to you about, J, don't you?
J: No.
X: That C didn't touch you the way you say he did.
J: He did!
...

X: Do you remember playing on the computer?
J: Yes.
X: Whereabouts was the computer?
J: Um, in the back room.
X: In the back room, okay. Now, and the question was asked "where was C" and what, where was C that day?
J: First in his room.
X: He was in his room, was he?
J: Yeah, with A.
X: With A? In his room?
J: And then he called me in.
X: Oh, I see. Well, it just so happens, J, that you said he was outside taking, putting the stuff in the cupboard from shopping!
J: Yeah, and then -
X: No, no no no no! Just a minute please, J! You just said that he was in the room with A!
J: Yeah, after the shopping was packed!
X: Oh, J, J! What did I say to you before about making up stories and telling lies?
J: That is the truth.
X: So you forgot about him being outside, taking and putting the stuff in the cupboards from shopping, did you forget about that did you?
J: [inaudible]
X: Oh, I see. And then the police officer said "what happened next", well what then did happen next after that then?

There is currently no Queensland legislation directed at communication with witnesses, apart from the interpreter provisions in the *Evidence Act 1977* (Qld). The judge's authority to exercise some degree of control over the behaviour of counsel in court has been discussed in Chapter 2 of this Discussion Paper under the heading "An Inherent Jurisdiction in the Court to Facilitate the Giving of Evidence". Although the Commission is unaware of any relevant empirical studies into the issue, it is unlikely that all justices, magistrates and judges control their courts in a manner which would avoid inappropriate communication with child witnesses. From anecdotal and other information provided to the Commission during preliminary submissions, this appears particularly to be the case in committals where, it has been observed, there is not the tempering effect of a jury present.[213]

In any setting, let alone a formal, intimidating setting like the traditional court room, the younger or less mature a child is, the more innovation may be required to communicate with the child. It would be inappropriate to talk to a five year old in the same manner as adults would normally talk to a teenager. It would also be inappropriate for a child

[213] Submissions 15, 22, 40.

to be spoken to in a manner which is based on the premise that all children of that particular age can understand that style of communication.

Effective communication with children will obviously depend on a number of factors - not the least of which will be the ability of the child to comprehend the questions put to him or her and the ability of the child to respond to those questions in a manner capable of being comprehended by the court.

Although the effectiveness of any communication style will depend largely upon the characteristics of the particular child witness, the fact that children ranging in age from very tender years through to mature teenagers may be witnesses would indicate that the personnel involved in the examination of the witness and the judge in whose court the examination is taking place ideally should be aware of a variety of communication techniques and have available to them whatever technical or other facilities are needed for effective communication.

The younger the child, the more difficult it may be for the court to communicate effectively with the child. Of itself, however, the age of the child witness should not prevent the court from endeavouring to obtain the best possible evidence from the child. In Queensland there is no statutory or common law rule, apart from the issue of competence, preventing a child capable of communicating from being a witness in any proceedings.[214] This also appears to be the case in other common law jurisdictions.

Recommendations for effective and empathetic communication with child witnesses have been in the forefront of international law reform proposals about children's evidence. Without effective communication the court will be missing out on what may very well be crucial evidence which is required for the just disposition of a particular matter. Without age-appropriate communication, the justice system could be seen as out of step with contemporary social expectations.

2. THE USE OF LANGUAGE

The study by Brennan and Brennan[215] of the language used in courts when child victims of alleged sexual abuse are cross-examined has highlighted some of the needs of children in court which can be responded to, denied or exacerbated through language.

The Brennans concentrated on cross-examination because:[216]

> Cross examination is a special kind of questioning which is geared tactically to upset the credibility of a witness. The witnesses here are victims, a psychological status which

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214 For a discussion on competency see Chapter 3 of this Discussion Paper.

215 Brennan M and Brennan R, *Strange Language: Child Victims under Cross Examination* (3rd ed 1988).

216 Id at 3.

> carries with it its own frailties and propensities. With these aspects in mind a question is not a mere question but a tactical tool deployed on the battleground of credibility; a battleground where the option for negotiation is wrested from the child victim witness.

The Brennans' concerns about the use and effect of language during cross-examination included:[217]

> Some children have told their "stories" 22 times to police, teachers, counsellors and doctors. What are the effects of multiple recounting? What do children remember of traumatic happenings and how do they recount such? What are the effects of multiple and continuous abuse and how is this reported by children? What account do courts take of age? Is aggressive cross-examination a legitimate tool to test truth? What are the effects of continuous questioning? What means are currently available for allowing children to tell their story? How can children's stories be validated?

The Brennans' report did not assume that children should not be confronted or that simple language is good or that retelling stories over and over again is necessarily bad:[218]

> It is in the nature of trauma to want to do this. Or that all recounts will be of equal quality for whatever purpose. Submitting children to complex adult language is not an issue either. Indeed, this is how children learn and develop language. However, it is an issue when their mostly unelaborated responses to complicated and lengthy questioning are regarded as evidence. In that context they are barred from negotiating their way through the forms, vocabulary and idiosyncratic expressions. Just answer "Yes" or "No" is the classic expression of this.
>
> The concept of negotiability is central to this report as we endeavour to display how the language of one person can be used to deny another the usefulness of their only admissible tool of expression, their own language. A longer term outcome of this report then is to seek ways to admit as evidence what children have to say and to allow them to negotiate meanings, ideas and experiences in ways and forms that tell clearly the stories they have to tell.

The Brennans' principal concern was that words, however used, can only be really understood and analysed in their context. For example, they noted that:[219]

> ... an account of court proceedings which denotes "the witness" without noting that she is 9 years old, female, the likely subject of constant sexual assault by her father over a period of 5 years, who is fearful of being sent away from her mother, who has been interviewed at least six but possibly 22 times, who is regarded as 'trouble', and much more, is also a recording that fails to tell a fuller story.

The Brennans suggested that there are three definable kinds of context in which words operate:[220]

> The first operates as a function of what kind of primacy words themselves have. In court

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217 Ibid.

218 Id at 4.

219 Id at 6.

220 Ibid.

> they are almost everything. The context of court is words. It is about what you say to me and what I say to you and what you said about what I said to you. Words are the stuff of the court's procedure. An analysis of words, how people respond to them, is consistent with this view of context.
>
> In the second context sense, the sense of what goes on around these words in the court itself, also is of significance. The clues of this context will place the words in time and place. They will attribute status to the actors and this will define and influence the power of assertions and responses.
>
> The third context, the pervasive and extant, brings with it all the force of psychological history. In the cases we are concerned with here, it is the history of being a victim. This particular history has its own susceptibilities which can be acted upon by well designed phrases and accusations designed to intimidate. This brings us to a fundamental psychological and legal question. Is it necessary to intimidate, accuse and vilify children in order to arrive at the truth of an incident happening or not?

3. FACILITATING COMMUNICATION WITH CHILD WITNESSES: CHILD INTERPRETERS/INTERMEDIARIES

A number of jurisdictions in Australia and overseas have proposed or implemented special measures for facilitating communication with child witnesses.

Western Australia

The Law Reform Commission of Western Australia recommended the introduction of "child interpreters" to facilitate communication with child witnesses.[221] The function of a child interpreter would be analogous to that of a foreign language interpreter in a case where the witness does not have sufficient understanding of English.[222]

The Commission considered that child interpreters would have to possess appropriate professional and practical skills in communicating with children, and would also need to be able to comprehend the language counsel use in examining and cross-examining witnesses.[223]

The Commission also envisaged that, where it was considered that such a person was appropriate in a particular case, the person would ordinarily be appointed in advance pursuant to an application made at a pre-trial directions hearing. The person would then be available when the child was giving evidence (in whatever manner). If the judge were satisfied that the child could not understand a question put by counsel, the judge would then ask the communicator to translate it to the child. Also, it may be appropriate for the person to translate the child's answer.[224]

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221 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.43.

222 Id at para 6.41.

223 Ibid.

224 Id at para 6.42.

The Commission's recommendations were implemented by amendments to the *Evidence Act 1906* (WA). The statutory function of the communicator is:[225]

> ... if requested by the Judge, to communicate and explain -
>
> (a) to the child, questions put to the child; and
>
> (b) to the Court, the evidence given by the child.

The Judges of the Supreme Court of Western Australia have agreed to guidelines for the operation of the special procedures available in Western Australia for the taking of children's evidence.[226] In the Guidelines the Judges refer to the child communicator as "effectively a 'child interpreter'".[227] The Judges considered that such a facility would most likely be necessary where a child is of a young age and there is a need for a trained person "such as a child psychologist or a kindergarten teacher" to assist the child in understanding the questions put to him or her and the court in understanding the child's responses.[228]

Ireland

A more limited provision than the Western Australian provision is section 14 of the *Criminal Evidence Act 1992* (Ireland)[229] which provides:

> (1) Where -
>
> (a) a person is accused of an offence to which this Part applies, and
>
> (b) a person under 17 years of age is giving, or is to give, evidence through a live television link,
>
> the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.
>
> (2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.

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225 *Evidence Act 1906* (WA) s 106F(2).

226 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court).

227 Id at 5.

228 Ibid.

229 This provision was discussed in Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at para 169. We thank the Irish Law Commission and the Law Commission (New Zealand) for providing us with information relating to the Irish provisions.

(3) An intermediary referred to in *subsection* (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

The provision applies to matters involving sexual offences or offences involving violence or the threat of violence to a person.[230]

New Zealand

New Zealand legislation also provides for a more limited kind of interpreter than the Western Australian provision where a complainant is a child or mentally handicapped person.[231]

Section 23E(4) of the *Evidence Act 1908* (NZ) provides:

> *Modes in which complainant's evidence may be given*
>
> ....
> Where the complainant is to give his or her evidence in the mode described in paragraph (b) or paragraph (d) of subsection (1) of this section,[232] the Judge may direct that any questions to be put to the complainant shall be given through an appropriate audio link to a person, approved by the Judge, placed next to the complainant, who shall repeat the question to the complainant. [note added]

The use of intermediaries under this provision is limited to where evidence is given in an alternative way.

The New Zealand Law Commission noted in its report that the statutory function of this intermediary is to put questions to a witness, not to rephrase the questions or interpret the witness's answer. The Law Commission, in its discussion, referred to the characteristics of an intermediary listed by the New Zealand High Court in the unreported decision of *R v Accused*:[233]

> [The intermediary] is professionally experienced and has no therapeutic obligation to or bond with the child. ... I think it would be going too far to say the intermediary must not "jolly along" the child to answer ... so long as the intermediary is responsibly and fairly putting the questions as asked, careful supplementary comments or requests to the child

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230 *Criminal Evidence Act 1992* (Ireland) s 12(a), (b). The provision also applies to "an offence consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of" those type of offences (*Criminal Evidence Act 1992* (Ireland) s 12(c)).

231 *Evidence Act 1908* (NZ) s 23E(4).

232 Where the necessary facilities and equipment are available, evidence is to be given outside the courtroom but within the court precincts and the evidence transmitted to the courtroom by means of closed-circuit television (s 23E(1)(b)) or the complainant placed behind a wall or partition so that those in the courtroom can see the complainant but the complainant is unable to see them and evidence given through an appropriate audio link (s 23E(1)(d)).

233 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at para 172 and note 177 quoting *R v Accused* (Unreported, High Court, Wellington, T91/92, 5 March 1993 per Neazor J at 5).

> to attend or answer would not be objectionable. If it seems that the child does not understand the question the intermediary will understand that it will be for counsel to rephrase it or approach the matter from some other angle.

The New Zealand Law Commission has proposed that the intermediary should have a broader statutory function:[234]

> The Commission believes that witnesses should be able to use intermediaries whenever their assistance is necessary to enable the witness to understand the questions put to them in court. We propose that in any case where the rational ascertainment of facts would be assisted by the use of an intermediary, the judge should have a discretion to direct that one be provided. The judge should also have a discretion as to who may act as intermediary. In many cases communication difficulties can be best addressed by lawyers and judges being sensitive to the characteristics of particular witnesses, but in some cases the assistance of a specialist intermediary may be more effective ...

As to who should be entitled to be an intermediary and who should act as an intermediary, the Law Commission proposed that:[235]

> ... an intermediary may rephrase questions to assist witness comprehension. Intermediaries will have special skills to enable them to communicate with those few witnesses who have real difficulties understanding questions put to them in court. In order for these witnesses to give reliable evidence it seems important that provision is made for the use of intermediaries rather than rely on counsel to ask questions in an appropriate manner. However, we do not suggest that intermediaries should interpret the witness's response to the court. It is envisaged, however, that an intermediary will ask questions in order to elicit a clear and unambiguous response from the witness.
>
> Although the current provision does not allow an intermediary to rephrase questions put to a witness, we believe that it is consistent with the principles of evidence law that an intermediary may do so.

The Law Commission stressed that the use of intermediaries must be subject to procedural fairness and to that end it would be part of the judge's role to give guidance to the intermediary on how to perform his or her function in a particular case and to "oversee the fairness and accuracy of rephrased questions".[236]

The Law Commission envisaged that the intermediary would take an oath and that an intermediary who made a misleading or false statement would be subject to criminal sanction.[237]

The New South Wales Children's Evidence Taskforce

The Report of the New South Wales Attorney General's Department Children's Evidence Taskforce considered, but did not adopt, the Western Australian child

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234 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at para 172.

235 Id at paras 173-174.

236 Id at para 175.

237 Ibid.

communicator provisions in section 106F of the *Evidence Act 1906* (WA). The Taskforce was of the opinion that:[238]

> ... particularly where a communicator would be used in conjunction with CCTV, too many processes would be placed between the witness and the court. There may also be difficulties involved in explaining to the court the testimony of a child which may raise the issue of whose evidence is really being given. The Taskforce considered that there were other means (particularly increased exposure of the judiciary and legal profession to issues which affect child witnesses) by which the difficulties associated with communicating with child witnesses in the courtroom can be mitigated.

South Africa

In its Issue Paper, *Sexual Offences Against Children*, the South African Law Commission noted that South Africa had introduced in 1991 a system of using an intermediary in matters involving child witnesses. This system was embodied as section 170A of the *Criminal Procedure Act 1977* (South Africa) which was quoted in the following terms:[239]

> (1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the age of eighteen years to undue mental stress or suffering if he testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his evidence through that intermediary.
>
> (2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary.
>
> (b) The said intermediary may, unless the court directs otherwise, convey the general purport of any question to the relevant witness. ...

The South African Law Commission went on to note:[240]

> The success of the intermediary system in South Africa has not been evaluated authoritatively. What appears necessary is that intermediaries should be experienced in interviewing children and specially trained in child language, psychology and the relevant law with particular emphasis on the law of evidence, which is not always the case. The supporting technological aids (video cameras, etc) are also not readily available at all [centres].

If the court does not appoint an intermediary it would appear that the child witness would have to confront the accused in open court and not have the benefit of being

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238 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.3.2.

239 South African Law Commission, Issue Paper 10, *Sexual Offences Against Children* (Project 108, 1997) at para 5.7.13. Also cited in Louw D and Olivier P, "Listening to Children in South Africa", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 179.

240 South African Law Commission, Issue Paper 10, *Sexual Offences Against Children* (Project 108, 1997) at para 5.7.14.

able to give evidence in a more informal setting. In its Issue Paper, the South African Law Commission asked whether the use of measures to shield the child witness from the accused should be dependent upon the court exercising its discretion to appoint an intermediary.[241] It also asked whether the intermediary system is working effectively; whether a child, if old enough, can refuse to testify through an intermediary; what criteria are there for appointment and necessary qualifications of the intermediary; and, whether the relevant regulations in respect of intermediaries are effective and appropriate.[242]

Information kindly provided to this Commission by the Law Commission in South Africa, based on responses to its Issue Paper, suggests that some difficulties have been experienced with the intermediary system. These difficulties stem partly from resistance to change, particularly by some magistrates and by some prosecutors who fear a reduced chance of conviction because the child appears less vulnerable with an intermediary, and partly from unavailability of and poor remuneration for intermediaries. Nonetheless, prosecutors who have used the system regularly and social workers who have worked with children either as intermediaries or after the court case, reported that the system does appear to reduce the anxiety of the child, who is then able to testify in a more relaxed manner. The majority of children questioned also preferred the use of the intermediary system.

Respondents to the South African Issue Paper generally considered that the choice as to whether or not an intermediary should be used should lie with the child. Apparently, many of the prosecutors who use the intermediary system do in fact allow the child to choose, although the law does not specifically provide for this.

At present the following people may become intermediaries:

- social worker/psychologist with 2 years experience;
- teacher with 4 years tertiary education and 4 years experience;
- trained child care worker with 3 years accredited training and 4 years experience;
- medical practitioner (no experience requirement).

The Law Commission commented on the need for amendment of the necessary qualifications, on the basis that it is patently inappropriate for a medical practitioner with no special training and experience in communicating with children to perform this role.[243]

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241 Id at para 5.7.8.

242 Id at para 5.7.14.

243 Letter from the South African Law Commission 29 October 1998.

4. THE USE OF EXPERTS[244]

The New Zealand Law Commission proposed as an alternative mechanism for assisting witnesses with communication difficulties the appointment of an expert witness to advise the court and counsel on the most appropriate way to question the witness:[245]

> This may address concerns under the previous proposal [intermediary], such as lack of party control over the interpretation of the questions which are put to the witness by an intermediary. If a witness has communication difficulties, as well as comprehension difficulties, then an interpreter should be provided ... An intermediary would not explain the witness's response - for example, that a witness because of cultural differences or intellectual disability may say "yes" when they really mean "no". This kind of explanation would be provided, if at all, by an expert witness.

5. THE ROLE OF THE COURT IN FACILITATING COMMUNICATION

The New Zealand Law Commission acknowledged the importance of the court and of counsel in facilitating communication with vulnerable witnesses. The Commission observed that, although in some cases the assistance of a specialist intermediary may be needed:[246]

> In many cases communication difficulties can be best addressed by lawyers and judges being sensitive to the characteristics of particular witnesses ...

Although the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their report on children and the legal process noted the trend towards legislative provisions for the appointment of child interpreters to "shield child witnesses from the confusion and intimidation caused by incomprehensible questions",[247] the Commissions saw the solution to this problem as more fundamental than simply providing for a child interpreter, attributing responsibility for many of the difficulties that children have in giving evidence to a failure on the part of judges and magistrates to control proceedings in their courts:[248]

> Magistrates and judges are meant to be 'referees' for a fair trial. They therefore have particular responsibility to ensure that child witnesses understand the questions asked and are not harassed or intimidated by tone of voice, aggressive questioning, incomprehensible language and unfair or abusive treatment. ... [counsel, magistrates and judges] tolerate,

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244 See also the discussion of expert witnesses in Chapter 5 of this Discussion Paper.

245 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at para 176. See also Chapter 5 of this Discussion Paper.

246 Id at para 172.

247 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.113.

248 Id at para 14.115.

or even perpetuate, child abuse by the legal system.

The Commissions observed that many submissions to them had opposed the use of child communicators, "considering them a poor substitute for requirements that judges and lawyers themselves have training in appropriate skills for dealing with children".[249] The Commissions made a number of recommendations about training for judges and magistrates to assist them in dealing with child witnesses.[250] Those recommendations included the development of guidelines and training to assist judges and magistrates to identify:[251]

- aggressive or confusing examination tactics, so as to enable judges and magistrates to recognise and prevent aggressive, intimidating and confusing questioning;

- language and grammar which is inappropriate to the age and comprehension of child witnesses, so as to enable judges and magistrates to ensure questions are stated in language that is appropriate to the age and comprehension of the child witness.

The Commissions also recommended that all prosecution staff who have contact with child witnesses should receive training in the use of age appropriate language for child witnesses, children's developmental stages and the possible effects of giving evidence on children of various ages.[252] The Commissions' attitude to the use of intermediaries and child communicators is similar to that expressed by the New South Wales Children's Evidence Taskforce, referred to at page 72 above.

6. QUESTIONS FOR DISCUSSION

(1) (a) Are you aware of any, and if so what, specific instances where child witnesses have had difficulty communicating with the court?

(b) Would a communicator have assisted the court and the child in those instances?

(2) What guidelines should there be for the role of the communicator - for example:

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249 Id at para 14.113.

250 These recommendations are discussed in Chapter 7 of this Discussion Paper.

251 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 110 at 346.

252 Id recommendation 111 at 346.

(a) Should the communicator act as an interpreter for a child in relation to all questions put to the child and in relation to all answers given by the child? or

(b) Should the communicator's role be dependent upon the court's assessment of a child's ability to answer a particular question or the child's ability to comprehend a question put to the child?

(3) Would any perceived need for a communicator or an expert witness be obviated by guidelines to increase the awareness of courts and legal representatives of age-appropriate communication techniques?

(4) Is it necessary to stipulate what qualifications the communicator should possess or should this be left to the discretion of the court after considering all relevant circumstances?

(5) Should it be the role of the court to give guidance to the communicator on how to perform his or her function in a particular case and to oversee the fairness and accuracy of rephrased questions?

(6) Should the communicator be required to take an oath?

(7) Should the communicator who makes a misleading or false statement be subject to criminal sanction?

(8) Should the court be able to appoint an expert to advise the court on the most appropriate way to question a witness with or without the assistance of a communicator?

(9) Who should be able to raise the issue of the use of a communicator?

(10) Should the issue of whether a communicator should be available in a particular case be resolved before the proceeding in which the child is to appear as a witness - for example, at a pre-trial hearing?

(11) Should the issue of the identity of an appropriate person to act as a communicator be resolved before the proceeding in which the child is to appear as a witness - for example, at a pre-trial hearing?[253]

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253 See the discussion of pre-trial hearings in Chapter 15 of this Discussion Paper.

CHAPTER 5

EXPERT EVIDENCE

1. INTRODUCTION

An expert witness is a witness who gives an opinion on a matter within his or her own field of expertise.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have acknowledged that experts regularly give evidence in family law or care and protection proceedings involving children.[254] The Commissions have explained the lack of use of experts in criminal proceedings involving children in the following terms:[255]

> ... little use is currently made of expert opinion evidence regarding child victim witnesses in criminal proceedings,[256] perhaps because the prosecution cannot generally call a witness solely for the purpose of bolstering the credibility of the complainant.[257] Issues surrounding patterns of disclosure or behaviour in child victims may also be considered to be within the "common knowledge"[258] of a jury[259] or not a fit subject for expert evidence.[260] In a number of recent cases in Australia expert evidence about such matters as child sexual abuse accommodation syndrome or the behaviour of child victims of sexual abuse has been excluded for these reasons.[261]

Nevertheless, experts may provide useful evidence concerning child witnesses in criminal proceedings in relation to many issues. These issues may include the

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254 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.74.

255 Id at para 14.75.

256 Referring to Oz Child Legal Service *IP* submission 195. See also *G v DPP* [1997] 2 All ER 755 as an example of judicial reluctance to accept expert evidence regarding the competency of children.

257 See *Evidence Act 1995* (Cth) s 102.

258 The common knowledge rule states "that an expert cannot give evidence on a matter within the knowledge and experience of the fact-finder": Law Commission (NZ), Discussion Paper, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at 15. Section 80 of the *Evidence Act 1995* (Cth) abolishes the common knowledge evidence rule.

259 Karpardis A, *Psychology and Law* (1997) at 179.

260 See *R v C* (1993) 60 SASR 467.

261 The following cases were cited as examples: *Re F (The Court)* (1996) 83 A Crim R 502 (NSW); *R v C* (1993) 70 A Crim R 378 (SA); *R v Johnson* (Unreported, Vic Court of Criminal Appeal, 8 December 1994); *R v Ingles* (Unreported, Tas Court of Criminal Appeal, 4 May 1994).

competency of a child to give evidence[262] or the most appropriate way for the child to be able to present his or her testimony.

Legislation that broadens the range of matters on which an expert may give his or her opinion in sexual abuse cases may overcome some of the common law restrictions on admissibility of evidence. These restrictions arise from evidentiary rules such as the common knowledge[263] and ultimate issue[264] rules.[265] However, there are also arguments against the use of expert witnesses in this context. The New Zealand Law Commission has produced a series of papers on the reform of evidence law. In a 1991 Preliminary Paper the Commission considered the use of "probability theory" by expert witnesses and, relevantly, by psychologists and psychiatrists.[266] The Commission noted that the probability theory sets up "likelihood ratios" of, for instance, how "consistent" a particular characteristic is with a child being sexually abused.[267] But it warned that it may be difficult for expert witnesses to give this evidence precisely:[268]

> First, they may not know the numbers of abused children who display a certain characteristic. The best they may be able to do is give evidence that a certain characteristic, for example being withdrawn and moody at school, is exhibited by many sexual abuse victims. Secondly, the expert may not have very much information about the non-abused population, for example, how many children in the general population are withdrawn and moody at school. To give this information experts may have to rely on their experience that the characteristic does mark abused children, or alternatively that the characteristic is only rarely encountered in non-abused children. In addition, other possible causes of the characteristic will need to be explored. It may be that some other trauma caused the withdrawn behaviour or the depression. Once again, all the factors affecting the likelihood ratio need to be brought to the attention of the court and a skilled cross-examiner will focus on these issues to test the expert evidence. Clarity in giving expert evidence of this kind is therefore important, as is the understanding of the judge and jury of all aspects of probability referred to by the expert.

In its preliminary deliberations, the Commission concluded that:[269]

> ... it is essential that the court and jury fully appreciate both the value and usefulness of the evidence and its limitations.

The Commission posed the question whether legal rules could or should be formulated

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262 See Chapter 3 of this Discussion Paper for a discussion on competency.

263 See note 258 of this Discussion Paper.

264 The ultimate issue rule provides "that an expert witness may not be asked the question which the court itself has to decide". See Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 29105.

265 Both rules have been abolished by s 80 of the *Evidence Act 1995* (Cth) and of the *Evidence Act 1995* (NSW).

266 *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991) at 31-36.

267 Id at 33-34.

268 Id at 34.

269 Id at 35.

to regulate evidence given in the form of probabilities.[270]

2. EXPERT EVIDENCE ON RELIABILITY[271]

The *Evidence Act 1977* (Qld) allows the court to receive expert evidence when determining the ability of a child under 12 years of age to give reliable evidence.

Section 9 of the *Evidence Act 1977* (Qld) confers a judicial discretion to receive a child's unsworn evidence. The court must receive such evidence "unless satisfied that the child does not have sufficient intelligence to give reliable evidence". Section 9A of the *Evidence Act 1977* (Qld) allows the court to accept expert evidence in determining the ability of a child under the age of 12 years to give reliable evidence.

Section 21A of the *Evidence Act 1977* (Qld) deals with the evidence of special witnesses,[272] but does not expressly state whether expert evidence can be admitted to determine whether a person is a "special witness". However, it has been suggested in the Queensland Court of Appeal that there is no reason why expert evidence should not be admitted in these circumstances.[273]

A number of preliminary submissions to the Commission have considered section 9A of the *Evidence Act 1977* (Qld). One submission criticised the absence of standards or guidelines for the measure of sufficiency required to determine the level of intelligence.[274] The Commission has no knowledge or information as to whether the lack of standards or guidelines is causing problems and would be pleased to receive comments in this regard.

Other submissions referred to problems which may generally occur when an expert is used in any court proceedings. One submission referred to the unreliability of "psychological expertise" and "enthusiastic or partisan psychiatrists".[275]

There may also be a problem of conflicting expert evidence when more than one party calls expert evidence. A concern is that a jury may not be competent to resolve conflicts of expert evidence.[276]

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270 Id Question 8 at 35.

271 See also Chapter 3 of this Discussion Paper for a discussion on competency.

272 "Special witness" is: a child under 12 years; or a person (including a child over 12 years) who would be likely to be disadvantaged as a witness as a result of intellectual impairment or cultural differences, suffer severe emotional trauma, or be so intimidated as to be disadvantaged as a witness.

273 *R v FAR* [1996] 2 Qd R 49 per Fitzgerald P at 52.

274 Submission 8.

275 Submission 24.

276 *R v FAR* [1996] 2 Qd R 49 per Fitzgerald P at 52.

In their 1997 Report on children in the legal process, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission strongly favoured the admissibility of expert evidence on issues affecting the reliability of a child witness's evidence:[277]

> **Recommendation 101.** Expert opinion evidence on issues affecting the perceived reliability of a child witness should be admissible in any civil or criminal proceeding in which abuse of that child is alleged. In particular, evidence that may assist the decision maker in understanding patterns of children's disclosure in abuse cases or the effects of abuse on children's behaviour and demeanour in and out of court should be able to be admitted.
>
> **Implementation.** The Evidence Act should be clarified to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. This legislation should in particular mirror the Evidence Act's abolition of the common knowledge and ultimate issue rules.

3. EXPERT EVIDENCE ON CREDIBILITY

There is no provision in Queensland legislation allowing expert evidence on the credibility of the evidence given by a child witness. A number of jurisdictions and agencies have elaborated on the use of experts to determine the credibility of child witnesses in child abuse cases.

(a) New Zealand

In New Zealand, the issue of expert evidence concerning a child witness's credibility has been addressed in legislative amendments, case law and Law Commission papers.

In 1989 a number of provisions were inserted into the *Evidence Act 1908* (NZ) to broaden the range of issues upon which an expert may be requested to testify in sexual abuse cases involving child complainants.[278] These issues included:[279]

- the complainant's intellectual attainment, mental capacity and emotional maturity;
- the general development level of children of the same age;
- the consistency or otherwise of evidence about the complainant's alleged behaviour with the behaviour of sexually abused children of the same age group as the complainant.

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277 Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 329.

278 *Evidence Amendment Act 1989* (NZ) s 3. This section inserts ss 23C-23I into the *Evidence Act 1908* (NZ).

279 *Evidence Act 1908* (NZ) s 23G(2).

The assumption in New Zealand is that expert evidence provides a context to aid the jury in assessing the child's credibility. Although the expert cannot directly express an opinion upon the accused's guilt or innocence or the child's truthfulness, the New Zealand Court of Appeal has considered that the use of the expert "will usually be especially important in assisting the jury to evaluate the truth of the complainant's evidence".[280] Yet the Court of Appeal has stressed as well that the accused "must be protected against assumptions too readily made and against generalisations too facilely applied to the particular case".[281]

In sexual abuse cases, psychologists may testify that the child's behaviour or emotional state is consistent with sexual abuse. This "social framework evidence" may "be necessary not because the subject is not a matter of common knowledge but rather because what is commonly 'known' about is simply wrong".[282] In relation to expert evidence on credibility, the New Zealand Law Commission in 1997 sought to maintain a cautious approach while simplifying the law.[283] The Commission considered that the value of this expert evidence depends on its reliability, and proposed the following:[284]

> Having reviewed this topic, the Commission now considers that the test of substantial helpfulness also proposed for expert evidence is an appropriate test of reliability for expert evidence reflecting on credibility. The Commission proposes to allow all expert evidence reflecting on credibility or truthfulness to be admitted so long as it is substantially helpful under that rule: see section 5 [of the Commission's *Draft Truthfulness, Character and Propensity Sections for an Evidence Code* included in the Commission's Report at p115] which provides that truthfulness evidence which satisfies the opinion rule is admissible. The Commission recognises that there is at present no means by which experts can determine a witness's intention to tell the truth, but it prefers to include a code rule which at least allows for that possibility.

(b) Canada

Canadian commentators also endorse the view that expert testimony should cover a wide range of issues:[285]

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280 *R v Tait* [1992] 2 NZLR 666 at 668.

281 Pipe M and Henaghan M, "Accommodating Children's Testimony: Legal Reforms in New Zealand", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 155, citing *R v S* (Unreported, New Zealand Court of Appeal, No 244/91, 20.12.91 at 13).

282 Norris J and Edwardh M, "Myths, Hidden Facts & Common Sense: Expert Opinion Evidence and the Assessment of Credibility" (1995) 38 *Crim LQ* 73 at 83.

283 Law Commission (NZ), Discussion Paper, *Evidence Law: Character and Credibility* (NZLC PP27, 1997) at para 79.

284 Id at para 83.

285 Dezwirek L, Wolfe D and Gowdley K, "Children and the Courts in Canada", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 93.

> Expert testimony on issues related to the psychological symptoms of abused children, recantation, delayed disclosures, the need for the screen or closed-circuit presentation, suggestibility, and memory in children should be offered as much as possible to the court as part of the prosecutor's case against an accused.

4. APPOINTMENT OF AN EXPERT

An expert is usually appointed by one party to the proceedings in order to give evidence-in-chief for that party and be subject to cross-examination by the other party or parties. This is the case where expert evidence is given in relation to a child witness.

Instead of individual parties appointing experts, procedures could be introduced to allow for the parties to agree early in the proceedings to the use of one expert. Although in many cases unlikely, agreement could be achieved at a pre-trial hearing. This would avoid any conflicts in expert testimony and limit the number of people who interview the child witness.

Further, the court could be empowered to appoint an expert. There is precedent for this in the Family Court. Order 30A of the *Family Law Rules* allows the court to appoint an expert, on its own or a party's motion, to advise the court on issues not involving law or construction. The court expert is to be a person agreed upon by the parties or, if agreement is not possible, a person nominated by the court. The expert, usually a child psychiatrist, can interview all relevant parties, and present a report for evaluation by the Family Court.

One advantage of adopting the procedure of a court-appointed expert is that it restricts the number of people who interview the child witness. This may reduce possible stress and trauma to the child and reduce the possibility that the child's evidence may become tainted as a result of repeated questioning. Allegations of tainting may stem from inconsistencies and from a belief that children are open to suggestibility. In addition, court-appointed expert witnesses are more likely to be seen as impartial and therefore not aligned to either the prosecution or defence case. This type of expert could be drawn from a panel of court-appointed experts. Ultimately, the court may employ professionals specifically to carry out these tasks.[286] Specially-designed training programs could also be considered.

The New Zealand Law Commission's preliminary consideration of some problems confronting expert evidence included some consideration of court-appointed experts and pre-trial exchange and presentation of expert evidence.[287] The Commission

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286 See also pp 226-227 of this Discussion Paper for a discussion of the Queensland Mental Health Tribunal in this respect.

287 Law Commission (NZ), Discussion Paper, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP18, 1991).

acknowledged problems in relation to court-appointed experts:[288]

> Thus, where there are both court and party experts, because of the aura of independence given to the court expert, the evidence of the parties' experts may be devalued - even though they may be just as competent and committed to ascertaining true facts. In addition, if the court expert is the sole or predominant source of opinion, then the court may be given unreliable evidence without an effective check. In broad terms it seems clear that there are advantages and disadvantages in relation to both kinds of expert witness, with the result that there is in all probability room for both in our trial procedures.

The Commission's inclinations in relation to expert witnesses in civil and criminal cases were as follows:[289]

> In civil cases the Commission favours the parties retaining the primary right to present expert evidence to the court. In this way, experts of all persuasions may be called as witnesses. However, we also consider there should be a general power for the court to appoint experts. Such a power would be potentially valuable, for instance, where there are several experts for the parties and their evidence is irreconcilable or difficult to understand. The power might also be useful when the judge considers that some helpful information is not being made available, especially where one of the parties is unable to obtain the services of an expert witness.
>
> The use of court-appointed experts in criminal cases requires special consideration. At present expert reports from probation officers are commonly prepared and received on sentencing matters. However, under our present system it is very doubtful whether the court should appoint an expert witness to give evidence at trial over the objections of the accused. Such a step might give the appearance that the court was adopting a prosecutorial role or overruling the accused's wishes concerning the conduct of the defence. If the court is to appoint an expert in a criminal case it would seem necessary to have the consent of the accused. Appointment on that basis could on occasions be valuable to an accused (especially where the defence has inadequate resources). We doubt, however, whether an accused will often be willing to take the risk involved in seeking a court-appointed expert, since the expert's report might well turn out to be unfavourable to the accused. Perhaps the concept of court-appointed experts is only feasible in criminal cases if there is an entirely new approach to the investigation of crime, with the process under the control of the court and with experts primarily appointed by the court and obliged to act on court instructions (subject to the accused being free to call contrary evidence).

As well, the Commission favoured pre-trial disclosure of expert evidence in both civil[290] and criminal cases,[291] in order to:[292]

> ... appreciably enhance the quality of the information before the court at trial, and reduce the time taken to identify precisely which parts of the expert evidence are in dispute.

The Commission was dissuaded from recommending the United States "panel" method

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288 Id at para 92.

289 Id at paras 96 and 97.

290 Id at para 101.

291 Id at para 108.

292 Id at para 106.

of questioning experts, whereby the experts (sworn as witnesses), counsel and judge together discuss the case in a "round table" discussion. This method of questioning would be inappropriate in a jury trial, although the Commission indicated support for "panel" questioning during pre-trial discussion or in some judge-alone trials.[293]

The Queensland Department of Justice has recently proposed reforms to the appointment of court-appointed experts.[294] Modelled on the Federal Court Rules, the proposal was to expressly empower the court to appoint court experts in civil trials from a list as chosen by the court or as agreed by the parties.[295] Moreover, the court would be able to order that the experts confer and prepare a document outlining areas of agreement and disagreement.[296] These proposals have not yet been implemented.

5. COSTS

The responsibility for the costs involved in using an expert witness will depend on which model is adopted. If parties (such as the prosecution or the defence) either solely or jointly engage the services of an expert then one would expect that the costs would be borne by the engaging party. Similarly, if the court engages the expert, it is arguable that the costs should be the court's responsibility.

6. QUESTIONS FOR DISCUSSION

(1) What, if any, problems have been experienced with the operation of section 9A of the *Evidence Act 1977* (Qld)?

(2) Are there problems caused by:

(a) The absence of standards or guidelines for the measure of sufficiency when determining the level of intelligence under section 9A of the *Evidence Act 1977* (Qld)?

(b) The difficulty of assessing the reliability of such evidence?

(3) Should the range of issues upon which an expert may be requested to

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293 Id at para 112 .

294 Department of Justice, *Uniform Civil Procedure Rules for the Supreme Court District Courts and Magistrates Courts - A Consultation Draft* (1997).

295 Id, Rule 476.

296 Id, Rule 474(4).

testify in sexual abuse cases be broadened to include issues other than the competency of a child to give evidence? In particular, should an expert be able to give evidence on either matters of common knowledge or the ultimate issue?

(4) **If the range of issues should be broadened, should a model similar to New Zealand (which is outlined on pages 81-82) be adopted - that is, to include factors such as the complainant's intellectual attainment, mental capacity and emotional maturity?**

(5) **Should a pre-trial procedure be introduced to allow parties to agree on an expert in advance of the trial?**[297]

(6) **Should the court be allowed to appoint an expert in criminal proceedings involving child complainants in addition to any experts called by the parties?**

(7) **Should a party be obliged to notify the opposing party or parties of its expert evidence? If so, when should they notify and in what detail? Should the notice obligation in a criminal case apply to an accused?**

(8) **Who should bear the costs of a court-appointed expert witness?**

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297 For a discussion of pre-trial hearings see Chapter 15 of this Discussion Paper.

CHAPTER 6

THE COURT ENVIRONMENT

1. INTRODUCTION

The physical appearance of the courtroom and its facilities may make the court environment an intimidating setting for anyone - let alone a child - to give evidence. Factors which may contribute to the unease of a child giving evidence and which may, in some cases, prevent the court from obtaining the best possible evidence from a child witness include:

- the physical design of the building, which may mean that a child complainant is forced to mix with the accused or with people associated with the accused;
- the lack of restrictions on who may be present in the court when the child is giving evidence;
- the shortage of "child friendly" facilities such as appropriate seating, microphones, waiting areas with things to occupy the child during what may be relatively long breaks; and
- the formal dress of members of the judiciary and legal personnel.

2. SHARING OF FACILITIES

In a recent joint report the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission observed that the design of court buildings can contribute to the intimidation of a child witness.[298] A child may be intimidated or distressed by having to share common waiting areas and facilities with the accused, his or her family, and defence counsel. This may occur before or after the court hearing or during breaks in the proceedings. One significance of this is that the use in court of special facilities such as screens or closed-circuit television could be defeated if, for example, during breaks, a child witness had to share the waiting area or toilets with the accused, or the accused's counsel or family members. This may have a detrimental effect on the child's ability to give evidence or to continue giving evidence.

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298 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at paras 14.117 and 14.118. See also Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 368 citing a study for Victim Support by Raine J and Smith R, *The Victim of Crime* (1991), which found that 60% of victims and witnesses in English courts had to wait in the same area as the defendant and his or her supporter; most felt worried, frightened or upset.

In a preliminary submission to the Commission, Protect All Children Today (PACT) commented on the trauma child witnesses endure when sharing court facilities with the accused:[299]

> Child witnesses and their families often have to share space in the same court house with defendants and defence legal staff. This can lead to tension and further trauma for child witnesses. Whether a conscious strategy on the part of counsel or simply an unavoidable consequence of the physical structure of the courtroom, *this practice is perceived by child witnesses as extremely intimidating*.
>
> Specialist court facilities (ie Children's Court in Orange County, LA) have been developed internationally and should be reviewed.
>
> Courtrooms and court practices are, in general, not child friendly.

On a more practical level, a PACT volunteer (having supported approximately 70 child witnesses) noted:[300]

> ... there are no special rooms for children at District Court or special amenities, i.e. separate toilets from a Witness Room where a child can safely use the amenity. There have been occasions when I have had to ask a Security Guard to take a young boy to the toilet. I feel that I lack in my duty of care in asking a stranger to do this task.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended that:[301]

> Child witnesses should be provided with appropriate waiting facilities in all court buildings where they are likely to appear as witnesses. These should ensure privacy and separation from the public and in particular from a defendant or hostile opposing party, that party's counsel and the media.

The recommendation to provide appropriate waiting rooms for child witnesses is also reflected in the recommendations of PACT in its preliminary submission to the Commission:[302]

> Provision of separate waiting rooms in court houses for child witnesses (& non-offending family) and other persons, especially defendant and their representatives.
>
> Specialised space be provided for child witnesses and non-offending family which addresses issues such as, adequate seating, age appropriate activities etc.
>
> Availability of refreshments, appropriate change and toileting facilities etc for children and siblings etc.

Queensland has partly addressed this problem. Courts currently under construction

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299 Submission 40.

300 Submission 29.

301 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 113 at 348.

302 Submission 40.

will provide a witness protection room,[303] normally beside the room in which closed-circuit television facilities are set up. The witness protection room will be furnished with lounge chairs, television and separate toilet. It will be a secure room which provides for alternate access, where possible.

The Commission recognises that it may be difficult to rectify design problems without great expense in existing court buildings. However, appropriate waiting facilities could be provided near the court building. In this regard the Commission notes the comments of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission:[304]

> All courts should designate an appropriate facility in or near the court building as a children's waiting room. Where facilities are not available in the court building, the prosecutor or legal representative for the party calling the child as a witness should be responsible for taking all necessary steps to ensure that the child is provided with appropriate facilities and protected from the risk of intimidation or harassment.

In some cases it may also be possible that a child witness be called from home at a time soon before he or she is required to provide testimony.[305]

3. EXCLUDING THE PUBLIC

Section 21A(2)(b) of the *Evidence Act 1977* (Qld) allows the court to restrict who may be present in the court when a young child gives evidence.[306] Courts are primarily closed to protect child witnesses from the trauma of giving evidence particularly about personal or embarrassing details in front of members of the public. In a 1995 publication by the Judicial Commission of New South Wales, Ms Judy Cashmore, the author of a monograph on *The Evidence of Children*, stated that:[307]

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303 Telephone conversation with Executive Officer, Courts Division, Department of Justice on 13 February 1998. There is a witness protection room located in the courts complex in Brisbane. It appears to have been used only rarely for child witnesses.

304 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.118.

305 See Chapter 8 of this Discussion Paper for a further discussion of delay within court proceedings.

306 This subsection applies to a child under 12 years or a person who would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness, or would be likely to suffer severe emotional trauma or would be likely to be so intimidated as to be disadvantaged as a witness. See s 21A(1) of the *Evidence Act 1977* (Qld).

307 Cashmore J, *The Evidence of Children* (Judicial Commission of New South Wales, 1995) at 37.

> Having to repeat the embarrassing details of sexual assault in front of a court full of strangers is recognised as being a very stressful aspect of testifying for both children and adults.[308] Recent research has also shown that, not only is it stressful, it also interferes with children's ability to provide reliable testimony. Children's recall was less complete and less accurate if they "gave evidence" in a courtroom than if they did so in a more familiar environment which they also reported was less stressful.[309]

The closure of the court in Queensland is still a matter for judicial discretion.[310] However, it is a facility not available to children 12 years or above unless they are classified as a "special witness".[311]

In South Australia, the courts do not have a discretion. Rather, the people who can be present in court in a child sexual case are prescribed by legislation.[312] The court must make an order excluding all persons except:

- "those whose presence is required for the purposes of the proceedings";
- a support person for the child; and
- "any other person who, in the opinion of the court, shall be allowed to be present".

4. "CHILD FRIENDLY" FACILITIES

Both the physical factors in the courtroom and the formal court dress adopted by the judge and counsel may also reduce the ability of a child witness to provide the best possible evidence.

In a preliminary submission to the Commission a PACT worker commented on the fact that courtrooms are not "children-friendly" - for example, the chairs are often too tall for

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308 Note referring to Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (1990); Whitcomb D, Shapiro ER and Stellwagen LD, *When the victim is a child: issues for judges and prosecutors* (National Institute of Justice, Washington DC, 1985) and note 52 of Cashmore J, *The Evidence of Children* (Judicial Commission of New South Wales, 1995).

309 Saywitz K and Nathanson R, "Children's testimony and their perceptions of stress in and out of the courtroom" (1993) 17 *Child Abuse and Neglect* at 613-622.

310 See also *Supreme Court Act 1986* (Vic) s 19(e); *Magistrates' Court Act 1989* (Vic) s 126 (1)(d) and Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 114 at 348, which also recommended that courts should have the discretion to exclude from the court all or any members of the public.

311 *Evidence Act 1977* (Qld) s 21A. See p 22 of this Discussion Paper.

312 *Evidence Act 1929* (SA) s 69(1a).

small bodies, and:[313]

> Wigs, gowns, navy blue suits, white shirts and dark trousers are not the usual items of clothing that children are expecting to see - no colour - they simply don't understand the significance of the legal clothing and have asked me about the men "dressing up".

In a submission to the Australian Law Reform Commission's and Human Rights and Equal Opportunity Commission's Issues Paper on *Children and the Legal Process*, the Victims Support Unit of the Queensland Director of Public Prosecutions Office emphasised that the "very legal, adult environment is ... disconcerting".[314] The submission referred also to Brennan and Brennan's study entitled *Strange Language*:[315]

> One of the concerns often expressed by people working with victims of child sexual assault is the devastating effect which court appearances have on these children. The alien environment, the male domination of the legal profession and the formality of the courtroom are frequently identified as forces contributing to the disquiet and distress of the child victim witness.

The Report of the New South Wales Children's Evidence Taskforce considered that the courtroom is an unfamiliar setting for most children and noted the following specific concerns:[316]

- the intimidating formality of the courtroom proceedings;[317]
- inappropriate design of some courtroom furniture;[318]
* the time spent waiting within court precincts can be very distressing;[319]
- courthouses, especially in smaller country towns, lack facilities - for instance, no separate areas for defence and Crown witnesses.[320]

Such concerns led to the following recommendations:

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313 Submission 32.

314 Submission 41.

315 Brennan M and Brennan R, *Strange Language: Child Victims Under Cross Examination* (3rd ed 1988) at 62. See further discussion of the Brennans' book in Chapter 4 of this Discussion Paper.

316 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96).

317 Id at para 4.2.6.

318 Ibid.

319 Id at para 4.2.8.

320 Id at para 4.2.9.

> the use of screens be evaluated to assess their efficacy as a solution to the problems experienced by child witnesses in court (recommendation 7);[321]
>
> all new courtroom designs incorporate profiles and elevations of furniture and fixtures accommodating of child witnesses (recommendation 8);[322]
>
> the witness position be provided with a gaslift chair (non-swivel, with arms) to accommodate both adult and child witnesses suitably and comfortably (recommendation 9);[323]
>
> microphones at the witness position in courtrooms be amplified and distributed to provide that a child's testimony is audible to key positions in the courtroom (that is, bench, bar table, jury box and dock) (recommendation 10);[324]
>
> the provision of hearing aid induction loops in courtrooms be investigated with a view to installation if appropriate (recommendation 11).[325]

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their recent joint report made specific recommendations in this area:[326]

> Upon the application of a party or on its own motion, a court should have the discretion to
>
> - modify seating arrangements
> - require the removal of wigs and gowns ...
>
> if necessary to prevent undue distress to a particular child witness.

In Victoria, the court may direct legal practitioners not to robe and to be seated while examining or cross-examining a child complainant.[327]

The guidelines for the use of closed-circuit television, videotapes, and other means for the giving of evidence approved by the Judges of the Supreme Court of Western Australia in 1996 note in relation to dress:[328]

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321 Id at 43. See Chapter 11 of this Discussion Paper for discussion on the use of screens.

322 Ibid.

323 Ibid.

324 Id at 44.

325 Ibid.

326 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 114 at 348.

327 *Evidence Act 1958* (Vic) s 37C(3)(d), (e). This section is not limited to child complainants.

328 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court) at para 3.6.

> Wherever the Judge and counsel appear on a video-tape, formal court dress should be worn to provide consistency for the jury. However, at a Pigot-style hearing [ie a pre-trial hearing at which all the child's evidence is taken and recorded. See Chapter 15 of this Discussion Paper], wigs and bibs may be discarded, since they are inconsistent with the less formal setting and because they may be intimidating to a child witness at such close quarters.

The Criminal Justice Commission has observed, in the context of Aboriginal witnesses, but equally applicable to any category of witness including child witnesses:[329]

> While some ceremony in court proceedings may be necessary, it is more important that all citizens have access to the courts and are able to understand proceedings in which they are involved.

5. QUESTIONS FOR DISCUSSION

(1) What difficulties, if any, does the court environment (other than in the Family Court)[330] pose for child witnesses and have those difficulties affected the court's ability to receive the best possible evidence from those children?

(2) What, if any, modifications to the court environment should be available for particular or all child witnesses to facilitate the court's reception of the best possible evidence from child witnesses?

(3) Should more appropriate waiting facilities be provided in court buildings where children are likely to appear as witnesses?

(4) If "yes" to question (3), should courts nominate an appropriate waiting facility near the courts if it is not available in the actual court building?

(5) Should there be restrictions on who is present in the court when a child complainant gives evidence?

(6) If "yes" to question (5), should this be a matter for judicial discretion (which is currently the position in Queensland) or should legislation prescribe who may be present (as in South Australia)?

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329 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) at 82.

330 As noted in Chapter 1 of this Discussion Paper, the Commission's terms of reference do not extend to an examination of the receipt of evidence from children in the Family Court and other Commonwealth courts.

(7) **Should the wearing of wigs and gowns be left to the discretion of the judge or should a protocol be adopted requiring less formal attire when children appear as witnesses?**

CHAPTER 7

PROFESSIONAL EDUCATION AND AWARENESS

1. THE NEED FOR EDUCATION AND AWARENESS

In this Discussion Paper, the Commission's approach has been to investigate the merits of a system which, in the interests of overall justice, allows children who are called to give evidence in court to communicate their evidence to the court as effectively as possible.

However, children involved in the litigation process face a number of obstacles which, in most cases, do not confront adults to nearly the same extent. Particular issues which arise include the capacity of the child to give evidence, differing levels of linguistic development, lack of familiarity with and apprehension about the legal process and, in child abuse cases, the complexity and psychological effect of intra-familial relationships, and the trauma of facing the alleged abuser.

Unless the legal professionals who participate in cases involving child witnesses are aware of the issues which may detrimentally affect the ability of a child to give evidence, the evidence may not be forthcoming or may be given in such a way that its value is significantly compromised. However, some judicial officers and members of the legal profession may not be familiar with the issues which can arise in relation to the giving of evidence by child witnesses. Several submissions received by the Commission from people experienced in working with children who are required to give evidence in court commented on the perceived lack of awareness of relevant issues amongst judicial officers and members of the legal profession.[331]

A member of the Victims Support Unit in the Office of the Director of Public Prosecutions observed that:[332]

> The legal system was designed by adults for adults. As it exists today, the legal system does not support children who make a complaint and therefore does not protect them from the risk of being re-victimised.
>
> There has been an increase in the diversity of training offered to judges, magistrates and court staff in recent years, including issues of culture and language. However, an understanding of the communication styles and needs of children has not yet been given the attention it deserves.

Similarly, PACT (Protect All Children Today), a support organisation for victims of child abuse, identified the following concerns:[333]

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331 See, for example, submissions 8, 40, 41, 43.

332 Submission 41.

333 Submission 40.

> Judiciary & legal staff lack formal training to know how to effectively communicate with young children.
>
> Judiciary & legal staff lack formal training in child development as it relates to the understanding/communicating of evidential matters by children (ie time, place, number etc.).
>
> Individual members of the judiciary have not historically adequately protected children from overly vigorous and abusive cross examinations.
>
> Judiciary & legal staff often lack insight into the social/family stress particular to children giving evidence within the criminal system.

Two people with experience in child protection issues noted:[334]

> A lack of knowledge about children and their capacity to be competent and reliable witnesses is evident at all levels of the legal system. There needs to be specialist training of investigators who are involved in interviewing children. There is also a need to educate judicial staff so that judgements are not made on the basis of preconceptions of child witnesses and that the risk of further traumatization of the child is reduced. ...
>
> It is also essential that education of judicial officers take place in order for the interview process to be understood. This education is essential and the use of this technique in the absence of this education will render it ineffectual.

The general lack of judicial qualifications to determine such issues was raised by Fitzgerald P of the Queensland Court of Appeal in *R v FAR*,[335] when describing what he saw as a deficiency in the *Evidence Act 1977* (Qld):[336]

> ... it gives no indication as to how the reliability of such evidence is to be assessed, or how trial judges are to direct juries on that topic; this is an extremely unsatisfactory omission, since one premise which seems to underlie the *Evidence Act*, i.e., that children's evidence can be reliable, is qualified by the premise that expert evidence might be necessary to enable judge and jury to test its reliability. In these circumstances, it is difficult to comprehend how, in the absence of expert evidence, judges or juries are competent to determine the reliability of children's evidence by reference to their common experience and common sense.

The need for judicial education and awareness is particularly important, since it is the judge or magistrate who controls the way in which the case is conducted and has the responsibility of ensuring that the court receives the best possible evidence in a way which is fair to all the parties involved. For example, in this Discussion Paper, the Commission has raised as options a number of facilities that might be used to assist children to give evidence. If the use of those facilities is ultimately to be the subject of judicial discretion, it is arguable that education as to the purpose of the various facilities is desirable to assist judges and magistrates to understand when those facilities might be appropriately used.

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334 Submission 28.

335 [1996] 2 Qd R 49.

336 Id at 55.

Even if legal professionals are currently familiar with these issues, the amount of continuing, recent research justifies the reception of information as on-going legal education. Moreover, "acquisition of skills and knowledge in working with children is a gradual process" so that there is a need for continuing professional development opportunities.[337]

Recently, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission conducted a joint inquiry into issues concerning children in the legal process. Their 1997 report called for all legal professionals to have an increased familiarity with and awareness of issues concerning child sexual abuse.[338]

Australia is a signatory to the *Convention on the Rights of the Child*. This Convention is intended to heighten awareness of issues concerning children. In particular, Article 4 of the Convention provides that signatories to the Convention:[339]

> ... shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.

Article 42 further requires signatories to:[340]

> ... make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Programs for legal professional education and awareness are one method of equipping legal professionals with information about child development, child psychology and child sexual abuse. Awareness of relevant issues may be facilitated by discussion or "education" sessions for the judiciary, magistracy and legal practitioners.

Submissions received by the Commission generally supported the need for the development of programs designed to increase awareness of issues related to the giving of evidence by child witnesses.[341] The Queensland Police Service, for example, considered that such programs would not only aim to "increase awareness of participants of the special needs of a child witness" but would also "assist the court during relevant discretionary deliberations".[342] The Department of Families, Youth and Community Care was of the view that:[343]

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337 Submission 41.

338 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.115.

339 (New York, 20 November 1989): entry into force for Australia 16 January 1991, Australian Treaty Series 1991 No 4.

340 Ibid.

341 Submissions 2, 28, 30, 40, 41, 43, 46.

342 Submission 46.

343 Submission 30.

Magistrates and judges with an interest in child welfare matters should be encouraged to undertake training and develop expertise in the areas of child protection and welfare including the developmental stages and needs of children. Likewise, lawyers and prosecutors should be required to undertake training in the cross-examination of children to ensure that the process of the criminal trial does not unnecessarily distress the child.

There should particularly be a requirement of the judiciary to undertake training in the issues and dynamics of child abuse, and in particular of child sexual abuse, to ensure that these legal processes are managed appropriately with regard to the child.

Training on culturally specific issues should also occur in relation, for example, to Aboriginal and Torres Strait Islander children giving evidence where there are significant variations in communication protocols and word usage from mainstream English. Support for child witnesses from Aboriginal and other groups in the form of interpreters or friends might be an appropriate response. A similar approach might be employed for children with disabilities.

2. INITIATIVES AND PROPOSALS FOR JUDICIAL EDUCATION AND AWARENESS

(a) Canada

By 1996 the Canadian National Judicial Institute had initiated a judicial training program on issues of child sexual abuse. It was commented that the number of federally-appointed judges attending indicated that "judges are willing to participate in formal training programs and are not as concerned that the training will interfere with their judicial independence".[344] Child abuse issues were then topical in the courts as, at the same time, Canadian Courts were considering the receipt of expert evidence on topics such as "child sexual abuse symptomatology, reliability of allegations of abuse, patterns of disclosure and recantation, competency of children to testify in court, suggestibility, and memory for abusive incidents".[345]

A Canadian academic proposal for a "Child Witness Code" suggests a program of consensual judicial education and child witness preparation:[346]

§12 Court Preparation Programs

Programs designed to prepare children to testify serve the interests of justice and are encouraged. Judges are encouraged to participate in court preparation programs, and judicial participation in such programs is not a ground for refusal or disqualification. Judges should make their courtroom and staff available for court preparation programs.

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344 Sas LD, Wolfe DA and Gowdey K, "Children and the Courts in Canada" in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) 77 at 86.

345 Id at 86-87.

346 Myers JEB, "A Decade of International Reform to Accommodate Child Witnesses: Steps towards a Child Witness Code" in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 248.

The fact that a child participated in a court preparation program may not be used to impeach the child's credibility.

(b) England

The recommendation of the Cleveland Report[347] in 1988 that "[a]ll lawyers engaged in this type of work including Judges and Magistrates should have a greater awareness of and inform themselves about the nature of child abuse and the management of children subjected to abuse and in particular sexual abuse,"[348] resulted in a training program for civil judges to prepare them for the *Children Act 1989* (UK).[349] The Report included guidelines, setting out appropriate skills for interviewing allegedly abused children, as agreed upon by professionals in the field of child abuse. The guidelines strongly endorse the necessity for training.

Reference to these guidelines in English judgments, notwithstanding the lack of attribution, affirms the judicial recognition of the value of informed opinion as to child abuse interviewing-techniques.[350]

Training for lay magistrates on their appointment has been provided for years, but recently extra training has been provided for magistrates sitting in family proceedings or the youth court.[351]

(c) Australia

The need for judicial education is highlighted by the 1997 Report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission.[352] A number of recommendations contained in the Report support the development of "guidelines and training programs" by the Australian Institute of Judicial Administration (AIJA) in consultation with child witness experts. Specific training for the judiciary and magistrates is recommended in relation to factors such as:[353]

- standard periods of time beyond which child witnesses of various ages should not

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347 *Report of the Inquiry into Child Abuse in Cleveland 1987* (UK) (Cmnd 412).

348 Id at 252.

349 Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 248.

350 See for example *H v H* [1990] Fam 86 per Butler Sloss LJ at 104-105.

351 Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 248.

352 *Seen and heard: priority for children in the legal process* (ALRC 84, 1997).

353 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 110 at 346.

be expected to give evidence in chief or to manage continuous cross-examination without a break

- standard length of breaks needed by child witnesses of various ages
- examples of aggressive or confusing examination tactics so as to enable judges and magistrates to recognise and prevent aggressive, intimidating and confusing questioning
- examples of language and grammar inappropriate to the age and comprehension of child witnesses so as to enable judges and magistrates to ensure questions are stated in language that is appropriate to the age and comprehension of the child witness.

The Report recommends that judicial training be complemented by training for legal professionals and practitioners. The constant refrain is age-appropriate language and a concern about the effect testifying will have upon a child. Prosecution staff with contact with child witnesses should be trained "in the use of age appropriate language for child witnesses, children's developmental stages and the possible effects of giving evidence on children of various ages".[354] Prosecutors in juvenile justice matters should be trained "in children's issues particularly concerning the exercise of the discretion to withdraw charges in minor matters".[355] Barristers' and Solicitors' Rules "should specifically proscribe intimidating and harassing questioning of child witnesses. Lawyers should be encouraged to use age appropriate language when questioning child witnesses".[356]

Such judicial and legal professional education programs may assist the court in its determination as to whether:

- to exercise judicial discretion as to appropriate courtroom behaviour and environment;[357]
- to permit "unconventional means of giving evidence for child witnesses from different cultural backgrounds"[358] or "for child witnesses with disabilities",[359] and to admit expert evidence relevant to each.[360]

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354 Id recommendation 111 at 346.

355 Id recommendation 231 at 529.

356 Id recommendation 112 at 347.

357 Id recommendation 114 at 348:
- modify seating arrangements
- require the removal of wigs and gowns
- exclude from the court any or all members of the public if necessary to prevent undue distress to a particular child witness.

358 Id recommendation 116 at 350.

359 Id recommendation 118 at 352.

360 Id recommendations 116 and 118 at 350, 352.

(d) Western Australia

The Law Reform Commission of Western Australia in its Report on Children's Evidence[361] analysed and responded to comments on the following two proposals from its earlier Discussion Paper:[362]

- the development of a written guide for legal personnel in dealing with child witnesses;

- the issue of guidelines to the judiciary, to magistrates and court officials in relation to the appropriate procedures and terminology for dealing with child witnesses.

The Commission recorded a "very supportive" public response to the proposals.[363] The Commission recommended adoption of four modes of education:[364]

- university undergraduate interdisciplinary courses relevant to child witnesses;

- continuing legal education at regular intervals, noting that:[365]

> Doctors, psychologists and social workers, as well as legal professionals, are likely to have significant contact with child witnesses. Specialized training for legal professionals with staff from other disciplines will prove mutually beneficial ... ;

- seminars for judges and magistrates, providing material similar to that for the legal profession;

- guidelines for judicial personnel to assist them in dealing with children. The Commission suggested that the guidelines could include matters concerning:[366]

> ... the law as to competence; directions as to appropriate questioning of children; the conduct of a voir dire examination; and suggestions in relation to discretionary matters such as the presence of support persons, arrangements within the court room and other special adjustments to procedure that may be necessary when children and other vulnerable witnesses testify.

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361 Law Reform Commission of Western Australia, Report, *Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991).

362 Law Reform Commission of Western Australia, Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1990) at para 6.8.

363 Law Reform Commission of Western Australia, Report, *Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 11.5.

364 Id at para 11.13.

365 Id at para 11.9.

366 Id at para 11.12. Note omitted from quote referring to the existence of guidelines in New South Wales in the Local Court Bench Book.

(e) New South Wales

The New South Wales Children's Evidence Taskforce recommended:[367]

> ... that the matter of judicial and legal profession education relating to communicating with children and the effective use of CCTV be referred for consideration by the appropriate agencies and associations. Consideration should also be given to the development of practice directions to Counsel, when dealing with a witness who is a child or young person ...

This recommendation followed from the Taskforce's discussion which considered the following to be significant in the process of taking evidence from child witnesses:

- an understanding of the degree of children's cognitive and emotional development and their communication skills:[368]

  > Development among the judiciary and legal profession of knowledge, skills and communication techniques (including the use of appropriate language) specific to child witnesses may result in evidence being better ascertained and may also reduce the intimidation suffered by child witnesses when called upon to give evidence in criminal proceedings.

- the development of "training courses" by appropriate bodies:[369]

  > It may be appropriate for relevant bodies such as the Judicial Commission, the Child Protection Council and the Law Society to develop training courses in child specific communication techniques and techniques in conducting proceedings using CCTV. In developing education packages for lawyers and the judiciary, emphasis should be given to workshops and practical exercises.

(f) Queensland

In 1996, the Criminal Justice Commission published a report entitled *Aboriginal Witnesses in Queensland's Criminal Courts*. Some of the issues considered in the report are also relevant in the context of child witnesses. For example, the report recommended the following:

- development and maintenance of a judicial officers' resource kit "concerning the aspects of language and culture that affect the way Aboriginal people in Queensland give evidence and the way that evidence is interpreted and understood in court";[370]

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367 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at 7.

368 Id at para 5.4.5.

369 Id at para 5.4.7.

370 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) recommendation 3.1 at 36.

- development for new judicial officers of a national judicial orientation program including information upon indigenous cross-cultural issues;[371]

- information be included in cross-cultural awareness training relating to Aboriginal special witnesses under section 21A of the *Evidence Act 1977* (Qld);[372]

- regional symposia involving various legal professionals and members of local Aboriginal communities;[373]

- cross-cultural awareness training for lawyers,[374] police prosecutors,[375] and for court staff who have contact with Aboriginal people.[376]

3. MANDATORY OR DISCRETIONARY EDUCATION AND AWARENESS PROGRAMS

Although some submissions received by the Commission indicated that attendance at awareness programs should be mandatory for judicial officers,[377] the Commission does not share that view.

It is inappropriate under our constitutional and judicial system that judicial officers be directed by some external agency to undergo further training, however that training may be described.

Independence of the judiciary in the context of the Australian constitutional and political framework has been described variously as "... a fundamental principle of the constitutional arrangements",[378] "a cornerstone of our society",[379] "a necessary

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371 Id recommendation 3.2 at 37.

372 Id recommendation 6.8 at 91. Section 21A deems a person who would be disadvantaged as a witness as a result of "cultural differences" to be a "special witness".

373 Id recommendation 3.3 at 37.

374 Id recommendation 3.4 at 40.

375 Id recommendation 3.5 at 40.

376 Id recommendation 6.7 at 88.

377 For example, submissions 40, 41.

378 King, the Hon Mr Justice LJ, "Minimum Standards of Judicial Independence" (1984) 58 *Australian Law Journal* 340 at 342.

379 Brennan, the Hon Sir G, "Courts for the people - not people's courts" *The Inaugural Deakin Law School Oration* (26 July 1995) at 25.

guarantee of democracy",[380] and "a constitutional principle with a sound practical rationale ... and ... the primary source of assurance of judicial impartiality".[381]

The executive is a major litigant before the courts in both civil and criminal matters. Almost all criminal cases are conducted in the form of a contest between the executive government and a citizen. If public confidence in the independence of the judiciary is to be maintained, the judiciary must not be or be seen to be subject to direction or influence by the executive arm of government in matters which bear upon the determination of civil or criminal litigation.[382]

The existing system contemplates the appointment as judges only of persons who bring to the judicial office the experience, intellectual ability and skills necessary to enable them to discharge their duties.[383]

Nevertheless, it is now generally accepted by the judiciary in Australia that the complexity of matters coming before the courts requires not only the appointment of suitable persons to judicial office but the participation by judges in continuing legal education.[384]

In Australia and England concerns about continuing legal education infringing judicial independence have been met by insistence that the senior judiciary should control judicial training and education.[385] Questions of how continuing professional legal education for members of the judiciary ought to be funded and approached are beyond the scope of this Discussion Paper.

4. QUESTIONS FOR DISCUSSION

(1) Is there a concern about the awareness of legal professionals in relation to the issues which arise in court proceedings involving child witnesses, in particular, prosecutions for sexual offences against children?

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380 Marks, the Hon Mr Justice K, "Judicial Independence" (1994) 68 *Australian Law Journal* 173 at 181.

381 Gleeson, the Hon Mr Justice M, "Who do Judges think they are?" *The Sir Earl Page Memorial Oration* (Sydney, 22 October 1997) at 2.

382 Gleeson, the Hon Mr Justice M, "The role of a judge and becoming a judge" *National Judicial Orientation Programme* (Sydney, 16 August 1998).

383 Brennan, the Hon Sir G, "Courts for the people - not people's courts" *The Inaugural Deakin Law School Oration* (26 July 1995) at 12.

384 See the observations of Nicholson, the Hon Mr Justice RD, "Judicial Education and the Means of Funding it in the Asian Region: a Judge's View" (1977) *7 JJA* 83.

385 Gleeson, the Hon Mr Justice M, "Who do Judges think they are?" *The Sir Earle Page Memorial Oration* (Sydney, 22 October 1997) at 8.

(2) If “yes” to question (1), how should this be addressed?

CHAPTER 8

DELAYS

1. INTRODUCTION

A number of the preliminary submissions to the Commission commented on the delays experienced in criminal proceedings involving child witnesses.[386] Respondents were concerned with the delays in the criminal justice system in Queensland between a complaint being made, the charges being laid, the committal, if any, taking place and the trial being heard. There was also concern expressed over the delays involved in the courtroom proceedings once a matter proceeded to committal or trial. All concerns were expressed in terms of the effect of the delay on the ability of the courts to receive the best possible evidence from a child witness and/or in terms of the adverse effects which could be suffered by the child as a result of having to recall events after a relatively lengthy period of time.

2. DELAYS BETWEEN COMPLAINT AND COURT PROCEEDINGS

(a) The extent of delay

Law and psychology commentators, Spencer and Flin, have observed, in the United Kingdom context (which appears to be very similar to the situation in Queensland), that children frequently have to wait many months between observing or experiencing a crime and being asked to recall the details of the events in court. Studies referred to by Spencer and Flin recorded average delays in the United Kingdom of between six months and ten and a half months.[387]

These figures are consistent with statistics maintained by the Queensland volunteer child witness support organisation Protect All Children Today (PACT). PACT has advised the Commission that, in Queensland, unacceptable delays exist throughout the entire process. According to PACT, some matters take, on average, between nine and twelve months to finalise from committal to trial. Some matters have taken as long as 36 months.[388]

It does not appear that any more official statistics are kept on delays in matters

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386 For example submissions: 37 (counsellor); 40 (Protect All Children Today); 46 (Queensland Police Service); 41 (Victims Support Unit, Director of Public Prosecutions Office); 16 (prosecutor); 18 (mother of 15 year old victim/child witness); 28 (social worker).

387 Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 299.

388 Submission 40 (Protect All Children Today).

involving child complainants or child witnesses generally proceeding to court in Queensland.[389] However, information provided to the Commission is to the effect that, in the Brisbane region, the time between arrest and a committal mention is usually 6 weeks and that committals are usually disposed of in 2 to 3 months. Delays beyond this period are often caused because the prosecution is not ready to proceed or because the accused requires more time to obtain legal advice or to apply for legal aid.[390] For matters proceeding to trial in the District Court, the time between complaint and trial is rarely less than 6 months and can be as long as 2 years.[391]

There may be further delays once a matter has been listed for trial. A New South Wales study found that a case may be listed for hearing on a number of occasions and that in New South Wales approximately 30% of cases involving child witnesses are not heard on the first listing.[392] A submission to the Commission from the Office of the Director of Public Prosecutions noted that, although cases involving child complainants are given limited priority in the District Court listing process in Queensland, due to the backlog in the courts, this may still mean that children are required to wait 6 months before the cases in which they are witnesses are heard. "This six months is above and beyond the delay already experienced as a consequence of the police investigation and the committal process."[393]

The Commission understands that attempts are made in the Queensland Supreme Court and District Courts to ensure that matters involving child complainants or witnesses are listed for hearing as soon as possible. Further, when the matter involving a child is given a trial date, attempts are made to ensure that the case is set down as the first or second trial on the list for the day.[394]

(b) The effect of delay

A significant concern with the delays experienced before and between court proceedings is that a child witness's ability to remember relevant events may be

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389 Department of Justice, *Annual Report 1996-1997*, Appendix 3, "Statistical Summary of Queensland Courts 1996-97" shows that the time taken for disposal of matters in the criminal jurisdiction of the District Courts from presentation of indictment to completion of trial or sentence in Brisbane was under 6 months for 82% of cases in 1996-1997 and under 12 months for 94% of the cases. There is no further breakdown in the statistics to show the percentage of cases involving children as complainants or witnesses completed within certain times.

390 Meeting between representatives of the Commission and Mr Deer CSM and Mr Pascoe SM 23 April 1998.

391 Meeting between representatives of the Commission and McGuire DCJ (President of the Childrens Court) 23 April 1998.

392 Cashmore J, *The Evidence of Children* (Judicial Commission of NSW, 1995) at 57.

393 Submission 41.

394 Meeting between a representative of the Commission and the Listing Clerk of the District Courts 4 November 1998.

affected.

Research indicates that, although "children, including very young children, are able to remember and retrieve large amounts of information from memory (especially when the events are personally experienced and highly meaningful), ... children (and adults to a lesser degree) have a significant memory loss after long delays. [Children] recall less correct information over time 'while maintaining as a constant the inaccurate information'".[395]

Children's retention of memories of events over time has been tested in a number of studies. For example, in one study, a group of 10 and 11 years olds was shown a film of a theft. When questioned about it 2 months later, the amount of information remembered had decreased, although the accuracy of recall was maintained.[396] In another study, a group of 5 years old was taken on a museum trip. The children's memories of the trip were tested 6 weeks, 1 year and 6 years later. The study concluded that, while the delay had reduced the amount of information recalled, with appropriate cues, the children could recall details of their trip 6 years after the event.[397]

Delay may result in an adverse and perhaps unnecessary impression of the child's credibility. Delay might also have an actual effect on the child's reliability as a witness.[398] It may expose the child to more rigorous cross-examination and, in some cases where the child witness is the complainant, the child may feel that he or she is being re-victimised by the legal system. Such a reaction might mean the difference between a child being able to give an account of the events and the child being unable to give any worthwhile account. As Judy Cashmore, in a review of children's evidence in New South Wales, has observed, delays may in fact prompt children not to give evidence or to be less impressive when testifying than they otherwise would have been. For example:[399]

> In one case that went to trial in the country, the case had been listed three times previously, and then did not go ahead because the complainant (a 14 year old state ward) refused to give evidence. The solicitor commented in relation to the case, "Perhaps the wishes of the victim would have been different had the trial proceeded earlier". In another

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395 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.20, referring to Ceci S and Bruck M, "Suggestibility of the child witness: A historical review and synthesis" (1993) 113 *Psychological Bulletin* 403 at 434. See also Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 299- 301.

396 Dent HR and Stephenson GM (1979), "Identification Evidence: experimental investigation of factors affecting the reliability of juvenile and adult witnesses" in Farrington D, Hawkins K and Lloyd-Bostock S (eds), *Psychology, Law and Legal Process*, referred to in Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 299-300.

397 Hudson J and Fivush R, "As time goes by: Sixth graders remember a kindergarten experience" 5 *Applied Cognitive Psychology* 347 at 356-357, referred to in Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 300.

398 See also Chapter 10 of this Discussion Paper.

399 Cashmore J, *The Evidence of Children* (Judicial Commission of New South Wales, 1995) at 57.

case, a previous trial had resulted in a hung jury. The instructing solicitor commented that "the victim was far less impressive in giving evidence [the second time] whereas the accused by comparison made a much more effective dock statement"; the outcome was a not guilty verdict.

(c) Proposals for minimising the effect of delay

In relation to the court's ability to receive the best possible evidence from a child witness, particularly a very young child witness, it is important to minimise the delays which occur before the child gives evidence.

An alternative to the child witness giving evidence in court and a way of circumventing the possible damaging effect that delays may have on the quantity and quality of a child's evidence would be for the child to be able to make early statements of his or her evidence and for those statements to be admitted as evidence in lieu of the child having to appear to give evidence in court.[400] If early out-of-court statements, including pre-trial recordings of the child's evidence, are utilised in lieu of the child having to appear at committal and possibly the trial, unavoidable delay in the proceedings should not affect the content and quality of the child's evidence.

In those cases where early statements of the child's evidence are not available to the court, or in those cases where, despite the availability of such statements the child is still required to give oral evidence at committal or at the trial, the court's ability to obtain the best possible evidence from the child can be improved only if the delays before proceedings commence and delays between proceedings are minimised. Fast-tracking matters involving child witnesses may assist the problem, provided that matters are not re-listed without very good reason.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have recommended:[401]

> **Recommendation 96**. When setting hearing dates, courts should give priority to cases involving child witnesses and set a fixed date for the evidence of the child. The prosecutor or legal representative for a party calling a child as a witness should be required to inform the court that a child is scheduled to appear so that the court can set an early pre-trial hearing for the video recording of the child's evidence or so that it can prioritise the matter and set the trial for a specified time rather than allocating it to a rolling list.
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> **Implementation.** The State and Territory courts, along with the federal courts, should amend their Rules and listing practices to this effect.

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400 Such possibilities are discussed in Chapter 10 of this Discussion Paper.

401 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 320. See also proposals for avoiding committals as a means of reducing delays in Chapter 14 of this Discussion Paper.

(d) Avoiding prejudice to the accused

An important matter to consider when addressing concerns about delays is whether or not a reduction in delays will prejudice the accused. While it would not be acceptable for the accused to use delaying techniques to reduce the child witness's ability to provide his or her best possible evidence during the court proceedings, nor would it be acceptable to deny the accused time within which to adequately prepare his or her defence. The use of out-of-court statements of evidence-in-chief of the child in lieu of the child appearing in court to provide testimony would not affect the accused's need for extra time within which to prepare his or her defence.

3. DELAYS IN THE COURSE OF COURT PROCEEDINGS

Once proceedings have commenced, whether a committal or a trial, there will invariably be delays in the course of the proceedings which adversely affect a child witness's ability to give the best possible evidence.

A child may be called as a witness for a particular day and be required to stay in the court precinct until the point when he or she is required to "take the stand" to be examined and cross-examined. It is possible that there will be a number of witnesses before the child on that day. It may be particularly difficult to keep the child occupied until it is his or her turn to give evidence - more so if there are no age-specific facilities, such as a room equipped with, for example, toys and drawing supplies.[402]

Once proceedings have commenced there will also be breaks and adjournments which may mean that the child's evidence will be interrupted and he or she will have to return to the stand at a later hour, or on subsequent days, to complete his or her testimony.

It may be possible to arrange court proceedings in such a way that child witnesses are examined and cross-examined early in the day before they become tired and distressed, and on a particular day rather than over a number of days. In some cases it may also be possible for the child witness to be called from home shortly before he or she is required to provide testimony.

4. QUESTIONS FOR DISCUSSION

(1) Are delays experienced in cases involving child complainants and, if so, when do such delays occur:

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[402] See Chapter 6 of this Discussion Paper for a consideration of the effect of the court environment on the ability of child witnesses to present evidence effectively. See also the comments at p 107 of this Discussion Paper as to the listing practices in the Queensland Supreme Court and District Courts.

(a) Between the making of the complaint and the charge being laid?

(b) Between the charge being laid and committal?

(c) Between committal and trial?

(d) In the course of the trial?

(e) At another and, if so, what, time?

(2) What examples of delays are you aware of in particular proceedings?

(3) What factors cause or contribute to delays in the various stages of the legal processes involving child complainants?

(4) What effect does delay have on the ability of child complainants to present their evidence effectively?

(5) In what ways could delays involving child complainants be reduced?

CHAPTER 9

TREATMENT BEFORE COMMITTAL OR TRIAL

1. INTRODUCTION

A child who has been sexually abused may need psychological or psychiatric treatment in order to effectively deal with the abuse and its ramifications. It will often be in the child's best interests for treatment to commence as soon as possible. As the submission from the Queensland Office of the Director of Public Prosecutions stated:[403]

> In my experience the sooner the child has access to effective counselling the sooner their behavioural disturbances abate and they regain some form of normality in their lives.

If the child is a complainant in a sexual assault case, any delay in bringing the case to trial may mean that treatment should be given before the matter comes to court:[404]

> If counselling is provided prior to the court process it may be able to alleviate the sense of guilt and fear of punishment that a child may feel after making a complaint, particularly if the offender is a member of their family.

2. LEGAL ISSUES ARISING FROM EARLY TREATMENT

The need for early intervention and treatment for children suspected of having been abused gives rise to the question of the possible effect which the treatment may have on the quality of the child's evidence. Concerns have been expressed that a child witness may be susceptible to suggestion, and that the child's evidence may therefore be tainted if counselling or other treatment takes place before the child has testified.

At least two factors contribute to this concern. Firstly, studies into the reliability of children's memories have shown that, although the accuracy of the information provided by young children questioned in an open-ended format is the same as for adults and older children, young children spontaneously provide less information.[405] Secondly, research also shows that children, including older children, are embarrassed about disclosing information of a sexual nature:[406]

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403 Submission 41.

404 Ibid.

405 Bussey K, "Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations and False Denials" (1995) 7 *Current Issues in Criminal Justice* 176 at 181; Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) 154; Oates RK, "Children as Witnesses" (1990) 64 *Australian Law Journal* 129 at 130.

406 Bussey K, "Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations and False Denials" (1995) 7 *Current Issues in Criminal Justice* 176 at 182.

> In sum, for younger children, less information is spontaneously reported when asked under conditions of free recall, and for many older children who have been abused the nature of the material they are reporting will serve to inhibit disclosure.

There is consequently a fear that counsellors, in providing therapy, will resort to suggestive techniques which cast doubt on the reliability of the child's evidence.

Opinions are divided on the extent to which children's memories are susceptible to suggestion:[407]

> Spencer and Flin have expressed the view that children can be susceptible to suggestion. ... Oates has reached the conclusion that children are no more susceptible to leading questions than adults. Cohen and Harnick have reached the opposite conclusion. Dunning expressed the view that the susceptibility of younger children to misleading information is greater than older children. Perry and Wrightsman have noted that the studies with respect to this issue 'offer mixed findings' with some studies supporting and others rejecting the view that 'young children are no more suggestible than adults'. Indeed, one study has concluded that normal children are unlikely to make false allegations of abuse as a response to suggestive questioning, whereas another study has concluded on the basis of a review of the literature that children 'can indeed be led to make false or inaccurate reports about very crucial, personally experienced, central events'. Batterman-Faunce and Goodman have concluded that situational variables can affect the extent to which children are likely to be susceptible to suggestion. [notes omitted]

It is beyond the scope of this reference to comment on this debate. However, it is important to recognise that there may be, or may be perceived to be, a tension between the need of a child witness for immediate therapy and the reliability of the child's evidence after therapy has been received.

A number of submissions to the Commission expressed the fear that counsel for the accused would allege that the child had been "coached" by the counsellor or other treatment professional.[408] An allegation of coaching may be sufficient to discredit the child's evidence, at least in the eyes of the jury. If an allegation of "coaching" is believed by the jury, then of course the child's evidence could be heavily discounted.

There is some basis for this fear. A defence lawyer recommended to others defending people accused of child abuse:[409]

> Subpoena the entire file of the Child Welfare Department so that the extent and number of conferences between Prosecution operatives in that area can be got on the record. This will be vital in order to show the jury the extent of rehearsing/contamination which has gone on under the guise of "counselling". Find out who the Psychiatrist/Counsellor is who the Prosecution have sent the complainant to and subpoena them similarly.

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407 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 155-156.

408 Submissions 22, 38.

409 O'Gorman T, "Defence Strategies in Child Sexual Abuse Accusation Cases" (June 1991) *Queensland Law Society Journal* 195 at 202.

A child psychiatrist has noted:[410]

> Lawyers' definition of "coaching" in this area is amazingly broad. For example, one lawyer made the following allegation to a professional witness: "I put it to you that the child knew what you wanted and knew that you would not let her go until she said what you wanted to hear". The child referred to was five years old. This was a fantastic proposition in view of the developmental level of five year olds. Besides, child abuse is a very unpleasant area to work with. Why any professional person would want to manufacture false disclosures is not immediately obvious to us.

3. POSSIBLE SOLUTIONS

A clinical psychologist with experience in the treatment of victims of abuse informed the Commission that he now prefers not to counsel children until after the trial, despite the advantages of early intervention, because otherwise it might be inferred that counselling will simply be seen as reinforcing the child's allegations.[411] Such a reaction is clearly not in the best interests of children who have been abused.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission also received submissions to the effect that therapy is often postponed until after the trial to avoid accusations that the child's evidence has been contaminated:[412]

> The longer the delay between the abuse and the trial, the longer the waiting time for these children who may need professional counselling.

Although many submissions to the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission were in favour of children having access to counselling when they need it rather than "when the trial dictates", a number of submissions were concerned about trial results and cross-examination in those circumstances.[413] The Commissions considered that, consistent with the Convention on the Rights of the Child, "the child's best interests should be paramount rather than 'winning' the trial at the expense of the child's mental health".[414]

Similarly, in England, an evaluation of the policy of fast-tracking prosecutions in child abuse cases noted that internal guidelines for agencies involved in child abuse

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410 Submission 22.

411 Submission 38.

412 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.53.

413 Id at para 14.54.

414 Ibid.

prosecutions also put the child's individual needs above the interests of the case:[415]

> *Working Together* states that:
>
> There will be occasions when the child's need for immediate therapy overrides the need for the child to appear as a credible witness in a criminal case. This needs to be weighed up and a decision made on the basis of the available knowledge. There should always be discussions with the ... [Crown Prosecuting Service] on the particular needs of the child, and the needs of the child are of prime importance.

However, just as it is not appropriate that treatment should be delayed to avoid any credible allegation that a child's evidence has been tainted as a result of therapy, it does not serve the interests of justice that a prosecution should have to be abandoned so that the child can receive treatment. It is desirable, if possible, that a solution be found that will allow the child's treatment to proceed without the risk of prejudicing the child's evidence.

(a) The nature of the therapy

A number of commentators have focused on the need to improve techniques for interviewing child complainants to avoid the possibility of suggestion:[416]

> ... the urgent goal of future research is to develop better interviewing strategies that do not influence children's memory of their experience either wittingly or unwittingly.

It has been observed that, if a child witness is not exposed to misleading information, the problem of evidence tainted by suggestion cannot arise.[417]

The Commission has been informed of a counselling service established by a support group for child complainants that undertakes therapy which does not involve discussing details of the case.[418]

The Commission's terms of reference do not extend to a detailed examination of pre-trial investigation and interviewing practices and techniques.

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415 Plotnikoff J and Woolfson R, *Prosecuting Child Abuse: An Evaluation of the Government's Speedy Progress Policy* (1995) at 60-61.

416 Bussey K, "Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations and False Denials" (1995) 7 *Current Issues in Criminal Justice* 176 at 192.

417 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 156.

418 Meeting between representatives of the Commission and Dr Richard Roylance, the President of PACT, 24 April 1998.

(b) Communications inadmissible in certain circumstances

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission discussed the imposition of a "privilege" on communications made for the purpose of therapeutic counselling. It was considered that this would at least recognise the desirability of encouraging people with psychological and other problems to seek help.[419] It would not necessarily prevent allegations of coaching being made.

Recent legislation in New South Wales makes provision for the court to order in certain circumstances that communications not be adduced in evidence if the court finds that adducing it would disclose a confidential communication (in a professional relationship to the witness).[420] Leave to adduce the evidence must not be given unless the evidence has substantial probative value, other evidence of the matters in the communication is not available and the public interest in maintaining the confidentiality of the communications or in protecting the alleged victim from harm is outweighed by the public interest in admitting the evidence.[421]

The contents of the communication will not be privileged from the accused even if the court determines that it cannot be adduced as evidence.

A possible criticism of this type of legislation is that it may deprive courts of information which would be relevant to the determination of issues. In response, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have noted:[422]

> ... the NSW approach permits the judge to determine the relevance and admissibility of this evidence. The legislation is not a panacea, but it does help to protect and provide counselling options for children who all too often have a real and pressing need for these services. The NSW option, when combined with early video-taping of children's evidence, can help to ameliorate some of the mischief caused to children by trial delays.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity

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419 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.55. The Commissions referred to a number of attempts overseas to adopt such a provision, including, for example: *Criminal Procedure Law* (NY) s 60.76 (rape crisis counsellor-client privilege) which provides for *in camera* review of counselling records upon the application of the accused, where the accused believes that disclosure of such records is necessary 'under the constitutions of the United States or of New York'.

420 The *Evidence Amendment (Confidential Communications) Act 1997* (NSW) amended the *Evidence Act 1995* (NSW). The new provisions came into force on 1 January 1998.

421 *Evidence Act 1995* (NSW) s 126H.

422 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.56. See also Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications* (Project No 90, 1993) for a discussion of privileged communications generally.

Commission recommended:[423]

> **Recommendation 97.** A legal privilege should be conferred on all communications between children and counsellors for therapeutic purposes.
>
> - Evidence of the communications should only be able to be adduced in court where the court gives leave.
>
> - The court should not be able to give leave unless the evidence has substantial probative value, other evidence of the matters in the communication is not available and the public interest in protecting the confidentiality of the communications or in protecting the alleged victim from harm is substantially outweighed by the public interest in admitting the evidence.
>
> **Implementation.** The Evidence Act should be amended to reflect the above provisions. The Attorney-General through SCAG should encourage all States and Territories to enact similar legislation. The Evidence Amendment (Confidential Communications) Bill 1997 (NSW) is an appropriate model for this legislation.

(c) Court appointed counsellors

The Queensland Police Service in a preliminary submission to the Commission suggested that allegations of leading, coaching or tainting of evidence may be reduced if counsellors could be appointed by the court prior to any proceedings.[424]

This could be achieved either by establishing a pool of qualified professionals employed by the courts or by establishing a pool of self-employed professionals from which to choose.

While possible in metropolitan regions, it may be difficult to establish a pool of such skilled professionals in regional centres or more remote areas of Queensland.

Further, parents of the child complainant may feel that their right to choose the most appropriate professional to treat their child has been diminished.

There is no reason to suppose that a court-appointed counsellor would be immune from allegations of coaching. Further, appointment of a counsellor by the court might give rise to a perception of bias on the part of the court if it indicates its opinion that the child is in need of therapy.

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423 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 321.

424 Submission 46.

4. QUESTIONS FOR DISCUSSION

(1) **Are you aware of examples of child complainants being denied treatment prior to court proceedings to avoid allegations that their evidence has been tainted by the treatment?**

(2) **Are you aware of prosecutions being adversely affected because priority is given to the need of a child complainant for treatment?**

(3) **What measures, if any, can be implemented to allow timely treatment and to avoid allegations of suggestion?**

(4) **Should legal privilege attach to communications for therapeutic purposes between a child complainant and his or her therapist?**

(5) **If "yes" to question (4), under what circumstances, if any, should the privilege be able to be overridden?**

CHAPTER 10

OUT-OF-COURT STATEMENTS

1. INTRODUCTION

Recent reforms and recommendations for reform in a number of Australian jurisdictions have promoted the increased use of pre-trial procedures in matters involving children who are alleged victims of abuse. In particular, there is greater recognition and use at trials of out-of-court statements - that is, statements made by children and recorded prior to the commencement of court proceedings and out of the courtroom.

Most frequently, out-of-court statements which could be relevant to court proceedings take the form of pre-trial statements recorded in written or videotaped form. But they might also include, for example, drawings made by the child after the alleged abuse, an audiotape of a statement made to police, or notes of what a child said to a social worker after the incident. Any of those statements may be relevant to a case involving an allegation of abuse against the child.

Increased use of pre-trial statements by child witnesses may reduce some of the problems faced by the courts in the receipt of children's evidence. It may mean, for example, that the child's statement made prior to the court hearing could be used in lieu of the child appearing in person at trial to testify. Additionally, it might mean that court time involved in examining and cross-examining the witness will be reduced. A child may also avoid the trauma associated with having to face the person alleged to have assaulted him or her or the person against whom the child has made an allegation and, as a result, the child may be able to provide the court with a more coherent recollection of relevant events.

The use of out-of-court statements may also decrease delays involved in court proceedings by avoiding lengthy examination of the child in court, although it is always possible that some legal argument will be generated by seeking to admit such statements. It has been recognised in all jurisdictions which have introduced relevant reforms that the admission of out-of-court statements must not substantially detract from well accepted rights of the accused - such as the right to challenge statements made by the complainant.

The Judicial Commission of New South Wales has noted that commentators on this area suggest that the use of pre-trial statements recorded on videotape may "increase reliability, lessen the likelihood of contamination and be less traumatic for the child,"[425] although a number of cases have shown the possibility that the evidence of children may be rejected where methods used by authorities in pre-trial examinations render it

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[425] Judicial Commission of New South Wales, Research Monograph, *Child Sexual Assault* (MS 15, 1997) at 72.

unreliable:[426]

> There are two main bases to a claim of contamination. The first is that children are more susceptible than adults to the effects of repeated questioning, and will more easily succumb to what they perceive as the questioner's authority. The second is an accused's concern that the complainant has been coached to produce answers appropriate for the prosecution. Generally, the required degree and accuracy of detail are special issues in the context of child sexual assault because the child is being asked to recall a traumatic experience, and the child's evidence will often seem to fall short of the degree of accuracy a jury may be entitled to expect of an adult witness.

However, the appropriateness or otherwise of particular methods of investigation is outside this Commission's terms of reference.

2. ADMISSIBILITY OF OUT-OF-COURT STATEMENTS

In the absence of specific statutory provisions, out-of-court statements would normally be inadmissible as evidence because they would offend the common law rule against the admissibility of hearsay evidence. The rule against hearsay evidence is an exception to the general rule that all relevant evidence is admissible. The rule against hearsay precludes a statement (whether written or oral) made by a person from being admitted as evidence of any fact or opinion contained in the statement, unless the statement was actually made by the witness in court.[427]

The application of the rule against hearsay is most readily recognised where a witness tells the court what he or she has been told by someone else. However, the rule excludes not only out-of-court statements relayed by third parties, but also previous statements of testifying witnesses - even though their earlier statements may be better evidence than the later recollection of what happened.

An argument in support of the rule against hearsay evidence is that because such evidence (including out-of-court statements) is not given on oath and is not subject to cross-examination at the time the evidence is generated (or relevant statements are made), it is inherently unreliable and may therefore unduly prejudice the accused.

For out-of-court statements to be admitted into court as evidence they must either fall within a common law exception to the rule against hearsay or be admitted pursuant to a specific statutory provision.

Arguments for relaxing the rule against hearsay evidence so as to enable the courts to receive pre-trial statements made by children include:

- If hearsay evidence is generally inadmissible, relevant and reliable evidence may be denied to the courts. The Australian Law Reform Commission and the

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426 Ibid.

427 Riordan JA (ed), *The Laws of Australia* (looseleaf) Vol 16.4 at para 66.

Human Rights and Equal Opportunity Commission have recognised the importance of some hearsay evidence:[428]

> Hearsay evidence may be particularly important in cases involving child complainants. Many allegations of criminal acts against children are not prosecuted or do not proceed because the child is presumed incompetent to give evidence or does not understand the duty to tell the truth in court, or because the trauma of testifying at trial prevents the child from giving evidence satisfactorily or at all. The ability to introduce the hearsay statements of the child, in addition to or instead of the evidence of the child, might address these problems.

- Hearsay evidence may in fact be the most compelling evidence of abuse in a particular case.[429] For example, the first recorded disclosure of sexual abuse by young children may be the most graphic, complete account of abuse, and may in fact directly support the allegations.[430] Further, in some cases, hearsay may be the only evidence available if the child cannot or will not testify.[431] In many cases the need for the child's hearsay is magnified by the paucity of medical and corroborating evidence.[432] This may be particularly the case in sexual assault cases, where out-of-court statements often amount to the only cogent evidence of the assault having taken place.[433]

- Hearsay evidence may be more reliable than live testimony.[434] The argument that hearsay may be concocted and that a jury would attach undue weight to that hearsay, fails to explain cases where the only reliable evidence is hearsay. The recognition of inaccuracy through repetition as a risk of oral evidence has to be weighed against the recognition that there are no such risks inherent in written hearsay. As Cross observes:[435]

> ... it is said that hearsay is excluded because of the danger of inaccuracy through repetition. In the case of oral hearsay, there is no doubt a risk that, if A is allowed to narrate what B told him C had said, the precise terms of C's original statement,

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428 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.78.

429 Myers J, "A Decade of International Reform to Accommodate Child Witnesses: Steps Towards a Child Witness Code", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 226.

430 Sas LD, Wolfe DA and Gowdey K, "Children and the Courts in Canada", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 83-84.

431 Ibid.

432 Myers J, "A Decade of International Reform to Accommodate Child Witnesses: Steps Towards a Child Witness Code", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 226.

433 Judicial Commission of New South Wales, Research Monograph, *Child Sexual Assault* (MS 15, 1997) at 69, citing *State v Myatt* 697 P 2d 836 (1985).

434 Sas LD, Wolfe DA and Gowdey K, "Children and the Courts in Canada", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 84.

435 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) para 31020 at 31,021-31,022.

> or even its exact purport, will not be before the court; but no such risks are inherent in written hearsay and yet, though there are more relevant exceptions, written hearsay is just as much subject to the general exclusionary ban as is oral hearsay.

Armed with appropriate judicial warnings, it is likely that a jury would give such evidence the appropriate weight.

- Although most children possess the capacity to give evidence in court, some children are not effective witnesses. Others cannot take the witness stand at all:[436]

> For a child who cannot testify, hearsay statements made prior to trial are the child's only way to communicate with the judge or jury. For a child who testifies but performs poorly, earlier hearsay statements may bolster the child's credibility.

- Traditionally, to characterise certain evidence as "hearsay" implies an inability to cross-examine the statement-maker or the witness, yet it is possible to cross-examine the witness about past statements. *Evidence Acts* which generally provide for out-of-court hearsay statements to be admissible in certain circumstances, as a general rule require the statement-maker to be available at trial for cross-examination. However, effective cross-examination of a witness in relation to his or her out-of-court statement may not always be possible because a witness may only be able to recount a previous written statement "so vaguely that effective cross-examination is impossible".[437]

In 1997 the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, in their review of children and the legal process, suggested Australia-wide amendment to the rules of evidence to permit hearsay and other relevant evidence in lieu of a child's live evidence at committal and at trial:[438]

> Evidence of a child's hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any civil or criminal case involving child abuse allegations, where admission of the hearsay statement is necessary and the out-of-court statement is reasonably reliable. A person may not be convicted solely on the evidence of one hearsay statement admitted under this exception to the rule against hearsay.

The Report recognised that a child witness's previous statement may fall within an exception to the rule against hearsay. But the current exceptions were criticised as insufficient to admit all relevant previous statements by children.[439]

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436 Myers J, "A Decade of International Reform to Accommodate Child Witnesses: Steps Towards a Child Witness Code", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 226.

437 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) para 31030 at 31,024.

438 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 102 at 332.

439 Id at para 14.79.

3. LEGISLATION ENABLING THE ADMISSION OF A CHILD'S OUT-OF COURT STATEMENTS

Legislation in most Australian jurisdictions enables the admission into evidence of one or more of at least three different types of out-of-court-statements made by children including:

(a) any statement made by a child which relates to a matter in issue in certain types of proceedings and which was made by the child to another person before the proceedings commenced. It would not matter that the statement was recorded in writing, electronically, or not;

(b) a court-ordered videorecording of the child's evidence-in-chief with cross-examination and re-examination to take place at trial (in a manner which may be the subject of the judge's directions);

(c) a statement made by the child in a pre-trial hearing. This type of statement would generally hold more weight than the first two as it would be made in carefully controlled circumstances.

Each of these types of out-of-court statement is discussed below.

(a) Any statement made by a child

Children may make relevant statements in many different forms - for example, drawings, complaints to family members or other trusted adults, statements to police and audiotaped interviews.

(i) Queensland

Section 93A of the *Evidence Act 1977* (Qld) reads:

> **Statement made before proceeding by child under 12 years or intellectually impaired person**
>
> (1) In any proceeding where direct oral evidence of a fact would be admissible, any statement tending to establish that fact, contained in a document (within the meaning of section 3), shall, subject to this part, be admissible as evidence of that fact if -
>
> (a) the maker of the statement was a child under the age of 12 years or an intellectually impaired person at the time of making the statement and had personal knowledge of the matters dealt with by the statement; and
>
> (b) the statement was made soon after the occurrence of the fact or was made to a person investigating the matter to which the proceeding relates; and
>
> (c) the child or an intellectually impaired person is available to give

evidence in the proceeding.

(2) Where a statement made by a child or an intellectually impaired person is admissible as evidence of a fact pursuant to subsection (1), a statement made to the child or an intellectually impaired person by any other person -

(a) that is also contained in the document containing the statement of the child or intellectually impaired person; and

(b) in response to which the statement of the child or intellectually impaired person was made;

shall, subject to this part, be admissible as evidence if that other person is available to give evidence.

(3) Where the statement of a person is admitted as evidence in any proceeding pursuant to subsection (1) or (2), the party tendering the statement shall, if required to do so by any other party to the proceeding, call as a witness the person whose statement is so admitted and the person who recorded the statement.

(4) In the application of subsection (3) to a criminal proceeding - **"party"** means the prosecution or the person charged in the proceeding.

(5) A person is an **"intellectually impaired person"** if the person has a disability -

(a) that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and

(b) that results in -

(i) a substantial reduction of the person's capacity for communication, social interaction or learning; and

(ii) the person needing support.

Section 93A of the *Evidence Act 1977* (Qld) enables any statement by a child under 12 years of age to be admitted if: the statement is contained in a "document";[440] it tends to establish a fact (where oral evidence would be admissible of that fact); and the following sub-criteria are fulfilled:

- the child has personal knowledge of the matters in the statement;
- the statement was made soon after the fact or was made to the investigator; and
- the child is available to testify.

There is no provision for the accused to be given a copy of the statement or

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440 "Document" is expansively defined in s 3 of the *Evidence Act 1977* (Qld). For instance, it encompasses the following: parts of "documents", written documents, photographs, audiotapes and "any other record of information whatever". Section 92(4) provides that a statement contained in a document is made by a person if:

(a) it was ... dictated or otherwise produced by the person; or

(b) it was recorded with the person's knowledge.

details of it prior to the trial. This may prove to be a disadvantage to the accused if he or she does not have an opportunity to prepare a defence to the allegations made in the statement.

The provision is limited in that it refers only to statements made soon after the occurrence of the event or made to a person investigating the matter before, or soon after, it becomes apparent to that person that the child is a potential witness.

The Queensland provision is restricted to statements made by children under 12 years of age, although it is not restricted to any particular type of proceeding.

Queensland courts may reject any statement, including a section 93A statement if, for any reason, it appears to be inexpedient in the interests of justice to admit it.[441] Section 130 of the *Evidence Act 1977*(Qld) contains a broader expression of the power to reject. It confirms the court's general power in a criminal proceeding to exclude evidence if it would be unfair to the accused to admit that evidence. It has been held that a section 93A statement should not be excluded from evidence merely because a child gives different versions of events in evidence at the trial.[442]

A number of cases suggest that section 93A should be read not restrictively but with the underlying rationale of the section in mind. This rationale is that the reception, and retrieval, of children's evidence should be facilitated.[443] It has been held that a child's evidence in a section 93A *Evidence Act 1977* (Qld) statement could be admitted despite the child's inability at trial to give evidence of matters in the statement.[444]

Two recent Queensland cases demonstrate the different approaches by Queensland judges to the absence of an opportunity to cross-examine the maker of an out-of-court statement. In the first case,[445] the only evidence against the accused was the child's statements in a videotaped interview. Two members of the Court of Appeal commented on the issue of cross-examination:[446]

> It was impossible for the accused to challenge or even to test those statements. The child was not only unable to recall the incident which formed the subject of the charge or to identify the appellant; she was also unable to recall even being interviewed by the police officer or going to the police station or, of course, what she said in the course of the videotaped interview. The practical consequence

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441 *Evidence Act 1977* (Qld) s 98.

442 *R v Morris ex parte Attorney-General* [1996] 2 Qd R 68 at 74.

443 See notes 444 and 445 of this Discussion Paper.

444 *R v Cowie, ex parte Attorney-General* [1994] 1 Qd R 326.

445 *R v Cumner* (Unreported, CA, Sup Ct of Qld, Fitzgerald P, Davies JA, Demack J, CA No 108 of 1994, 28 July 1994).

446 Id per Fitzgerald P and Demack J at 2.

> was that cross-examination as to the statements made by the child in that interview was impossible.
>
> In our opinion, in all the circumstances, evidence of the statements made by the child in the videotaped evidence should not have been received. [emphasis added]

The second case highlights the division in judicial opinion on section 93A statements when there is a contradiction between the section 93A statement and the child's trial testimony.[447] The President of the Court of Appeal referred to potential difficulties with cross-examination in these circumstances, concluding:[448]

> However, in deciding whether it would be unfair to an accused to receive evidence of out-of-court statements by a child, regard should be had to whether, and if so how adequately, it would be possible to test that evidence by cross-examination.

Yet the second member of the Court did not accept "the approach discussed in the reasons of the President":[449]

> I am inclined to the view that the enactment of s.93A constituted a sensible and useful reform: but Courts, whether or not in agreement with the policy of the section, should in my opinion exercise the discretion to admit or exclude statements taken under it without any preconception that admission of such statements is unfair. Section 93A statements will often be of considerable assistance to juries in performing their difficult task of determining whether or not allegations of child sexual abuse are proved, to the requisite standard.

The third member of the Court stated:[450]

> Nothing said by [the President] should, in my view, obscure the importance of the reliability of the statement and the possibility that factors other than an inability to cross-examine upon it may affect that question, or overemphasize the importance of one of many possible factors affecting that question.

Queensland cases have raised the issue of whether a provision similar to section 21A(3) of the *Evidence Act 1977* (Qld) should be inserted in section 93A.[451] The issue is whether a statement should not be given if it would "unfairly prejudice any party to the proceeding" - that is, either the accused or the prosecution.[452]

(ii) Western Australia

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447 *R v FAR* [1996] 2 Qd R 49.

448 Id at 55.

449 Id per Pincus JA at 61.

450 Id per Davies JA at 61.

451 Section 21A of the *Evidence Act 1977* (Qld) is set out at pp 23-24 of this Discussion Paper.

452 Id per Fitzgerald P at 53.

In Western Australia section 106H of the *Evidence Act 1906* (WA) was introduced some years after the Queensland provision. It enables any pre-trial statement of a child to be admitted as evidence provided certain conditions are fulfilled. The provision reads:[453]

> **Admission of child's statement in proceeding for sexual offences etc**
>
> (1) In any Schedule 7 proceeding,[454] a relevant statement may, at the discretion of the Judge, be admitted into evidence if -
>
> (a) there has been given to the defendant -
>
> (i) a copy of the statement; or
>
> (ii) if the statement is not recorded in writing or electronically, details of the statement; and
>
> (b) the defendant is given the opportunity to cross-examine the affected child.
>
> ...
>
> (3) In subsection (1) "relevant statement" means a statement that -
>
> (a) relates to any matter in issue in the proceeding; and
>
> (b) was made by the affected child to another person before the proceeding was commenced,
>
> whether the statement is recorded in writing or electronically or not.

This provision was enacted to implement a recommendation of the Law Reform Commission of Western Australia in its 1991 *Report on Evidence of Children and Other Vulnerable Witnesses*.[455] The Commission was of the view that there will be circumstances in which a child's complaints or other statements, whether written, oral or electronically recorded, should be admitted in cases involving a sexual offence or an intra-familial assault or abuse.

Unlike the Queensland provision, section 106H is not limited to statements made soon after the occurrence of the event or made to a person investigating the matter. However, the jury may see a delay between the event and the making of the statement as significant, depending on all the circumstances of the case. Unlike the Queensland provision, the Western Australian provision is restricted to certain types of proceedings - "Schedule 7" proceedings. A "Schedule 7" proceeding broadly refers to a sexual or other serious offence involving children

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453 A similar provision is found in the *Evidence Act 1906* (Tas) s 122F.

454 A "Schedule 7 proceeding" refers to offences where the affected child was under 16 years of age at the date the complaint was made and relates to certain sexual offences and other violent offences in the *Criminal Code* (WA). It also relates to care and protection proceedings. For it to be a Schedule 7 proceeding in relation to the "other serious offences" referred to, there must have existed a particular relationship with the defendant (for example, parent, step-parent etc).

455 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 3.33.

under 12 years of age.[456]

The Law Reform Commission of Western Australia considered whether the witness should also be available for cross-examination on the evidence given.[457] Upholding the importance of a witness's availability for cross-examination, the Commission was of the view that any particular concerns with the child having to confront the accused in court could be dealt with by other facilities which should be available to the child - such as the use of closed-circuit television.[458]

Admission of this type of evidence may work to the benefit of the accused as well as that of the court in receiving the best possible evidence from the complainant. For example, it may avoid the situation which arose in the case of *Sparks v The Queen*,[459] where the court refused to admit a child's hearsay statement to her mother made an hour and a half after the girl had been assaulted that "it was a coloured boy" who assaulted her. A white man was convicted.

The Law Reform Commission of Western Australia also believed that notice of intention to offer the statement in evidence should be served on the accused in advance to provide the accused with sufficient opportunity to consider the statement and, if necessary, prepare a defence.

(iii) New South Wales

In New South Wales, evidence of a previous representation[460] is, in certain circumstances, excepted from the operation of the hearsay rule.

In a criminal proceeding, if the person who made a previous representation is not available to give evidence about an asserted fact, the hearsay rule does not apply to evidence of the representation given by a person who "saw, heard, or otherwise perceived the representation being made", provided that the representation was made, inter alia, when or shortly after the asserted fact occurred and in circumstances that make it unlikely that the representation is a

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456 See note 454 above.

457 A provision in the Washington Revised Code Ann. s 9A.44120 was considered and rejected by the Law Reform Commission of Western Australia. That provision allows a prior statement of a child under the age of 10 to be admitted even though the maker is not available to be called as a witness, provided that there is corroborative evidence of the act. Thus, the child would not have to confront the accused in court. See Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 3.27.

458 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 3.31.

459 [1964] AC 964.

460 The Dictionary to the *Evidence Act 1995* (NSW) defines "representation" as including:

(a) an express or implied representation (whether oral or in writing), or
(b) a representation to be inferred from conduct, or
(c) a representation intended by its maker to be communicated to or seen by another person, or
(d) a representation that for any reason is not communicated.

fabrication, or in circumstances that make it highly probable that the representation is reliable.[461] Further, the hearsay rule does not apply to evidence of a previous representation made in the course of giving evidence if, in that proceeding, the defendant in the proceeding in which it is proposed to adduce evidence of the representation cross-examined the person who made the representation, or had a reasonable opportunity to do so.[462]

If the person who made the previous representation is available to give evidence about an asserted fact, and if the person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given either by the person who made the representation or any other person who saw, heard or otherwise perceived the representation being made provided that, at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation.[463]

These exceptions to the hearsay rule do not apply unless the party seeking to adduce evidence of the representation has given reasonable notice in writing to each other party.[464] Nor do they permit the use of a previous representation to prove the existence of an asserted fact if, at the time when the representation was made, the person who made the representation was not competent to give evidence about the fact, unless the representation was made contemporaneously by the person about his or her health, feelings, sensations, intention, knowledge or state of mind.[465]

(iv) South Australia

In South Australia, where the alleged victim of a sexual offence is a young child,[466] the court in its discretion may admit hearsay evidence in the form of "evidence of the nature and contents of the complaint from a witness to whom the alleged victim complained of the offence", provided that the alleged victim has been called, or is available to be called, as a witness and provided that the evidence has sufficient probative value to justify its admission. In exercising its discretion the court must consider "the nature of the complaint, the circumstances in which it was made, and any other relevant factors".[467]

In addition, "first-hand documentary hearsay" is admissible in all proceedings.

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461 *Evidence Act 1995* (NSW) s 65(1), (2).

462 *Evidence Act 1995* (NSW) s 65(3).

463 *Evidence Act 1995* (NSW) s 66.

464 *Evidence Act 1995* (NSW) s 67.

465 *Evidence Act 1995* (NSW) s 61.

466 *Evidence Act 1929* (SA) s 4 (definition of "young child").

467 *Evidence Act 1929* (SA) s 34ca.

This hearsay evidence is characterised as a statement contained in:[468]

> ... an apparently genuine document purporting to contain a statement of fact, or written, graphical or pictorial matter in which a statement or fact is implicit, or from which a statement of fact may be inferred.

The proposed witness or examinee - that is, the statement-maker - must have had personal knowledge of the statement at the time the statement was prepared.[469] However, the Court has a discretion to exclude the evidence if the prejudice that might result to any of the parties from its admission outweighs its evidentiary weight. The court is also able to exclude the evidence if to admit it would be contrary to the interests of justice.[470]

(b) Court-ordered videorecording of evidence-in-chief

Some jurisdictions enable a witness's evidence-in-chief to be recorded prior to the court hearing. Any cross-examination on that evidence still takes place in court.

(i) Western Australia

In Western Australia, section 106I(1)(a) of the *Evidence Act 1906* (WA) provides:

> **Video-taping of child's evidence, application for directions**
>
> (1) Where any Schedule 7 proceeding has been commenced in a Court, the prosecutor may apply to a judge of that Court for an order directing -
>
> (a) that the affected child's evidence in chief be taken, in whole or in part, and presented to the Court in the form of a video-taped recording of oral evidence given by the affected child ...
>
> (2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).

Further guidance is given to the courts in section 106J for making orders under section 106I(1)(a). Section 106J reads:

> **Giving of evidence by video tape**
>
> (1) A judge who hears an application under section 106I(1)(a) may make such order as the judge thinks fit which may include directions as to -
>
> (a) the procedure to be followed in the taking of the evidence, the

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468 *Evidence Act 1929* (SA) s 45b(1). See *R v Perry (No 3)* (1981) 28 SASR 112 at 116-118; *R v Perry (No 4)* (1981) 28 SASR 119; *Ryan v ETSA (No 2)* (1987) 47 SASR 239 at 244.

469 *Evidence Act 1929* (SA) s 45b(2). As confirmed by the case law: *R v Calabria* (1982) 31 SASR 423 at 429-431 per King CJ; *Duke Group Ltd (in liq) v Arthur Young (No 1)* (1990) 54 SASR 498 at 507; *The Duke Group Ltd (in liq) v Pilmer* (1994) 63 SASR 364.

470 *Evidence Act 1929* (SA) s 45b(3)(b), (c).

presentation of the recording and the excision of matters from it; and

(b) the manner in which any cross-examination or re-examination of the affected child is to be conducted at the trial.

(1a) An order under subsection (1) -

(a) is to include directions, with or without conditions, as to the persons, or classes of persons, who are authorized to have possession of the video-taped recording of the evidence; and

(b) may include directions and conditions as to the giving up of possession and as to the playing, copying or erasure of the recording.

(2) An order under subsection (1) may be varied or revoked by the judge who made the order or a judge who has jurisdiction co-extensive with that judge.

The presentation to a court of a videotape of evidence[471] is admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court.[472]

The Western Australian legislation is based on the recommendations of the Law Reform Commission of Western Australia in its 1991 *Report on Evidence of Children and Other Vulnerable Witnesses*. That Commission recommended:[473]

> In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated, the court should have power to direct that the prosecution should be permitted to present a child's evidence in video-recorded form at trial in lieu of evidence-in-chief. The child would be available for cross-examination and re-examination by counsel. Such examination would take place under conditions laid down by the judge.

The conditions laid down by the judge might include, for example, the use of closed-circuit television or screens to separate the accused and the child witness.

The Judges of the Supreme Court of Western Australia consider that the procedure under section 106I(1)(a) is an unlikely one that should be used only in exceptional circumstances:[474]

> It might arise if there was good reason for a prosecutor to want a child's evidence-in-chief at a very early stage while it is fresh in the child's mind.

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471 Under ss 106H, 106J, or 106K of the *Evidence Act 1906* (WA).

472 *Evidence Act 1906* (WA) s 106L.

473 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 4.29.

474 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court) at 5.

(ii) New Zealand

In New Zealand, in any committal involving a sexual offence upon a child under 17 years of age, the child's videotaped evidence may be admitted if the court is satisfied that the videotape has been made, and is identified, in the prescribed manner and form.[475]

Where the videotape of the child's evidence has been shown at committal, the trial judge may direct that the videotape be admitted at trial.[476] The judge may view the tape before it is shown to the jury and may order that any evidence be deleted which would, but for the use of the videotape, be excluded.[477] Counsel for the accused retains the right to cross-examine the child.[478] Where the accused is unrepresented, the judge may give such direction as he or she thinks appropriate as to the manner of cross-examination or re-examination.[479] These provisions enable the judge to control the proceedings even though the evidence of the child complainant has been pre-recorded.

(iii) England

In England, the *Criminal Justice Act 1988* (UK)[480] follows a similar scheme. The court may give leave for a videotape of an interview with a child witness to be admitted into evidence, unless it is apparent that the child will not be available for cross-examination or that, having regard to the interests of justice, the tape should not be admitted. The scheme is restricted to cases involving assaults or offences of a sexual nature against children.

Where leave is given for a videotape to be admitted into evidence, the child is not to give evidence-in-chief otherwise than by the videorecording, unless the court considers it to be in the interests of justice to do so.[481]

The court may direct that parts of the recording will not be admitted. Moreover, the child may be called to give evidence, but he or she may not be examined in chief on any matter which, in the court's opinion, has been dealt with in the videotape.

Where leave to admit a videorecording is to be sought at trial, the videorecording may be considered by a magistrate's court conducting committal

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475 *Summary Proceedings Act 1957* (NZ) s 185CA(1).

476 *Evidence Act 1908* (NZ) s 23E(1)(a).

477 *Evidence Act 1908* (NZ) s 23E(2).

478 *Evidence Act 1908* (NZ) s 23F(2).

479 *Evidence Act 1908* (NZ) s 23F(3).

480 *Criminal Justice Act 1988* (UK) s 32A.

481 *Criminal Justice Act 1988* (UK) s 32A(6A), (6B), (6C), (6D).

proceedings even though the child is not called at committal.

Although the United Kingdom provisions aim to spare the child examination-in-chief at trial,[482] judges have told the English Law Commission that they could have the opposite effect:[483]

> ... because there is no examination in chief the child, once called to give evidence, is thrust immediately into a hostile cross-examination, and this experience gives the witness the impression that the court is against him or her. It is ironical that a child is able to give his or her own story in examination in chief in an atmosphere less formal and pressured than that prevailing in the court, yet he or she has to endure the much more traumatic and fraught experience of being cross-examined in the formal court atmosphere. [notes omitted]

Moreover, there is a fear that, because the witness may have to repeat his or her story a number of times, the witness may unintentionally overlay the original account with altered versions.[484]

The English Law Commission preferred, as its reform option, that "previous consistent statements be admitted as evidence of the truth of their contents in certain circumstances".[485] The English proposal would allow evidence of a child's previous statement to be admitted:[486]

> (d) where the witness cannot remember details in a statement which he or she made or adopted when the details were fresh in his or her memory and the details are such that the witness cannot reasonably be expected to remember them.

However, the witness could still be cross-examined as to the truth of the contents of the previous statement.

(c) Statements made at court-ordered pre-trial hearing

(i) Queensland

In Queensland, section 21A(2)(e) of the *Evidence Act 1977* (Qld) would appear to authorise the pre-trial taking and videotaping of the child's evidence-in-chief, cross-examination and re-examination:

> (2) Where a special witness is to give or is giving evidence in any proceeding,

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482 Home Office and Department of Health (UK), *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (1992) at 1.

483 Law Commission (UK), Consultation Paper, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC CP138, 1995) at para 13.23.

484 Id at para 13.33.

485 Id at 197.

486 Id at para 13.42.

the court may, of its own motion or upon application made by a party to the proceeding, make one or more of the following orders -

...

(e) that a videotape of the evidence of the special witness or any portion of it be made under such conditions as are specified in the order and that the videotaped evidence be viewed and heard in the proceeding instead of the direct testimony of the special witness.

Section 21A(3), (5)-(7) provides:

(3) An order shall not be made pursuant to subsection (2) if it appears to the court that the making of the order would unfairly prejudice any party to the proceeding or, in a criminal proceeding, the person charged or the prosecution.

(5) Where the making of a videotape of the evidence of a special witness is ordered pursuant to subsection (2)(e), the court may further order that all persons other than those specified by the court be excluded from the room in which the special witness is giving that evidence.

(5A) However, any person entitled in the proceeding to examine or cross-examine the special witness shall be given reasonable opportunity to view any portion of the videotape of the evidence relevant to the conduct of that examination or cross-examination.

(6) A videotape, made under this section, of any portion of the evidence of a special witness shall be admissible as if the evidence were given orally on the proceeding in accordance with the usual rules and practice of the court.

(7) The room in which a special witness gives evidence pursuant to an order made pursuant to subsection (2)(c) or the room occupied by a special witness while the evidence of the witness is being videotaped shall be deemed to be part of the court in which the proceeding is held.

A number of difficulties with the Queensland provisions were identified in the Law Reform Commission of Western Australia's *Report on Evidence of Children and Other Vulnerable Witnesses*. Those difficulties include:[487]

(1) Because conditions have not yet been prescribed by Rules of Court, in some cases where a young child gives evidence in an informal setting on a videotape the child has been examined and cross-examined while alone in a room with the prosecutor or defence counsel (as the case may be). ... the extreme informality of the situation can work against effective evidence being given by a very young child, since the child may not fully appreciate the situation and be more susceptible to the desire to please the sole adult in the room with him or her (and therefore more susceptible to answer leading questions in the way he or she perceives is wanted).

(2) There is no provision for an early pre-trial hearing at which conditions can be prescribed for the making of a videotape. As a result 6 months or

487 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 4.38.

more may elapse before any examination or cross-examination of a child on videotape is authorized, and the freshness of the evidence is therefore lost, unless a complaint has been made on videotape to an investigating officer "soon after" the event and that videotape is admitted. ... an early decision by the trial court to allow videotaping would render the legislation far more effective.

(3) A difficulty arises from the fact that a videotape of evidence forms an exhibit at the trial and as such is permitted in the jury room. If the videotape contains only the child witness's evidence or statement and no cross-examination, then its availability in the jury room may be prejudicial to the accused and undesirable.

(ii) England

In England in 1989 the *Report of the Advisory Group on Video Evidence*[488] recommended that any child complainant under 14 years of age in a sexual assault matter could give evidence in a pre-trial informal hearing at which no one could be present other than the judge, counsel for the prosecution and defence, the child witness and any person whom the judge allowed - such as a support person for the child. The accused would observe proceedings by way of closed-circuit television from a different room and would communicate with counsel by way of audiolink.

At the pre-trial hearing both the prosecution and the accused's counsel would be able to question the child, but the judge would carefully control questioning. The hearing, with the judge presiding, would be subject to the normal rules of evidence with one exception. If a videotape existed of the child making a statement or being interviewed concerning the alleged offence, then that videotape (being admissible at the trial under a new exception to the hearsay rule) could be shown to the child at the pre-trial hearing and the child invited to confirm the account which he or she has given and to expand upon any aspects which the prosecution wish to explore.

Counsel for the accused would be able to cross-examine the child, under the judge's control. Before the videotaped interview was admitted, and before the pre-trial hearing, the interview would have to be viewed by the judge, the accused and counsel in chambers or some other suitable place, and, after argument from both sides, a decision would be made by the judge on whether to admit the recording in whole or in part.

The whole of the pre-trial hearing at which the child gave evidence would be videotaped and at the trial the videotape and any videotaped interview would be shown to the jury in lieu of the child's testimony being given in court. The child would not be required to appear in court during the trial unless he or she wished to.

Where it became necessary to recall a child who had been cross-examined at

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488 Home Office (UK), *Report of the Advisory Group on Video Evidence* (The Pigot Committee, 1989) at paras 2.25-2.39.

a pre-trial hearing, a further special out-of-court hearing would occur which would be subject to the same conditions as the first.

The Pigot Report proposals relating to a pre-trial hearing were not adopted.

(iii) Tasmania

In 1990 the Law Reform Commissioner of Tasmania recommended:[489]

> That, in an appropriate case, a police officer may on notice to the person charged apply to a Children's Magistrate for the evidence of a child to be taken prior to committal proceedings. The magistrate may, if satisfied that such a course is appropriate, convene a hearing in a suitable place at which the examination-in-chief, cross-examination and re-examination will proceed. The dress of all parties should be informal, and the proceedings should be recorded electronically. I recommend that subject to the other rules of evidence, the video tape of the hearing be admissible on the trial of the accused; and that the child not be called as a witness unless the presiding judicial officer considers that there are exceptional circumstances which require his recall in the interests of justice. I envisage that, without any change in the law, the video tape would be subject to scrutiny in the trial court, and that any parts of it which offended against the laws of evidence, or which a judicial officer considered, in the exercise of his discretion, should be excluded, could be edited out.
>
> That a similar procedure be implemented whereby, after committal proceedings have been completed, a Judge can authorise a judicial officer to preside at a special hearing in advance of trial during which the child's evidence may be taken ... with the same provisions as to admissibility of the video tape.

These recommendations were excluded from the 1993 amendments to the *Evidence Act 1910* (Tas) which implemented a number of other recommendations of the Law Reform Commissioner relating to children's evidence.

(iv) Western Australia

In Western Australia, section 106I(1) of the *Evidence Act 1906* (WA) reads:

> **Video-taping of child's evidence, application for directions**
>
> (1) Where any Schedule 7 proceeding has been commenced in a Court, the prosecutor may apply to a Judge of that Court for an order directing -
>
> ...
>
> (b) that the affected child's evidence be taken at a pre-trial hearing.
>
> (2) The defendant is to be served with a copy of, and is entitled to be heard on, an application under subsection (1).

Further elaboration is provided by section 106K which reads:

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489 Law Reform Commissioner of Tasmania, Report, *Child Witnesses* (Report 62, 1990) recommendations 4, 5 at 4.

Giving of evidence at pre-trial hearing

(1) A judge who hears an application under section 106I(1)(b) may make such order as the judge thinks fit which is to include -

(a) directions, with or without conditions, as to the persons who may be present at the pre-trial hearing;

(b) directions, with or without conditions, as to the persons, or classes of persons, who are authorized to have possession of the video-taped recording of the evidence,

and, without limiting section 106M, may include directions and conditions as to the giving up of possession and as to the playing, copying or erasure of the recording.

(2) An order under subsection (1) may be varied or revoked by the judge who made the order or by a judge who has jurisdiction co-extensive with that judge.

(3) At a pre-trial hearing ordered under subsection (1) -

(a) no person other than a person authorized by the judge under subsection (1) is to be present at the hearing;

(b) subject to the control of the presiding judge, the affected child is to give his or her evidence and be examined and cross-examined;

(c) except as provided by this section, the usual rules of evidence apply;

(d) the proceedings are to be recorded on video-tape;

(e) the defendant is to be in a room separate from the room in which the hearing is held but is to be capable of observing the proceedings by means of a closed circuit television system.

(4) The affected child's evidence at the trial is to be given by the presentation to the Court of the recording made under subsection (3), and the affected child need not be present at the trial.

(5) Where circumstances so require, more than one pre-trial hearing may be held under this section for the purpose of taking the evidence of the affected child, and section 106I and this section are to be read with all changes necessary to give effect to any such requirement.

The presentation to court of videotaped evidence under section 106K of the *Evidence Act 1906* (WA) is admissible as if the evidence were given orally in the proceeding in accordance with the court's usual rules and practice.[490]

The above provisions were based upon recommendations of the Law Reform Commission of Western Australia. That Commission observed that there will be cases in which children will be unable to testify in court and therefore it should be possible, in appropriate cases, for the child's evidence to be given at a

490 *Evidence Act 1906* (WA) s 106L.

special out-of-court hearing, thus making it unnecessary for the child to appear in court. The Commission preferred the model adopted by the Pigot Committee in the United Kingdom[491] and followed by the Tasmanian Law Reform Commissioner[492] to that adopted by Queensland.[493]

The Judges of the Supreme Court of Western Australia have agreed to guidelines for the operation of the special procedures available in Western Australia for the taking of children's evidence.[494] In the Guidelines the Judges note that, although each application for the use of the pre-trial hearing facility should be considered on its merits, certain factors should be taken into account, namely:[495]

(i) The twin aims of the Act which are -

(a) to enable the child witnesses who would not otherwise be able to give evidence effectively, or at all, to do so; and

(b) to avoid undue trauma to child witnesses arising from such features of the traditional trial process as confrontation with the accused person and the need to tell a distressing story in a daunting public environment.

(ii) The child's age. Where the child is very young - say, under the age of 8 or 10 years - the Court should lean towards allowing the procedure. A very young child may have difficulty in giving evidence in another way.

(iii) The length of time likely to elapse before the matter comes to trial. Here the Judge needs to take into account the fact that a period of more than six months before trial will, in general, impact more on a very young witness's recall than on a mature person's. In addition, it may be more difficult for a young witness to recover from the traumatic events while the prospect of going to court remains and while he/she is not permitted to discuss the events with anyone.

(iv) The availability of CCTV facilities to enable the witness to give evidence from a Remote Room.

(v) Any special circumstances applicable to the case or to the child witness. These may include personal factors (such as intellectual delay or physical or intellectual handicap) and family circumstances, cultural factors which may make it more than usually difficult for the witness to talk in front of people, and evidentiary issues.

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491 See discussion at pp 136-137 of this Discussion Paper.

492 See discussion at p 137 of this Discussion Paper.

493 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 4.39. See pp 135-136 of this Discussion Paper for the Western Australian Commission's comments on the Queensland provision.

494 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court).

495 Id at 16.

4. QUESTIONS FOR DISCUSSION

GENERAL STATEMENTS OF THE CHILD COMPLAINANT

(1) To what extent are pre-trial statements of child witnesses currently admitted as evidence under section 93A of the *Evidence Act 1977* (Qld) in Queensland Courts?

(2) What, if any, difficulties have been experienced with the admission of such statements under section 93A of the *Evidence Act 1977* (Qld)?

(3) Should any statement of the child (for example, drawings, conversations with others, etc) be admissible:

- **(a) At committal?**
- **(b) At trial?**

(4) If "yes" to question (3), what, if any, restrictions should be imposed on the admission of such statements:

- **(a) That the statement be made soon after the event to which it relates, or soon after it is apparent that the child is a potential witness or at any time prior to committal or trial?**
- **(b) That the statement was made to another person by the child?**
- **(c) That the child be available for cross-examination:**
  - **(i) At committal?**
  - **(ii) At trial?**
- **(d) That a copy of the statement be made available to the accused before the committal/trial?**
- **(e) That, if the statement is not recorded, details of the statement be made available to the accused before the committal/trial?**

(5) Should the admissibility of such statements be restricted to child complainants of a particular age?

(6) **Should the admissibility of such statements be restricted to proceedings involving particular, and, if so, what, offences?**

(7) **Should the statement referred to in question (3) not be admitted as evidence if, in the opinion of the court, it would unfairly prejudice the accused?**

VIDEORECORDED EVIDENCE-IN-CHIEF

(8) **To what extent are pre-trial videorecorded statements of a child complainant's evidence-in-chief currently admitted under section 21A of the *Evidence Act 1977* (Qld) in Queensland Courts?**

(9) **What, if any, difficulties have been experienced with the admission of such statements under section 21A of the *Evidence Act 1977* (Qld)?**

(10) **Should the *Evidence Act 1977* (Qld) specifically enable the court to order the videorecording of the child complainant's evidence-in-chief to be replayed in court in lieu of the child presenting evidence-in-chief in court:**

- **(a)** **At committal?**
- **(b)** **At trial?**

(11) **If "yes" to question (10) what, if any, restrictions should be imposed on the admission of such evidence:**

- **(a)** **That the child be available in court for cross-examination and re-examination on the statement:**
  - **(i)** **At committal?**
  - **(ii)** **At trial?**
- **(b)** **That the child be available for cross-examination only:**
  - **(i)** **At committal?**
  - **(ii)** **At trial?**
- **(c)** **That the accused be given a copy of the statement prior to:**
  - **(i)** **The committal?**

(ii) The trial?

(d) That the magistrate or judge be able to view the videorecording before committal or trial to determine if any evidence should be deleted from the videorecording or that the use of the videorecording be excluded?

(e) That the child be available for cross-examination in court on the videorecording but that the magistrate or judge be able to give such direction as he or she considers appropriate as to the manner of cross-examination or re-examination?

(f) That the statement may be used at the committal even if the child is not called to give testimony at the committal?

(g) That the admissibility of such statements be restricted to child complainants of a particular age?

(h) That the admissibility of such statements be restricted to proceedings involving particular, and, if so, what, offences?

(12) Should the statement referred to in question (10) be admitted if it would unfairly prejudice the accused?

(13) If "yes" to question (10) what, if any, facilities should be made available to assist the child in giving his or her best possible evidence?[496]

VIDEORECORDING OF ALL CHILD'S EVIDENCE

(14) To what extent is videorecorded evidence-in-chief, cross-examination and re-examination of child witnesses currently admitted as evidence under section 21A(2)(e) of the *Evidence Act 1977* (Qld) in Queensland courts:

(a) At committal?

(b) At trial?

(15) What, if any, difficulties have been experienced with the admission of such statements under section 21A(2)(e) of the *Evidence Act 1977* (Qld)?

(16) Should the *Evidence Act 1977* (Qld) specifically enable the court to

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496 See for example Chapters 6, 10, 11, 12 and 13 of this Discussion Paper for a discussion of the different types of facilities which it may be desirable to have available for child complainants.

authorise the pre-trial recording of the child's evidence-in-chief, cross-examination and re-examination?

(17) If "yes" to question (16) what, if any, restrictions should be imposed on the admission of such evidence?

(18) If "yes" to question (16) what, if any, facilities should be made available to assist the child in giving his or her best possible evidence?[497]

497 Ibid.

CHAPTER 11

CLOSED-CIRCUIT TELEVISION AND SCREENS

1. INTRODUCTION

The use of closed-circuit television and screens at committals, during trials and at pre-trial proceedings (for obtaining evidence from child witnesses) to facilitate the giving of evidence by children and other "special" or vulnerable witnesses has been available in all Australian jurisdictions for some years.[498]

The intent of legislation facilitating the use of closed-circuit television and screens was to allow children and other vulnerable witnesses to give evidence in ways which were less traumatic to them, with the aim of increasing the extent and quality of evidence presented to the courts by such witnesses.

The principal source of trauma for a child witness which could be reduced or eliminated by the use of screens or closed-circuit television is that associated with the child coming face-to-face with the accused in the courtroom. Courtrooms are traditionally laid out in such a way as to enable the accused to clearly see the witness and *vice versa*. Such obvious and close proximity between an accused and a child witness may result in the child refusing to say anything in court because of the feelings the child has in relation to the accused; such as fear, guilt or love. Screens will generally prevent the child from seeing the accused and *vice versa* although the accused's presence in the courtroom may still be obvious to the child witness - a cough or other sound coming from the accused may be as off-putting to some children as being able to see the accused - particularly if, as in most cases involving allegations of child abuse, the accused is known to the child.

The use of closed-circuit television and screens in Queensland is authorised by section 21A of the *Evidence Act 1977* (Qld), even though that provision does not specifically refer to those facilities. The use of those facilities is, however, entirely at the discretion of the court.

In some jurisdictions, such as Western Australia,[499] there is a presumption in favour of the use of closed-circuit television or screens. In those jurisdictions, it is not necessary for the prosecution to satisfy the court that the facilities are warranted in a particular case. However, the presumption is rebuttable and still depends ultimately on the exercise of the court's discretion. In other jurisdictions, such as South Australia,[500] the

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498 See *Evidence (Closed-Circuit Television) Act 1991* (ACT); *Crimes Act 1900* (NSW) ss 405D-I; *Evidence Act 1958* (Vic) s 37C and Part 11A; *Evidence Act 1977* (Qld) s 21A; *Evidence Act 1929* (SA) s 13; *Evidence Act 1906* (WA) ss 106N-106Q; *Evidence Act 1939* (NT) s 21C; *Evidence Act 1910* (Tas) ss 122G-I.

499 *Evidence Act 1906* (WA) s 106N.

500 See *Evidence Act 1929* (SA) s 13.

court may make an order that closed-circuit television or screens be used on its own motion.[501]

(a) Discretionary power to allow closed-circuit television and similar measures

Since 1989 in Queensland the courts have had considerable discretion under section 21A of the *Evidence Act 1977* (Qld) to authorise special arrangements to assist vulnerable witnesses in court.[502] Such arrangements include: excluding the accused from the court; obscuring the accused from the view of the witness; excluding other persons from the court; permitting the witness to give evidence in another room; permitting the presence of another person to provide emotional support for the witness; and videotaping the evidence of the witness and presenting it in court in lieu of direct testimony from the witness.

Obviously, any number of considerations could be taken into account by the court in determining whether or not to permit the use of special arrangements for certain witnesses. Different judges will place different emphasis on different circumstances. For example, one judge, in discussing the exercise of the court's discretion in making screens available to a timid, 19 year old witness, observed:[503]

> But where a prima facie intimidation appears to affect the ability of the witness to give evidence, it seems proper to make some arrangement which will minimise or eliminate the problem, subject always to the protection of the accused from "unfair prejudice". It may be noted that the subsection does not require the total elimination of all prejudice, and the scheme of s. 21A is to entrust to the Court a balancing exercise between disadvantage to a witness and prejudice to an accused.

The judge went on to describe the use of the screens as a "relatively minor adjustment" to traditional court procedure.

A number of preliminary submissions to the Commission have expressed concern over the discretionary use of these facilities in Queensland during committals and at trial.[504] The general feeling in those submissions appears to be that Queensland magistrates and judges are reluctant to exercise their discretion in favour of the use of closed-circuit television and screens - perhaps in the belief that the right of the accused to a fair trial will be compromised.

The lack of a mandatory requirement for the use of screens or closed-circuit television may have contributed to the low rate of use of closed-circuit television. It is arguable that the lack of a mandatory legislative requirement for the use of these facilities for child witnesses has led to a lack of the required equipment in the courts.

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501 See *Question of Law Reserved (No 2 of 1997)* (Unreported, Sup Ct of SA, Court of Criminal Appeal, Doyle CJ, Cox and Williams JJ, sccrm-97-312; s6563, 26 February 1998) where the Court discusses its powers to make an order under s 13 of the *Evidence Act 1929* (SA) on its own initiative.

502 See pp 23-24 of this Discussion Paper where s 21A of the *Evidence Act 1977* (Qld) is set out in full.

503 *R v West* [1992] 1 Qd R 227 per Thomas J at 231.

504 For example submissions 23, 28, 37, 44, 46.

The Commission understands that in most Queensland courts, for example, closed-circuit television facilities are not available. If such facilities are available, the equipment is outdated or not in working order.[505] However, it is difficult to determine the exact rate of use for closed-circuit television and protective screens as, to date, no statistics have been kept on the frequency of the use of these measures.[506]

(b) Mandatory use of CCTV and similar facilities in specified proceedings involving child witnesses

Both New South Wales and Western Australia make mandatory provision for the use of closed-circuit television in certain specified situations.

(i) New South Wales

Under the *Crimes Act 1900* (NSW), the courts are required to receive evidence by means of closed-circuit television facilities or by means of any other similar technology where the proceedings are of the specified kind and involve children under 16 years of age at the time of giving evidence.

This requirement of the use of closed-circuit television or similar technology does not apply where the child is the accused or defendant in the relevant proceedings.[507]

Where the provisions apply, a child can choose not to give evidence by those means and a child must not give evidence by those means if the court orders that such means are not to be used.[508] However, the court may make such an order only:[509]

> ... if it is satisfied that it is not in the interests of justice for the child's evidence to be given by such means or that the urgency of the matter makes their use inappropriate.

Where a child would otherwise be entitled to give evidence by closed-circuit television or other similar technology, but does not do so because closed-circuit television and similar facilities are not available, or the child chooses not to give evidence by those means, or the court orders that the child may not give evidence by those means, the court must make alternative arrangements for the giving of evidence by a child in order to restrict contact (including visual contact)

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505 Conversation with Court Administrator, Supreme Court and District Courts, 19 March 1998.

506 Ibid.

507 *Crimes Act 1900* (NSW) s 405D(7).

508 *Crimes Act 1900* (NSW) s 405D(3), (4).

509 *Crimes Act 1900* (NSW) s 405D(5).

between the child and any other persons.[510]

Those arrangements may include: the use of screens; planned seating arrangements for people who have an interest in the proceedings (in which case regard may be had to the level at which they are seated and the people in the child's line of vision); and the adjournment of proceedings to other premises (which are deemed to be part of the court). Where a child chooses not to use such arrangements, the court must direct that the child be permitted to give evidence in the ordinary way.[511]

(ii) Western Australia

In 1992 the *Evidence Act 1906* (WA) was amended to incorporate new provisions relating to the evidence of children and other vulnerable witnesses.[512] The Western Australian provisions relating to screens and closed-circuit television were unique at that time. The use of those facilities is to be regarded as the routine procedure for child witnesses giving evidence about alleged sexual or violent offences committed against them.

This can be contrasted with jurisdictions which require an application to be made to court and access to the procedures to be granted or denied by the court only after hearing argument from both defence and prosecution. The result in those other jurisdictions, which include Queensland, appears to have been a relatively low rate of use of closed-circuit television and possibly screens.

The Law Reform Commission of Western Australia, upon whose recommendations the 1992 reforms were based, noted the following arguments in favour of the mandatory use of closed-circuit television:[513]

> ... if the removal of a child witness from the court is potentially prejudicial to an accused, in that a jury may infer that the witness has cause to be frightened of the accused, then it would appear that a jury is less likely to be so influenced if the absence of the witness is routine. In such a situation the trial judge can instruct the jury that removal of the witness and the hearing of the witness's evidence by CCTV is routine for witnesses of a certain age and that no inference should be drawn from the mode in which the evidence is taken. Where a discretion to allow the use of CCTV exists, it may be more difficult for a trial judge to persuade the jury that no adverse inference should be drawn from the witness's absence from the court.

With the presumption in favour of the use of closed-circuit television, the Law

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510 *Crimes Act 1900* (NSW) s 405F.

511 *Crimes Act 1900* (NSW) s 405F.

512 The *Evidence Act 1906* (WA) was amended by the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA). The amendments were introduced to implement the Law Reform Commission of Western Australia's recommendations contained in its *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991).

513 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.26.

Reform Commission of Western Australia considered it appropriate to require the judge to warn the jury that the use of these facilities was routine and that an adverse inference should not be drawn from it. Section 106P of the *Evidence Act 1906* (WA) provides that when the facilities are used pursuant to subsections 106N(2) and (4) the judge is to instruct the jury that the procedure is "a routine practice of the court and that they should not draw any inference as to the defendant's guilt from the use of the procedure".[514]

The Judges of the Supreme Court of Western Australia have suggested that the way fairly to give effect to section 109P would be to simply say: "You should not draw any inference against the accused person from the use of the procedure."[515]

The Law Reform Commission of Western Australia was concerned with the possibility of argument being generated over whether the discretion was properly exercised:[516]

> Another difficulty with a completely discretionary approach to the use of CCTV is the potential for prolonged legal argument, and appeals, on the question whether the discretion was properly exercised. This possibility is probably greater where (as in the Australian Capital Territory and Queensland) the legislation lays down fixed grounds on which a court may allow the use of CCTV. These statutes require that the court must make a finding as to the witness's emotional state or ability to give evidence in the normal way, and it is expected that the trial judge will hear evidence on the question on a voir dire and invite cross-examination of witnesses and legal argument on the issue to be decided. [notes omitted]

The Law Reform Commission of Western Australia considered it undesirable that a procedure introduced to facilitate the giving of evidence by young children should itself generate delays, uncertainties and additional issues to be determined at trial:[517]

> The introduction of expert evidence to assist a judge in determining whether a child should give evidence by some alternative procedure inevitably leads to these kinds of problems. The Commission appreciates that there may be value in expert evidence in particular cases. However, it appears that in general a case should be decided by the trial judge without the assistance of experts, on the submissions of prosecuting and defence counsel at a pre-trial hearing or on the basis of affidavits. Because the issue of how evidence is to be given may very well determine whether it is given at all, it seems imperative that the matter be decided as early as possible - both for the witness's sake and for the sake of proper preparation for trial by everyone involved. In some cases where the discretion exists to allow the use of CCTV, judges have wanted to delay the decision until after they have themselves seen the child witness in court. This might appear reasonable, but has been found to be unsatisfactory in that once a

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514 A similar warning must be given under s 405H of the *Crimes Act 1900* (NSW).

515 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court) at para 1.4.5.

516 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.28.

517 Id at para 5.30.

child witness "freezes" or is sufficiently upset for a judge to allow the use of CCTV, the witness has sometimes been unable to continue at all, whatever the conditions.

In Western Australia, provided legislative requirements are met, closed-circuit television, or removable screens (where closed-circuit television is not available) are to be used unless the witness chooses not to use the facilities. There is a presumption in favour of the use of the special procedures. As a result of the amendments, children who give evidence in criminal trials concerning matters of a sexual or violent nature are now permitted to do so:[518]

* from a room separate from the court-room, using closed-circuit television;

* with a removable screen to break the line of sight between witness and accused, when closed-circuit television is not available;

* by pre-trial video-taped recordings of the whole or part of their evidence, evidence-in-chief and cross-examination.

2. EVALUATION OF USE OF CLOSED-CIRCUIT TELEVISION AND SCREENS

The Commission is aware of only one significant Australian study evaluating the use of closed-circuit television and screens in court proceedings involving children. In January 1996 the Western Australian Ministry of Justice released an evaluation of the mandatory use of the procedures in Western Australia.[519]

During the evaluation observers watched 75 jury trials where children and young people 18 years of age or under gave evidence about alleged sexual assaults committed against them, or an alleged sexual act directed at them. That figure includes all jury trials for the period under review where evidence was taken by closed-circuit television, and most metropolitan jury trials in which removable screens were used.

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518 *Evidence Act 1906* (WA) s 106N(2)-(4). These provisions read:

> (2) Where the necessary facilities and equipment are available one of the following arrangements is to be made by the judge for the giving of evidence by the affected child -
>
> (a) he or she is to give evidence outside the courtroom but within the court precincts, and the evidence is to be transmitted to the courtroom by means of closed-circuit television; or
>
> (b) while he or she is giving evidence the defendant is to be held in a room apart from the courtroom and the evidence is to be transmitted to that room by means of closed-circuit television.
>
> (3) Where subsection (2)(b) applies the defendant is at all times to have the means of communicating with his or her counsel.
>
> (4) Where the necessary facilities and equipment referred to in subsection (2) are not available, a screen, one-way glass or other device is to be so placed in relation to the affected child while he or she is giving evidence that -
>
> (a) the affected child cannot see the defendant; but
>
> (b) the judge, the jury (in the case of proceedings on indictment), the defendant and his or her counsel can see the affected child.

519 Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996).

The results of the evaluation were very positive. The basic conclusion endorsed the continued use of closed-circuit television as the preferred facility for assisting children to present their evidence:[520]

> Closed-circuit television (CCTV) and removable screens were introduced to reduce the stress on children and other vulnerable witnesses giving evidence to juries about criminal matters. Those who used closed-circuit television adapted well to it, and appreciated the protection and privacy it offered. The use of closed-circuit television - and to a lesser extent removable screens - does remove some major sources of stress, without compromising the rights of the accused person. However, it is clear from witnesses' responses that, even with the aid of this equipment, the experience of giving evidence in a criminal trial remains a difficult one for many.

The Judges of the Supreme Court of Western Australia have stated the following reasons why, after four years experience of the new procedures in Western Australia, the preferred method is for a child witness to give evidence by closed-circuit television from a remote room while the accused remains in court:[521]

(a) This has been the accepted method in nearly all other jurisdictions.

(b) The child is not exposed to the courtroom.

(c) The accused and his/her counsel are in the same room.

(d) In the event of an adjournment or objection it is better for the accused to be in the courtroom.

The Judges have said that, if the application is to have the accused in the remote room and the child in court, a sound reason should be advanced before this type of order is made. The difficulties of communication between the accused and his/her counsel and of bringing the accused back into court in the event of adjournments and legal discussion were also noted.[522]

The Judges have developed detailed guidelines for the use of closed-circuit television and screens.

3. ISSUES RAISED BY THE USE OF CLOSED-CIRCUIT TELEVISION

There are a number of issues relevant to the use of closed-circuit television which have been addressed in other jurisdictions. The issues primarily arise from comparing the use of closed-circuit television for the presentation of a child's evidence with the traditional means of presenting that evidence.

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520 Id at 150.

521 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court) at para 1.4.2.

522 Id at para 1.4.3.

(a) The right of the accused to confront the witness

One objection made to the use of closed-circuit television and screens is that the use of such devices infringes what could be regarded as the accused's right to be in the presence of, or to confront, a witness testifying against him or her.

Under section 617 of the *Criminal Code* (Qld), no indictable offence can be heard in the absence of the accused unless he or she conducts himself or herself in such a way as to make the continuance of the proceedings impracticable. In such a case the court may order the accused to be removed and direct that the trial proceed in the absence of the accused. Apart from that provision there appears to be no legislative entitlement for an accused to be present in a Queensland court. Nor does there appear to be any legislative requirement that a witness against an accused must present his or her evidence within the hearing and sight of the accused.

The Law Reform Commission of Western Australia considered the equivalent provision in the Western Australian *Criminal Code* to Queensland's section 617, and noted that the use of closed-circuit television could not have been contemplated when the provision was enacted. The Commission did not see the provision as being an insuperable obstacle to the use of closed-circuit television.[523]

Although there will be a physical separation of the accused and the child when closed-circuit television is used, the accused and his or her counsel will continue to be able to see and hear the child. Further, the remote room from which the child (or accused) will give his or her evidence will be classified as part of the courtroom for the purposes of the proceedings.

The position under the common law was considered in the case of *Smellie v R*.[524] The appellant had been convicted of assaulting, ill-treating and neglecting his eleven year old daughter. At the trial the judge ordered that, while the girl gave evidence, the accused was to sit on the steps leading out of the court - out of his daughter's sight. The judge was of the opinion that the presence of the accused would frighten the girl.

On appeal, it was argued that there was a common law right of an accused to be within the sight and hearing of all the witnesses throughout the trial. It was further argued that there was a likely prejudicial effect on the jury of the removal of the appellant from the court when the complainant gave evidence. The appeal was dismissed by the Court of Criminal Appeal which held:[525]

> If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.

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523 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.10. See also the general discussion on this issue at paras 5.8-5.10.

524 (1919) 14 Cr App R 128.

525 Id per Lord Coleridge CJ at 130. This case was followed by the Queensland Court of Criminal Appeal in *R v West* [1992] 1 Qd R 227 at 230.

The Western Australian Ministry of Justice evaluation of the mandatory use of closed-circuit television and/or screens in Western Australia observed that "[m]ost Counsel and all Judges who made comments thought CCTV and removable screens were fair to the accused".[526]

(b) Possible distortion of the image of the witness

One concern which has been expressed in relation to the use of closed-circuit television is the possibility of distortion of the information being conveyed by electronic means. The television screens might be considered to enhance or diminish the child's evidence. However, these concerns may now have been allayed, with the increasing acceptance of a large variety of witnesses giving evidence through the use of videoconferencing and videolink facilities in both the State and Federal courts.[527] These facilities are continually improving and it is now possible to obtain reliable, high quality images.

In an English study[528] there was nothing to suggest that jurors watching a witness give evidence over closed-circuit television would produce decisions or judgments on the credibility of the witness radically different from those made under regular court conditions. There was seen to be no significant difference in communication for "live" interviews of children as against interviews given by way of closed-circuit television. The effect of the style of television shot on perceptions of a witness's credibility was also examined. It appeared that the style of shot - for example, close-up or distant - does have an impact on a witness's credibility but not a consistent impact. Children seen in medium-distance were perceived as more honest than those in close-up. Close-up shots produced higher overall ratings of attractiveness and also appeared to reduce or eliminate differences in credibility based on the age of the witness. Older children were generally perceived as more credible than younger children.

The results of this study suggest that, in order to eliminate any bias resulting from one or other fixed camera image of a witness (close-up/medium shot), a jury should ideally be presented with more than one view of the witness giving evidence by closed-circuit television. Of course, if there are significant problems with images the child could give evidence in the courtroom with the accused being in a remote room.[529]

Among its recommendations relating to the use of closed-circuit television in Western Australian courts, the Law Reform Commission of Western Australia recommended that a Code of Practice be developed for the use of such facilities. The Code of Practice should ensure, among other things, that a jury is presented with more than one view or

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526 Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996) at 147.

527 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 5.3.2. See also Bennetts V, "Appearing by Video Link - Old Dogs Learn New Tricks" (Sept 1998) *Proctor* at 23-24.

528 Westcott H, Davies G and Clifford B, "The Credibility of Child Witnesses seen on Closed-Circuit Television" 15(1) (1991) *Adoption and Fostering* 14.

529 This can already happen in Queensland under s 21A(2)(a) and (4) of the *Evidence Act 1977* (Qld).

shot of a witness giving evidence over closed-circuit television.[530]

In line with the recommendation of the Law Reform Commission of Western Australia, the Judges of the Supreme Court of Western Australia have developed Guidelines for the use of closed-circuit television in Western Australian courts.[531] In the Guidelines the Judges refer to five monitors with an optional sixth monitor to be set up in the courtroom.[532] There is to be a main monitor relaying a single image of the witness giving evidence in the remote room. That image will be seen by the judge, jury, counsel and the accused. A second, smaller monitor situated under the main monitor will show the same image which the child is seeing on the main monitor in the remote room. A third or "bench" monitor only to be seen by the judge will enable the judge to observe what is happening in the remote room at all times. Further monitors, which are optional, are to the right and left of the jury to enable the jury to obtain a closer view of the witness. These monitors can be used where the main monitor is regarded as too far away.

In a review of juries' perceptions of the use of the closed-circuit television procedure in Western Australia[533] problems relating to possible distortion were considered to be minimal. Out of the 13 Supreme Court trials in which children gave evidence using closed-circuit television over the review period there were problems with the sound to the jury in one trial and to a lesser extent in a second trial. A third trial had problems with sound being transmitted to the witness. A power failure during one trial meant that the complainant had to continue her evidence the next day. There were also problems at that trial with cameras focusing on two counsel. Instead of an automatic shift of the transmitted image from one counsel to the other, this had to be done manually by moving the focus of the one operating camera.

At least 94% of the jurors said they could hear the witness clearly. 97% of the jurors said they could see the witness clearly. One juror indicated that the closed-circuit television gave "a clearer, truer picture of the type of child in years and maturity".

Although some jurors experienced difficulty in judging the size and age of the witness, only a few of those jurors wanted to see the child in the courtroom.

Only 16 of the 109 jurors surveyed indicated that it would have been easier to reach a verdict if they had seen the witness in the courtroom, although two of those 16 expressed some uncertainty about this.

Jurors were asked if they found anything about the closed-circuit television equipment

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530 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.21.

531 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court).

532 Id at 6 and 7.

533 Ministry of Justice Strategic and Specialist Services Division, *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995); Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996).

which was distracting. Two thirds answered "no". The most common source of distraction was the time taken to set up the closed-circuit television link with the separate room. The next most common sources of distraction were the distance of the television monitors from the jury box and reflections on the monitors.

Three quarters of the jurors were satisfied with their views of the witness. The view on one of the monitors is a narrow angle view showing a close-up view of the witness - usually of the face and upper body. The other gives a wide angle view showing the witness at the table facing the camera together with the adults seated either side of the witness. In most trials the jury sees a close-up view of the witness while the witness is speaking. The wider angle view is shown occasionally, often when there is a pause in the evidence, to show the jury the environment from which the child is giving evidence.

Those jurors who were dissatisfied with the views they had most commonly expressed a preference for a whole body shot or for a wide angle shot of the room including the two adults seated with the child.

Most jurors surveyed indicated that they thought the closed-circuit television equipment was used to protect the child from possible intimidation from the accused or from stresses associated with the courtroom, such as giving evidence of an intimate nature in front of strangers. The next most common reason given was that reducing stress on the child was likely to improve the child's ability to give evidence.

The findings of the survey were said to support the following conclusions:[534]

> most jurors do not perceive CCTV to be an impediment in reaching a verdict;
>
> jurors do not find the CCTV equipment distracting when it is working properly;
>
> jurors who hear evidence by CCTV which is working properly are likely to hear more clearly than jurors who hear evidence from a child witness speaking without amplification in the courtroom;[535]
>
> most jurors say it would <u>not</u> make it easier to reach a verdict if they saw the child in the court room. This applies even to jurors who find it difficult to judge the size and/or age of a child witness giving evidence by CCTV. In other words, most jurors are satisfied with evidence being presented in a form other than by a witness in the court room;
>
> most jurors understood Judges' explanations about the reasons for the use of CCTV and removable screens; and
>
> ...
>
> From the point of view of most jurors surveyed for this study, the practice of taking evidence from children by CCTV, or with the aid of removable screens, is working well. [original emphasis]

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534 Ministry of Justice Strategic and Specialist Services Division, *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 36.

535 This was considered important because jurors need to hear well if they are to make judgments based on the facts of the case.

The main recommendations of the review team were:[536]

> When closed-circuit television or removable screens are used, jurors should be asked at the earliest convenient point whether any aspect of the equipment - such as reflections on television monitors or the placement of removable screens - is interfering with their ability to judge evidence. ...
>
> When closed-circuit television is used, consideration should be given to showing the jurors the separate room from which evidence is given - before the witness enters - so that jurors have a better understanding of the surroundings in which the witness is giving evidence. This may assist the minority of jurors who have difficulty with the image relayed by television.

Western Australian Judges interviewed as part of the evaluation of the Western Australian reforms agreed with the legislative intent that the procedures such as closed-circuit television be routine rather than optional. Judges who had used both closed-circuit television and screens preferred closed-circuit television because screens were not seen as capable of removing as many sources of stress for the witness.[537]

The Western Australian review of the operation of the Western Australian reforms also involved interviews with lawyers who had used closed-circuit television or removable screens. In the interviews a number of lawyers were concerned that jurors would react to evidence given by closed-circuit television differently from how they would if the same evidence were given "live" in the courtroom.

The authors of the review noted, for example, that some prosecutors believed that evidence seen on television screens in the courtroom would have less emotional impact on jurors than evidence given from the witness box and therefore jurors would be less likely to believe the witness. There was also a concern that the closed-circuit television picture would make it difficult for jurors to judge the size and age of the child witness. It was considered that this in turn would affect the ability of the jury to judge the relative size and power of the accused and the witness. "These factors, it was believed, would reduce the chances of a conviction".[538] The results of the review would not support these predictions to any meaningful degree.

A number of defence counsel were concerned that the use of closed-circuit television or removable screens would give the jury the impression that the accused must be guilty. They doubted the effectiveness of the compulsory warning that the judge gives the jury that the jury is not to draw any inference about guilt or innocence from the use of closed-circuit television or removable screens.[539] Others were of the view that it would be easier for witnesses making false statements to do so in front of a video

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536 Ministry of Justice Strategic and Specialist Services Division, *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 37.

537 Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996) at 141.

538 Ministry of Justice Strategic and Specialist Services Division, *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 2.

539 Id at 3.

camera from a separate room than it would be to do so in front of the accused in the courtroom, the jury and the judge - resulting in more wrongful convictions. Again, there is no evidence to support such a view.[540]

4. ISSUES RAISED BY THE USE OF SCREENS

Screens are often seen as a less expensive alternative to the use of closed-circuit television and as a compromise to those people who have concerns, however unfounded, about the use of closed-circuit television to enable children to present their evidence without having to face the accused.

Various types of screens may possibly be used in Australian courts, for example:

* a removable, opaque partition where the child witness and the accused cannot see each other;

* a "one-way mirror", allowing the accused to see the child witness but not vice versa; or

* a removable, opaque partition with a video camera transmitting the image of the child witness to a television monitor which is positioned near the accused and which only the accused can see.[541]

It is likely that screens are used in Queensland courts on a more regular basis than closed-circuit television simply because they are significantly cheaper and far easier to install and move.[542] Also, there is anecdotal evidence at least that some magistrates and judges in Queensland are reluctant to permit closed-circuit television in their courtrooms, possibly based on some of the beliefs referred to in the above discussion on the operation of the Western Australian provisions.

The concerns that have been expressed in relation to the use of screens include:

* it is unlikely that screens would be very helpful because the child witness would be bound to know that the accused was behind the screen;[543]

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540 See for example the studies into the behaviour of mock trials referred to in Ministry of Justice Strategic and Specialist Services Division, *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 3.

541 Ministry of Justice Strategic and Specialist Services Division, *Jurors' Response to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995). See also the description in Scottish Law Commission, *Report on The Evidence of Children and Other Potentially Vulnerable Witnesses* (Report 125, 1990) at para 4.24 and NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 5.2.19.

542 See also the comments of the NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 5.2.20.

543 Scottish Law Commission, *Report on The Evidence of Children and Other Potentially Vulnerable Witnesses* (Report 125, 1990) at para 4.17 and NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 5.2.21.

* the court proceedings may be disrupted because of the possible logistical difficulties created by the introduction of screens to the courtroom, for example, diminished acoustics;

* the erection of the screen is, more than any other technique, likely to be prejudicial to the accused because, by its very nature, it would appear to be an *ad hoc* arrangement which, despite warnings to the contrary, would lead a jury to conclude that the child had good reason to be afraid of the accused;

* screens do not protect child witnesses from the impact of the courtroom;[544]

* "Witnesses interviewed after giving evidence using screens spoke of the disturbing effects of looking directly at the accused's supporters sitting in the public gallery, and of the embarrassment of having to speak about the intimate details of an alleged sexual assault before a room full of strangers";[545]

* screens do not remove as many sources of stress for the witness.[546]

On the other hand, there is an opinion that screens have been used regularly in courts, including Queensland courts, and have been seen to be very helpful.[547]

The regular use of screens in courts in England and Wales, with apparent success (in terms of enabling a child to give evidence without prejudice to the accused when, in the ordinary manner of giving evidence, the child would not have been able to give evidence), led the Scottish Law Commission to recommend regulating the use of screens rather than suppressing it.[548] The Scottish Law Commission recommended that the matters requiring regulation included:

* whether the use of a screen could be authorised against the wishes of the accused;[549]

* the question of what the grounds should be for authorizing the use of screens;[550]

* the nature of the screens themselves, which should be so constructed that the

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544 Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996) at 145.

545 Ibid.

546 Id at 141-142.

547 Meeting between representatives of the Commission and McGuire DCJ (President of the Childrens Court) 23 April 1998; meeting between representatives of the Commission and Mr Deer CSM and Mr Pascoe SM 23 April 1998; and, also, see comments of NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 5.2.20.

548 Scottish Law Commission, *Report on The Evidence of Children and Other Potentially Vulnerable Witnesses* (Report 125, 1990) at para 4.20.

549 Id at para 4.21. The Law Commission thought that this should be possible.

550 Id at para 4.22.

accused is able to watch the witness and observe the witness's demeanour while the witness is giving evidence;[551] and

* procedures for applications to use screens.[552]

The Law Reform Commission of Western Australia recommended that the use of screens should be authorised in courts where closed-circuit television is not available and where the court is satisfied that the use of screens in a particular case is desirable "provided that the screen is so constructed as not to obstruct the accused's view of the witness while the witness is giving evidence".[553] That could be achieved by a screen being constructed of one-way glass or the use of opaque glass with the accused being able to see the child via closed-circuit television.

The Law Reform Commission of Western Australia's recommendations were implemented by the 1992 amendments to the *Evidence Act 1906* (WA). It is now mandatory under that legislation for screens to be used where there are no facilities for the use of closed-circuit television.

The Judges of the Supreme Court of Western Australia have issued Guidelines for the use of screens in Western Australian courts.[554] An opaque screen is placed between the witness box and the accused. The accused is able to see the witness with the assistance of a television monitor placed on the accused's side of the screen which shows an image of the witness who is sitting on the other side of the screen in the focus of a special camera. The witness must not see the accused. Also, the judge, counsel and, if applicable, the jury must be able to see both the accused and the witness.

The Guidelines warn that care must be taken to ensure that the movements in and out of the courtroom by the witness do not allow the witness to be confronted by the accused prior to the evidence being given. A number of suggestions have been made to achieve that result, including adjourning the court so as to allow the witness to enter the courtroom.

The Western Australian Judges also note that care must be taken by the presiding judge to ensure that the accused does not attempt to draw attention to himself or herself by, for example, sounds such as coughing. They also suggest that the screen be placed, if possible, equidistant from the witness and the accused in order to avoid any impression of favouring either party.

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551 Id at paras 4.23-4.25.

552 Id at para 4.26.

553 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at paras 5.43-5.45.

554 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court) at 27-28.

Lastly, the Guidelines note that, before evidence is given with the aid of the screen, a warning in terms of section 106P of the *Evidence Act 1906* (WA) must be given to the jury that the procedure is routine for such witnesses and no inference as to the guilt of the accused should be drawn from the use of the procedure.

5. QUESTIONS FOR DISCUSSION

(1) **Is section 21A of the *Evidence Act 1977* (Qld) adequate in relation to the use of closed-circuit television and/or screens?**

(2) **Are you aware of any problems with the operation of the current provisions? If so, what is the nature of the problems?**

(3) **Is there any need to limit the amount of eye contact possible between child witnesses and others in the court room, such as an accused?**

(4) **Should the use of closed-circuit television (if available) be mandatory for the presentation of children's evidence in certain matters?**

(5) **If "yes" to question (4), in what types of matters should it be mandatory?**

(6) **If the use of closed-circuit television should be mandatory in matters where children are witnesses, what, if any, exceptions should there be? For example, what should happen if the child requests that closed-circuit television not be used?**

(7) **If closed-circuit television facilities are not available in a particular court, should it be mandatory that screens be used to prevent the child witness having to see the accused? If so, what, if any, exceptions should there be to the use of screens in these circumstances? For example, what should happen if the child requests that screens not be used?**

(8) **If there is to be no mandatory requirement as to the use of closed-circuit television and/or screens, what, if any, fetters should there be on the discretion of the magistrate or judge in the use of these facilities?**

(9) **If closed-circuit television and/or screens are to be used on a regular basis in cases where children are to give evidence, should the judge be required to warn the jury that they are not to draw an inference from their use which is adverse to the accused? If yes, what are the appropriate terms of such a warning?**

CHAPTER 12

IDENTIFICATION OF THE ACCUSED

1. INTRODUCTION

A fundamental underpinning of the presumption of innocence of a person accused by another of an act or omission which is in issue in criminal proceedings is the identification of the accused. It is standard procedure for witnesses who make allegations about an accused to be required to identify the accused in court. The most common form of identification is visual.[555] The witness will be asked to point to the accused in response to a question from the prosecutor along the lines of "Do you see the person you are referring to in court?"

2. IDENTIFICATION OF THE ACCUSED

The Law Reform Commission of Western Australia considered what would be the most appropriate way for a child witness to identify a particular person as the accused when, pursuant to the implementation of the Commission's other recommendations, the child witness would not be required to give oral evidence in the presence of the accused.[556] If the identification was to be done in the traditional way - that is, by looking at the accused and pointing to him or her in court - the Commission recognised that this might be as upsetting to the child as giving evidence in the presence of the accused.[557]

Although identification may be a rare issue in child abuse cases, there may be some cases in which it is essential. In those situations, oral evidence will normally be required to link the child's allegation that a person committed certain acts to the accused.

The Law Reform Commission of Western Australia observed that such a requirement may be met by a person, other than the child, giving evidence:[558]

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555 Riordan JA (ed), *The Laws of Australia* (looseleaf) Vol 16.3 at para 64.

556 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.52.

557 Id at para 5.47. The New South Wales Children's Evidence Taskforce recorded that a child witness's or complainant's concerns with seeing the accused or with the presence of the accused in the courtroom were the worst difficulty of the court process as consistently reported by child witnesses or their parents: NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at paras 4.2.2 and 4.2.3, citing a number of studies and a recent New South Wales survey.

558 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.52.

(1) Where the accused is related to the child, another family member or familiar adult may be able to identify the accused person in the courtroom.

(2) There will be cases where the accused is not related to the child and where it would therefore be inappropriate or impossible for another member of the child's family to identify the accused in court. However, an identification parade may have taken place before the trial. If so, evidence of the identification would have been given by the police at the trial.

In other cases, it will be necessary for the child witness to identify the accused in court. The Law Reform Commission of Western Australia suggested that one way of conducting the identification would be by the use of closed-circuit television. However, recognising that in some cases this may be unsatisfactory (for example, because of possible image distortion), the Commission then suggested:[559]

> Where there are insurmountable problems in relation to the use of CCTV, the child and the accused would have to be present in the courtroom at the same time for the sole purpose of identification. If this were to occur, it should take place only after the child's examination-in-chief, cross-examination and re-examination.

The Law Reform Commission of Western Australia recommended:[560]

> In cases where it has been determined that the child will be able to present evidence out of the presence of the accused, and identification of the accused is an issue:
>
> (1) where the accused is a member of the child's family, the identification should if possible be undertaken by another family member or familiar adult;
>
> (2) where from the circumstances of the particular case it is necessary for the child to identify the accused at the trial, the child should be able to identify the accused by way of closed-circuit television;
>
> (3) if the use of closed-circuit television for identification of the accused by the child witness is considered by the presiding judicial officer to be inappropriate in the circumstances of the particular case, the child witness should be in the presence of the accused solely for the purpose of identification and only after the child's examination-in-chief, cross-examination and re-examination are complete.

The Commission's recommendations were implemented in the 1992 amendments to the *Evidence Act 1906* (WA).[561]

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559 Id at para 5.53.

560 Id at para 5.54.

561 Section 106Q of the *Evidence Act 1906* (WA) provides:

> Where evidence of an affected child is given in a manner described in section 106N(2) or (4), and the identification of the defendant is an issue, the affected child is not to be required to be in the presence of the defendant for that purpose -
> (a) for any longer than is necessary for that purpose; and
> (b) before the affected child's evidence (including cross-examination and re-examination) is completed.

New South Wales has similar legislation to Western Australia in relation to the identification by a child witness of the accused, except that the child witness is prevented from identifying the accused by way of closed-circuit television or similar technology if the child is entitled to give evidence by those means. Section 405DC of the *Crimes Act 1900* (NSW) reads:

> **Giving identification evidence when closed-circuit television is used**
>
> (1) If a child is entitled to give evidence by means of closed-circuit television facilities, or any other similar technology, that child may not give identification evidence by those means.
>
> (2) However, such a child is entitled to refuse to give identification evidence until after the completion of the child's other evidence (including examination in chief, cross-examination and re-examination),
>
> (3) In addition, the court must ensure that such a child is not in the presence of the accused for any longer than is necessary for the child to give identification evidence.
>
> (4) In this section:
>
> "identification evidence" has the same meaning as in the Evidence Act 1995.

Presumably the prohibition on the use of closed-circuit television or other such means to identify the accused is to ensure that the child has a complete and uninterrupted view of the accused.[562]

3. QUESTIONS FOR DISCUSSION

(1) Are there situations where a child complainant should be permitted to identify an accused by indirect means, or should face-to-face identification always be required?

(2) If it is necessary for a child witness to identify the accused, and if facilities are used to enable the child to present his or her evidence out of the presence of the accused, how should that identification take place? For example, if the child is presenting his or her evidence by way of closed-circuit television, should the identification also take place by way of the closed-circuit television facilities?

(3) If circumstances make it inappropriate for closed-circuit television facilities to be used for the identification of the accused (for example, if, in the particular case, there is some distortion of the picture being

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562 The Report of the Children's Evidence Taskforce simply recommended enacting a provision to the effect of s 106Q of the *Evidence Act 1906* (WA). See NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.4.1.

transmitted), under what circumstances should the child be required to identify the accused in the accused's presence:

(a) In the presence of the accused solely for the purpose of the identification? (Western Australia)

(b) In the presence of the accused only after the child's evidence, including cross-examination and re-examination, is complete? (Western Australia)

CHAPTER 13

SUPPORT

1. INTRODUCTION

The courtroom experience can be a traumatic experience for a child witness. The child will be in unfamiliar and formal surroundings and will be questioned by strangers, often in a language and a manner which may be intimidating to the child. The presence in the courtroom of someone with whom the child feels comfortable, and who is preferably situated close to the child, may reduce any traumatic effect on the child of the courtroom experience. It may also result in the court receiving better evidence from the child, who may otherwise be so intimidated as to be unable to give any evidence at all, let alone give an intelligible account of what he or she witnessed or experienced.

This positive effect on the quality of the child's evidence may also be had if the child is prepared for his or her courtroom experience. This could be achieved by, for example, familiarising him or her with the courtroom or the special facilities to be used for the receipt of the child's testimony. It is currently possible for child witnesses to be shown through the courtroom or the remote witness facilities (such as the separate room from which a child may testify via closed-circuit television linked to the courtroom).

A number of submissions praised the work of Protect All Children Today (PACT), an organisation which has a child victim support program which utilises trained volunteers to assist child witnesses before, and in, court.

PACT volunteers are usually involved with the child witness from an early stage of the proceedings. After a complaint is made, contact may be made with a PACT worker who will then provide ongoing support through the committal and trial stages. This support may include familiarising the child with the court environment, his or her role as a witness, entertaining the child during sometimes lengthy delays before the child is required to give evidence, and sitting near the child while he or she is giving evidence at committal or trial.

The Victims Support Unit of the Queensland Office of the Director of Public Prosecutions, in its submission to the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission Issues Paper on *Children and the Legal Process*,[563] stressed that intensive support and counselling[564] is required pre- and post-trial, for child victims:[565]

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563 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Issues Paper, *Speaking for ourselves: Children and the legal process* (ALRC IP 18, 1996).

564 See Chapter 9 of this Discussion Paper for a discussion of treatment of child witnesses before committal or trial.

565 Submission 41. In an attempt to address this concern a Queensland-wide referral directory has been developed.

> The majority of children who are victims or witnesses in criminal proceedings require intensive support and counselling to ensure their recovery from the trauma of the offence(s), both before and after trial. Our office (Queensland DPP) is committed to referring such children, and their families, to available services for such support. More often than not, we find it very difficult to locate a service which is affordable and easily accessible for the child at the time it is required. The key obstacles are extensive waiting lists and/or exorbitant financial cost.

The author of the submission recorded her experience of being a support person:[566]

> As a support person working with women and children who have already accessed the criminal court process, I am required to warn clients not to discuss the details of the offence with me. This can, at times, limit the effectiveness of the support I provide.

The submission reinforced the value of access to PACT for children in south-east Queensland, and of the PACT practice of continuity of support:[567]

> The benefits of the continuity of support from the same worker is evident from the years of PACT's experience and feedback from clients. As a result of the supportive and reassuring role the support workers play, and also as they do not discuss the details of the offence with the child, they provide a comforting new friend for the child who is more often than not feeling the effects of anxious parents and often enormous upheaval to the family unit they previously relied on.
>
> A support person should be available to the child at the first possible opportunity and once it is clear that the child is comfortable with that person they should remain throughout the process.

2. DISCRETIONARY NATURE OF SUPPORT SERVICES

Although judges, pursuant to their inherent jurisdiction,[568] have always been able to permit support persons to accompany witnesses in court, Queensland has legislated for that possibility in section 21A of the *Evidence Act 1977* (Qld). In particular, section 21A(2)(d) enables the court to order that a support person be present while a special witness (including a child under 12 years) gives evidence.[569] However, there is no entitlement as of right to have a support person. The entitlement to the presence of a support person will be at the discretion of the magistrate or judge who will likely take into consideration arguments put forward by prosecution and defence counsel.

There is no direction in the Queensland legislation as to exactly what the support person can and cannot do - again, that appears to be left to the discretion of the judge in controlling his or her court. However, it is apparent that judges do not always allow PACT volunteers to sit or stand near the child witness in the courtroom. In the case of a 7 year old boy who gave evidence at committal and trial, the Commission was

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566 Ibid.

567 Ibid.

568 See Chapter 2 of this Discussion Paper for a discussion on the court's inherent jurisdiction.

569 See p 22 of this Discussion Paper for a discussion of the term "special witness".

advised by his mother that, at the trial, the PACT worker had to sit in the public gallery and could not even be seen by the child when giving evidence.[570]

The Director of Public Prosecutions has issued a guideline entitled "Screening of Accused Persons and Presence of Support Persons".[571] Concerning support persons, the Director of Public Prosecutions recorded that "occasionally" in court the seating of a support person has created difficulties for the special witness. For example, the support person has been obscured from the special witness's view by the accused, or the special witness has had the accused in view when searching for the support person. To avoid this, the following guideline was issued:[572]

> Counsel appearing for the prosecution, whether in the magistrates court or at trial, in cases where a witness has been declared a special witness and the magistrate or judge has made an order under section 21A(2)(d), should ensure, with the approval of the presiding judge or magistrate, that the support person is so seated that the special witness is enabled to see the support person without having also to have in view the face of the person charged.

3. AUTOMATIC RIGHT TO SUPPORT PERSON AND LOCATION OF SUPPORT PERSON IN COURTROOM

The automatic right of a child witness to have a support person and, to a lesser extent, the physical location of the support person in a courtroom, have been the subject of reform or proposals for reform in a number of jurisdictions.

(a) New South Wales

The Report of the New South Wales Children's Evidence Taskforce recommended that a child or young person have the right to a support person in court. Moreover, it suggested that the support person should be "allowed to be in close proximity to the child or young person at all times".[573] In making this recommendation, the Taskforce referred to the current lack of a right to support in New South Wales[574] and the fact that what entitlement there is lies in the judge's discretion. The Taskforce contrasted this with the position in Western Australia where a child under 16 years of age when giving evidence is entitled to a court-approved support person.[575]

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570 Submission 39.

571 Guideline No 6 of 1997 (18 June 1997).

572 Director of Public Prosecutions (Qld), *Annual Report 1996-1997* Appendix 1 [7.15] at 105.

573 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) recommendation 28 at 60.

574 Id at para 8.2.1. Only two sections of the *Crimes Act 1900* (NSW) permit support persons to be present in court: s 77A in court-ordered *in camera* proceedings in sexual offence cases and s 405D(2A)(a) in cases where closed-circuit television is used.

575 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.2.2.

Anecdotal evidence suggested to the Taskforce that the New South Wales model was "not working adequately" and the Western Australian model was preferred.[576]

The Taskforce emphasised that the use of closed-circuit television should not supplant the improvement of procedural protection for vulnerable witnesses,[577] such as:[578]

> ... the expansion of programs for victim support, education and training of professionals in communicating with child witnesses.

(b) Western Australia

In Western Australia a child witness is entitled as of right to have a support person. This support person can be not only present in the Court, but "near to him or her".[579] The Law Reform Commission of Western Australia proposed the introduction of the relevant provision to enable children to give evidence in court despite the difficulty of doing so.[580] This provision was also "directed to reducing the trauma of a court appearance for a child witness by ensuring that the child is accompanied at all times by an adult with whom the child is comfortable, and whose presence will be helpful if the child feels unduly stressed".[581]

The Law Reform Commission of Western Australia was of the view that "[i]nherent in the idea of a 'support person' is the need for the child to feel comforted by that person's presence while giving evidence":[582]

> To that extent there must be some rapport between the child and the support person, based on that person's relationship with the child and sympathetic understanding of the difficulties children may have in giving evidence. The support person will need to be:
>
> * sufficiently informed about court proceedings to be aware of a support person's obligations and to behave appropriately;
>
> * sufficiently acquainted with the child to be a familiar element in what may otherwise be a strange environment;
>
> * not personally involved in the proceedings, for example as a witness or as a person with any interest in the outcome.

The Western Australian Commission suggested that, "[i]f the child has a therapist or

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576 Id at para 8.2.3.

577 Id at para 8.7.1.

578 Ibid.

579 *Evidence Act 1906* (WA) s 106E.

580 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.25.

581 Id at para 6.25.

582 Id at para 6.29.

counsellor, then that person may very well be the best possible support person. If not, the child may be able to nominate a neighbour, teacher or personal friend whose presence would be comforting".[583] Further, it believed that the child's wishes should be taken into account when determining the identity of the support person, although the final decision as to an appropriate person should be made by the court.[584] The Law Reform Commission of Western Australia also believed that the matter should be settled in advance of the trial at a pre-trial hearing.[585]

(c) South Australia

In South Australia a child witness is also entitled to have present in court a support person within reasonable proximity to himself or herself.[586] However, the South Australian legislation goes further than the recommendations of the Law Reform Commission of Western Australia in relation to the choice of the support person. In South Australia, a child witness can have the support of a person of his or her choice although the person is not to interfere in the proceedings.[587]

(d) New Zealand

The New Zealand Law Commission has expressed the view that there should be a presumptive entitlement to a support person for all complainants, subject to the court's discretion to withdraw permission.[588] The Law Commission believed that this would further the aims of evidence law by assisting the witness's confidence in giving relevant evidence.[589] The Law Commission did not consider that this would detract in general from procedural fairness, although a factor relevant to the exercise of the court's discretion would be concerns with fairness in any particular case.[590] As the Law Commission suggested, "a respected public figure acting as a support person may operate to bolster the credibility of the witness unfairly so that regard needs to be given to the genuineness of the request".[591]

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583 Id at para 6.31.

584 Id at para 6.32.

585 Ibid. See Chapter 15 of this Discussion Paper for discussion of a suggestion that pre-trial hearings be held to settle certain matters before the trial. If there were a concern as to the appropriateness of a particular person to be a support person, that issue could be raised at the pre-trial hearing.

586 *Evidence Act 1929* (SA) s 12(4).

587 *Evidence Act 1929* (SA) s 12(4). A "young child" is defined in s 4 of the *Evidence Act 1929* (SA) as a child of or under 12 years of age.

588 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at para 163.

589 Ibid.

590 Ibid.

591 Ibid.

The New Zealand Law Commission believed that it should be up to the judge in each case to determine what role a support person could take in the particular case.[592] It considered the determination would depend on such circumstances as the age of the witness, the nature of the proceedings or offence, and the relationship between the witness and the defendant in a criminal case:[593]

> For example, it may be appropriate for a support person to have a young child who is a witness on their lap, whereas in other cases there would be much less physical contact. Sometimes a support person may encourage the witness to speak by talking to the witness, but this may not be appropriate in every situation.

The New Zealand Law Commission endorsed proposals made by Kathleen Murray for the Central Research Unit of the Scottish Office in relation to the use of support persons.[594] Murray proposed that:[595]

> * The identity of the support person for the child should be agreed between the parties at the application hearing and be known to the child before the trial.[596]
>
> * Guidelines on the role of support persons should be issued to adults accompanying children required to give evidence at trial, with particular reference to the extent of permitted communication with the child, whether or not any comfort can be provided, whether they should interrupt the questioning in the event of an error by counsel.
>
> * The person accompanying the child should have the facility to alert the judge in the event of any problem arising for the child while giving evidence, technical or otherwise. [note added]

4. QUESTIONS FOR DISCUSSION

(1) To what extent are support persons permitted to be present in Queensland courts with child complainants?

(2) What, if any, difficulties have there been with the use or presence of support persons for child complainants in Queensland courts?

(3) The court currently has a discretion to order that a support person be present while certain children give evidence. Should legislation provide that:

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592 Id at para 164.

593 Ibid.

594 Id at para 165.

595 Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials*, The Scottish Office, Central Research Unit (Scotland) (1995) recommendations 13, 14 and 15 at 170.

596 See Chapter 15 of this Discussion Paper for a discussion of the orders that can be made at a pre-trial hearing.

(a) All child complainants as of right be entitled to a support person?

(b) There be a rebuttable presumption in favour of using a support person?

(4) If "yes" to question (3)(b), in what circumstances should the presumption in favour of a support person be rebutted (for example, if the child does not want a support person present)?

(5) Should legislation specifically state that the support person be near to the child witness?

(6) To what extent should the child's wishes be taken into account when determining the identity of the support person?

(7) Should the identity of a support person be settled at a pre-trial hearing?[597]

(8) Should the magistrate or judge determine the role a support person should take in each case?

(9) If "yes" to question (8), should this guidance include any of the following:

(a) Written guidance on his or her role?

(b) The extent of permitted communication with the child?

(c) Whether or not the support person may comfort a distressed child and, if so, in what manner?

(d) Whether the support person should be able to alert the judge in the event of any problem, technical or otherwise, arising for the child while giving evidence (for example, problems with the CCTV reception, the need for the child to go to the toilet)?

597 Ibid.

CHAPTER 14

THE COMMITTAL

1. INTRODUCTION

The primary purpose of a committal is for a magistrate[598] to determine whether there is sufficient evidence against the accused to commit the accused to stand trial. Other purposes that have been identified to support the need for committals include the following: the committal process acts as a catalyst to draw out early pleas of guilty;[599] the accused is given notice of the case against him or her; and the accused is given the opportunity to cross-examine witnesses.[600]

The significance of committals has been recognised in the High Court:[601]

> ... the principal purpose of that examination is to ensure that the accused will not be brought to trial unless a prima facie case is shown or there is sufficient evidence to warrant his being put on trial or the evidence raises a strong or probable presumption of guilt ... For this reason, apart from any other, committal proceedings constitute an important element in the protection which the criminal process gives to an accused person.
>
> [Committal proceedings] constitute such an important element in the protection of the accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair. [words in square brackets added]

A difficulty that arises for child witnesses in criminal proceedings is the possibility that they may have to testify - and be cross-examined - at two separate court hearings: at committal and - if the accused is committed for trial - at the subsequent trial. The two hearings may be months apart, and may be months or even years from the event that led to the accused being charged with the offence for which the child is a witness.[602]

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598 A single justice of the peace (magistrates court) is also able to hear a committal: *Justices Act 1886* (Qld) s 104 and *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(b). See also Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, 1998).

599 Young, the Hon Mr R, Chief Judge, District Court NZ, *Preliminary Hearings - The Case Against*, 6th International Criminal Law Congress (1996) at 2 <http://lawnet.com.au/journal/vol1/congress/young> (5 September 1998).

600 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 429. See *R v Haig* (1995) 13 CRNZ 526 at 534; *C v Wellington District Court* [1996] 2 NZLR 395 at 397. See also Legislative Assembly (Vic), *Parliamentary Debates* (Vol 383, 7 October 1986) at 996 debating the *Crimes (Proceedings) Bill*. Preliminary hearings in South Australia pursuant to s 107 of the *Summary Procedure Act 1921* (SA) are discussed in *Goldsmith v Newman and the State of South Australia* (1992) 59 SASR 404 at 410-411; (1992) 65 A Crim R 563 at 568-569.

601 *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 99, 100.

602 In the Brisbane region committals usually commence within 6 weeks of arrest (information from meeting between representatives of the Commission and Mr Deer CSM and Mr Pascoe SM, 23 April 1998). This may be due to the existence of a protocol for committals in the Brisbane region. See *Brisbane Central Magistracy Committals Project Protocols* (1995) at para 14.2.

At committal there is no jury present. A child witness is examined by the prosecutor and then cross-examined by the accused's counsel. In an attempt to discredit the case against the accused, the cross-examination is often relentless. Because committals take place in the absence of a jury, the tempering effect on counsel that may be present in jury trials is absent. Many preliminary submissions to the Commission have been critical of the conduct of committals where children must give evidence as complainants. The mother of a child complainant noted that in her experience the cross-examination was relentless, traumatising, rude and intimidating.[603]

Magistrates do have the power to control their courts. They can control cross-examination that is oppressive, trivial or tautological. It is not known to what extent individual magistrates are prepared to interfere in defence counsel's questioning of child witnesses. However, two Senior Crown Prosecutors in a preliminary submission to the Commission considered that children felt vulnerable during the committal process because of the failure of magistrates, in general, to intervene during improper cross-examination.[604]

In 1996, the New South Wales Attorney-General, the Hon JW Shaw, in his second reading speech on the *Justice Amendment (Committals) Bill 1996* (NSW) referred to the report of the Hunt working party, which examined these issues and raised similar concerns:[605]

> ... the working party [chaired by Mr Justice Hunt, Chief Judge at Common Law In New South Wales] referred to the problem occasioned by legal counsel for the defendant making use of the committal hearing for the purpose of conducting a mini-trial ... [P]rosecution witnesses ... are subjected to excessively lengthy cross-examination, much of which in no way assists the court in arriving at its decision as to whether the defendant should be committed. Whilst magistrates already have power to terminate cross-examination where it is not assisting the court (s 41(9)), that power has not operated adequately to prevent the abuses to which I have referred. [words in square brackets added]

From the defence's point of view, the committal is seen as very significant. It is an opportunity for the accused to put an early end to the criminal proceedings against him or her. The aggression sometimes used by defence counsel to achieve this is illustrated by the advice on defence strategies given by a Brisbane lawyer experienced in criminal defence work:[606]

> It is important that the committal proceedings in child sexual abuse accusations be used for full, complete and absolute discovery. There are, effectively, no other mechanisms by which bastardry by the investigating police and accompanying Social Worker Psychiatrists etc. can be discovered.

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603 Submission 7.

604 Submission 33.

605 Legislative Council (NSW), *Hansard*, (26 September 1996) at 4671.

606 O'Gorman T, "Defence Strategies in Child Sexual Abuse Accusation Cases" (1991) *Queensland Law Society Journal* 195 at 201.

On the other hand:[607]

> It has been frequently stated by the courts, that the committal is not intended to be a rehearsal proceeding to allow the defence to try out its cross-examination on the prosecution witnesses with a view to using the results to advantage at trial.

A child complainant can be so traumatised from the cross-examination that occurs at the committal that he or she is not willing to give evidence at the trial, or is not emotionally capable of doing so. Consequently, the trial does not occur and the accused is discharged.

It would appear that the manner in which many court proceedings and, in particular, committals involving children as witnesses are conducted may not be conducive to the court receiving the best possible evidence from child witnesses. In addition to aggressive cross-examination, the proceedings sometimes suffer other problems common to litigation generally: delay; trauma from face-to-face confrontation with the accused; and confusion from the formalities of the surroundings and the procedures adopted in court.[608]

Such problems may jeopardise the quality and extent of evidence received from a child witness.

2. CHILD WITNESSES' ATTENDANCE AT COMMITTAL

In recent years, a number of Australian jurisdictions have addressed concerns about child witnesses having to attend committals at the instigation of the defence. In some jurisdictions, the need for the presence of any witnesses at committal has been reconsidered. In those jurisdictions, reforms have largely accepted the record of a witness's out-of court-statement as evidence in lieu of the need for the witness's oral evidence at the committal.[609]

Obviously, it is a paramount concern that the accused's right to be dealt with fairly and to challenge the evidence against him or her should be preserved. Following recent reforms to the New South Wales procedures for committals, the New South Wales Attorney-General noted:[610]

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607 Berry P, "Impact of the New Committals Regime: Justices Amendment (Committals) Act 1996" (1998) *Law Society Journal* 70.

608 A number of preliminary submissions to the Commission stressed that child witnesses should not have to attend committals: 15 (child and youth mental health service); 16 (prosecutor); 21 (psychiatrist); 29 (PACT worker); 38 (clinical psychologist); 39 (mother of victim - child cross-examined over 6 hours (3 sessions 5 months apart)).

609 However, even if a child witness is not required to give oral evidence at the committal, he or she may still be required to give evidence and be available for cross-examination at the trial of the accused unless there are procedures in place that enable the child's out-of-court statements to be presented in lieu of his or her direct oral evidence at trial. See Chapter 10 of this Discussion Paper for a detailed discussion of out-of-court statements.

610 Shaw J and Schurr B, "Changes to Committal Procedures in New South Wales" (1997) 21 *Criminal Law Journal* 213 at 214.

> Governments in many jurisdictions have adopted the policy of "streamlining" committals and removing abuses that have led to delay and to unacceptable stress on witnesses who were victims of an alleged act of violence. The challenge has been to still ensure that an accused is not subjected to a prosecution in which there is clearly insufficient evidence. Many lawyers believe that assessing the evidence of witnesses in cross-examination is the only way to bring to light short-comings in what otherwise appear to be strong prosecution cases when judged on the written statements alone.

A number of models concerned with the reception of children's evidence at committal are discussed below.

3. DISCRETIONARY TENDERING OF OUT-OF-COURT STATEMENTS

In Queensland, section 110A of the *Justices Act 1886* (Qld) provides that written statements of evidence from prosecution or defence witnesses may be admitted as evidence at committal in lieu of those witnesses attending at the committal to give evidence or make statements. Such a statement may also be admitted if the prosecution and defence agree that the statement-maker is to be present for cross-examination when the statement is tendered in court. However, such statements may not be admitted if the defendant is unrepresented, or if the prosecution and the defence do not agree to its admission.

It is unclear how section 110A of the *Justices Act 1886* (Qld) and sections 21A(2)(e) and 93A of the *Evidence Act 1977* (Qld) sit together.[611] Apart from section 110A of the *Justices Act 1886* (Qld) and sections 21A[612] and 93A of the *Evidence Act 1977* (Qld), there are no other provisions in Queensland enabling the court to receive out-of-court statements of a child complainant at a committal in lieu of the child's attendance at the committal.

4. MANDATORY TENDERING OF OUT-OF-COURT STATEMENTS

Legislation in South Australia, New South Wales and Western Australia generally provides for the mandatory tendering of out-of-court statements by child witnesses in lieu of children having to present oral evidence at the committal.

(a) South Australia

In South Australia, it is mandatory for the evidence of prosecution witnesses to be

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611 It is possible that reconciliation of these provisions was never considered by the drafters of the *Evidence Act 1977* (Qld) provisions.

612 In Chapter 10 of this Discussion Paper the possibility of s 21A(2)(e) enabling videorecordings of a child's evidence to be admitted in legal proceedings in lieu of the child appearing was discussed. "Written statements" in s 110A of the *Justices Act 1886* (Qld) is not defined, but could be read as including electronic or other recordings of statements.

tendered at committal in the form of written statements, unless the witness is a child under 12 or a person who is illiterate or suffers from an intellectual handicap.[613] If the witness falls within this excepted class, a verified transcript of the witness's out-of-court oral statement may be tendered - that is, evidence may be in the form of a written statement of a police officer verifying it to be an accurate record of the witness's oral statement at interview, or a videotape or audiotape of interview accompanied by a verified transcript.[614]

The court will not grant leave to call a witness for oral examination in court unless it is satisfied that there are special reasons for doing so. In determining whether those special reasons exist, the court must have regard to a number of matters including:[615]

> (a) the need to ensure that the case for the prosecution is adequately disclosed; and
>
> (b) the need to ensure that the issues for trial are adequately defined; and
>
> (c) the Court's need to ensure ... that the evidence is sufficient to put the defendant on trial; and
>
> (d) the interests of justice, but if the witness is the victim of an alleged sexual offence or a child under the age of 12 years, the Court must not grant leave unless satisfied that the interests of justice cannot be adequately served except by doing so. [emphasis added]

A lawyer experienced in criminal defence work has expressed the view that there is an "organised push going on to extend the South Australian provision of not calling the complainant at committal in child sexual abuse cases", and that this must "be resisted because otherwise an accused will be denied a fair trial if he has to cross examine a complainant for the first time at trial. It is like cross examining in a total vacuum."[616] Of course, this statement does not take into account the possibility that cross-examination can still occur - that is, cross-examination of a child witness prior to committal or prior to trial at a special pre-trial hearing.[617] Cross-examination at a special pre-trial hearing would be in lieu of cross-examination at committal or at trial.

(b) New South Wales

In New South Wales, the evidence for the prosecution in any committal must be given by written statement, although a magistrate may dispense with that requirement in

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613 Committals in South Australia are referred to as "preliminary examinations" and are covered by ss 101-114 of the *Summary Procedure Act 1921* (SA).

614 *Summary Procedure Act 1921* (SA) s 104(4).

615 *Summary Procedure Act 1921* (SA) s 106(3).

616 O'Gorman T, "Defence Strategies in Child Sexual Abuse Accusation Cases" (1991) *Queensland Law Society Journal* 195 at 202.

617 See Chapter 15 of this Discussion Paper for a discussion of the concept of pre-trial hearings.

certain specified circumstances.[618]

A person who has made a written statement may be required to attend the committal. However, if that person is an alleged victim of an offence involving violence, he or she cannot be called for cross-examination on the statement unless the magistrate is satisfied that there are "special reasons" why, in the interests of justice, the witness should be called to give oral evidence.[619] Offences "involving violence" are defined to include prescribed sexual offences and abduction or kidnapping.[620] The magistrate will normally determine whether "special reasons" exist at a preliminary hearing at which the statement of the alleged victim is tendered for the purpose of the application to have the alleged victim attend the committal.

The object of the procedure is to avoid the necessity of the alleged victim giving evidence twice, especially in matters involving allegations of a sexual offence.

(c) Western Australia

In 1991, the Law Reform Commission of Western Australia recommended that, in the case of an alleged sexual offence against, or intra-familial assault on, or abuse of, a child under 16 at the time the proceedings are initiated, the court should be empowered to allow the child's evidence at committal to be given in the form of a previously-made written statement, audiotape or videotape.[621] This would then constitute the child's evidence at committal. The Law Reform Commission of Western Australia further recommended that, where such a statement was admitted, the child should not be called or summoned to attend for examination and/or cross-examination unless the magistrate was satisfied that there were special circumstances that justified the complainant being so called.[622]

That recommendation was made in response to concerns that children were being routinely subjected to examination and cross-examination both at committal and at trial. It was not considered appropriate that a child should have to give evidence in person on both occasions. Further, cross-examination at committal could be more stressful to the child than cross-examination at trial because at trial there is the constraining effect

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618 *Justices Act 1902* (NSW) s 48AA. The exceptions include where the statement was prepared but a copy of the statement could not reasonably be served on the defendant.

619 *Justices Act 1902* (NSW) s 48E(2)(a). In any other case the magistrate must be of the opinion that there are "substantial reasons" why, in the interests of justice, the witness should attend to give oral evidence: s 48E(2)(b). Note that s 48E(8) of the *Justices Act 1902* (NSW) provides that the regulations to that Act may make provision for or with respect to the determination of special reasons under s 48E(2)(a) and the determination of substantial reasons under s 48E(2)(b). A recent review of applications to cross-examine under s 48E has shown approximately 60 per cent have been granted. The frequency of applications under s 48E is low - only 7.5 per cent of cases. This has been attributed in large part to the fact that legal aid is generally not available for committals. See Berry P, "Impact of the New Committals Regime: Justices Amendment (Committals) Act 1996" (1998) *Law Society Journal* 70.

620 *Justices Act 1902* (NSW) s 48E(9).

621 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 3.38.

622 Ibid.

of the jury's presence on defence counsel.[623]

These recommendations of the Law Reform Commission of Western Australia were implemented by an amendment to section 69 of the *Justices Act 1902* (WA) in 1992.[624]

5. SPECIAL RULES FOR THE PROSECUTION OF SEXUAL OFFENCES

In Victoria, special rules apply to committals for particular sexual offences. These rules include, for example: the alleged victim must be represented by a legal practitioner;[625] the court must be closed to the public, although the alleged victim may have a support person present;[626] a hand-up brief procedure[627] must be used unless the court gives leave not to do so;[628] and, obviously to address concerns about the effect of delays on certain victims, the committal must commence within three months after the commencement of the proceeding for that type of offence.[629] However, with the rights of the accused in mind, if the committal has not commenced within the three month period, the accused is to be brought before the court for an order that he or she is not to stand trial unless the court is satisfied that, in the interests of justice, a longer period should be fixed.[630]

If the accused requires a person to attend at the committal, the accused must give the person notice.[631] However, the court may set aside that notice - thereby dispensing with the need for the witness to attend the committal to give oral evidence - if it is satisfied that it would be "frivolous, vexatious or oppressive in all the circumstances to require a witness to attend at the committal proceeding".[632] In making such a decision, the court may have regard to the witness's statement or recorded evidence.[633]

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623 Id at para 3.35.

624 In Western Australia, committals are referred to as "preliminary hearings" and are regulated by ss 66, 69-73 and 101-130 of the *Justices Act 1902* (WA).

625 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 15(2).

626 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 15(3).

627 The hand-up brief procedure is set out in Sch 5 cl 1 of the *Magistrates' Court Act 1989* (Vic). The hand-up brief contains such material as copies of relevant statements and copies of any documents intended to be relied upon as evidence.

628 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 15(5).

629 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 15(8). See Chapter 8 of this Discussion Paper for a discussion of the effect of delays on a child witness.

630 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 15(9).

631 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 3(2).

632 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 3(7).

633 *Magistrates' Court Act 1989* (Vic) Sch 5 cl 3(8).

6. AVOIDANCE OF COMMITTAL

In 1991, the United Kingdom introduced a procedure whereby the Director of Public Prosecutions may refer a matter involving a child witness directly to the Crown Courts, thereby bypassing the committal stage altogether. This move appears to have been designed to avoid both unnecessary delay before a matter is finally dealt with by the criminal courts and unnecessary trauma for the child witness.[634] In a preliminary submission to the Commission, Queensland's Director of Public Prosecutions recommended that the Commission consider the United Kingdom provisions.[635]

The United Kingdom procedure appears in section 53 of the *Criminal Justice Act 1991*(UK).[636] Essentially, in alleged sexual offences involving violence or cruelty, the section provides for a "notice of transfer" to be given, whereby the functions of the magistrates' court cease. The notice is given when the Director of Public Prosecutions considers three conditions to have been met: the evidence is sufficient to commit the accused; a child is involved as complainant or witness; and the case should be transferred and proceeded with without delay by the Crown Court "for the purpose of avoiding any prejudice to the welfare of the child".

This provision was part of a package of reforms designed to give priority to the

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634 McGuire DCJ, President of the Childrens Court of Queensland, supports the bypassing of the committal in these types of proceedings: meeting with representatives of the Commission, 23 April 1998.

635 Submission 44.

636 Section 53 of the *Criminal Justice Act 1991* (UK) provides:

> (1) If a person has been charged with an offence ... (sexual offences involving violence or cruelty) and the Director of Public Prosecutions is of the opinion -
>
> (a) that the evidence of the offence would be sufficient for the person charged to be committed for trial;
>
> (b) that a child who is alleged -
>
> (i) to be a person against whom the offence was committed; or
>
> (ii) to have witnessed the commission of the offence;
>
> will be called as a witness at the trial; and
>
> (c) that, for the purpose of avoiding any prejudice to the welfare of the child, the case should be taken over and proceeded with without delay by the Crown Court,
>
> a notice ("notice of transfer") certifying that opinion may be given by or on behalf of the Director to the magistrates' court in whose jurisdiction the offence has been charged.
>
> (2) A notice of transfer shall be given before the magistrates' court begins to inquire into the case as examining justices.
>
> (3) On the giving of a notice of transfer the functions of the magistrates' court shall cease in relation to the case ...
>
> (4) The decision to give a notice of transfer shall not be subject to appeal or liable to be questioned in any court.
>
> ...
>
> (6) In this section "child" means a person who -
>
> (a) in the case of an offence falling within section 32(2)(a) or (b) of the 1988 Act, is under fourteen years of age or, if he was under that age when any such video recording as is mentioned in section 32A(2) of that Act was made in respect of him, is under fifteen years of age; or
>
> (b) in the case of an offence falling within section 32(2)(c) of that Act, is under seventeen years of age or, if he was under that age when any such video recording was made in respect of him, is under eighteen years of age.
>
> ...

"Committed for trial" means committed in custody or on bail by a magistrates' court with a view to trial before a judge and jury: *Magistrates' Courts Act 1980* (UK) s 6.

prosecution of child abuse cases. However, an evaluation of these reforms has revealed disappointing results:[637]

> The research discovered that these cases, far from receiving priority treatment, actually took longer than the national average to reach disposition ... New statutory procedures to expedite cases were little used and were ineffective in delay reduction. Cases where the new procedures were used actually took longer than others in the study sample.

Two hundred prosecution cases were evaluated. Notices of transfer were issued in only eleven of the one hundred cases studied that were eligible for such a notice:[638]

> Prosecutors gave a number of different reasons for their reluctance to use notice of transfer provisions:
>
> (a) It is a mistake to consider notice provisions hurriedly, therefore it is difficult to issue them, as required, before a mode of trial decision.
>
> (b) Risk versus speed (notice should not be used to transfer weak cases, because it is a higher risk strategy to bypass committal).
>
> (c) Statements of evidence to be served with the notice may be vulnerable to defence review.
>
> (d) There is confusion as to whether charges can be added or the indictment amended (a relatively common practice) after transfer.
>
> (e) Notice of transfer does not necessarily result in a faster trial ...
>
> (f) These cases are more time-consuming to prepare ...
>
> (g) A decision cannot be made until the full file has been received from the police.
>
> (h) Notice should be used only if the defence are delaying matters or ask for an old-style committal.
>
> (i) The removal of the defence's right to require the presence of a child witness at an old-style committal is a far more significant protection, and makes the use of notice of transfer unnecessary in most cases.

7. AN ALTERNATIVE - CHILDRENS COURT

As noted on page 175 of this Discussion Paper, many preliminary submissions to the Commission have been critical of the conduct of committals where children give evidence as complainants. Currently, the Childrens Court hears committals where children are accused - that is, where they are themselves charged with offences. The Childrens Court is a specialised court, which was established to cater for criminal and welfare matters involving children.

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637 Plotnikoff J and Woolfson R, *Prosecuting Child Abuse: An Evaluation of the Government's Speedy Progress Policy* (1995) at 82.

638 Id at 48.

An alternative proposal is for all committals involving a child complainant to be conducted by a Childrens Court magistrate who would be likely to have a special expertise to better facilitate the giving of evidence by a child.

This proposal may not be feasible given the large decentralised nature of the State of Queensland. Currently, there is only one full-time Childrens Court magistrate. Generally, the bulk of matters arising in the Childrens Court is carried out by non-specialist magistrates.[639]

8. USE OF PROCEDURES TO ASSIST CHILDREN TO GIVE EVIDENCE IF THEY MUST ATTEND COMMITTALS

The provisions introduced into Queensland legislation in 1989 that were designed to lessen the trauma suffered by children in giving evidence can be utilised in all courts in Queensland, including magistrates courts where committals are held. It is therefore possible for aids to giving evidence including closed-circuit television,[640] screens, the use of out-of-court statements, and support persons, to be used during committals to lessen the trauma that might be suffered by children and other vulnerable witnesses. It would appear that magistrates are generally receptive to the use of new technology such as screens and closed-circuit television, when available, and other innovative procedures such as the use of support persons and pre-committal directions hearings to ensure the receipt by the court of the best possible evidence from the child.[641]

9. QUESTIONS FOR DISCUSSION

(1) In Chapter 10 of this Discussion Paper (Out-of-Court Statements) a number of questions were asked in relation to the admission into evidence of out-of-court statements at committal and at trial. Specific questions were asked in relation to whether certain statements should be admitted in lieu of the child being available to provide oral evidence (including cross-examination and re-examination) at committal and possibly at trial. In light of your consideration of those questions: will it ever be necessary for child complainants to be available as witnesses at committals, if admissible statements of the child's evidence, including cross-examination and re-examination, made by the child prior to the committal, are available to the court?

639 Childrens Court of Queensland, *Fourth Annual Report 1996-97* at 109.

640 Closed-circuit television is available only in Brisbane and the major regional centres.

641 Meeting between representatives of the Commission and Mr S Deer CSM and Mr A Pascoe SM, 23 April 1998.

(2) **If "yes" to question (1), in what circumstances would it be necessary for a child complainant to be available to provide oral evidence at committal?**

(3) **If "no" to question (1), should the child's availability to provide oral evidence at committal be at the discretion of the court or should it be prohibited?**

(4) **If the child's availability to provide oral evidence at the committal should be at the court's discretion, what, if any, restrictions should be imposed on the discretion?**

(Note: in Queensland, for a statement to be admitted in lieu of the oral evidence of the complainant: the defendant must be represented; the prosecution and the defence must agree; and such an agreement might be subject to the person making the statement being present in court for cross-examination.)

(5) **Should it be possible for the Director of Public Prosecutions to refer a matter directly for trial, thus bypassing the committal stage for certain types of cases or in certain circumstances (as in the United Kingdom)?**

(6) **If "yes" to question (5), for what types of matters should this power be available?**

(7) **Should all committals involving a child complainant be conducted by a Childrens Court magistrate?**

(8) **What is your understanding of the interaction between section 110A of the *Justices Act 1886* (Qld) and sections 21A and 93A of the *Evidence Act 1977* (Qld) in relation to the tendering of out-of-court statements?**

CHAPTER 15
PRE-TRIAL HEARINGS

1. INTRODUCTION

In this Discussion Paper, the Commission has discussed a number of facilities that might be utilised to assist child witnesses to give the best evidence of which they are capable: for example, the use of out-of-court statements;[642] the giving of evidence-in-chief by videotape;[643] the giving of evidence-in-chief (and possibly cross-examination) at a pre-trial hearing;[644] the giving of evidence using alternative arrangements such as closed-circuit television and screens;[645] and the presence of a support person.[646] This raises a question as to when a ruling as to the use of these facilities should be made.

The desirability of settling as many procedural matters as possible before a trial has been recognised in civil proceedings for a number of years, with an increasing emphasis on case management.[647] In relation to criminal proceedings, there has also been an increasing emphasis on pre-trial procedures that can be used to narrow the issues in dispute in trials, and to shorten what might otherwise be lengthier trials.

For example, in 1997, section 592A was inserted into the *Criminal Code* (Qld), thereby enabling a number of matters to be resolved prior to the commencement of a trial.[648] Section 592A provides in part:

> **Pre-trial directions and rulings**
>
> (1) If the Crown has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial.
>
> (2) Without limiting subsection (1) a direction or ruling may be given in relation to -
>
> (a) the quashing or staying of the indictment; or

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642 See Chapter 10 of this Discussion Paper.

643 Ibid.

644 Ibid.

645 See Chapter 11 of this Discussion Paper.

646 See Chapter 13 of this Discussion Paper.

647 See the discussion of case management in the civil context in Davies GL, the Hon Mr Justice, *Managing the Work of the Courts*, a paper delivered at the Australian Institute of Judicial Administration Asia-Pacific Courts Conference "Managing Change" (22-24 August 1997). Note the comment at pp 7-8 of that paper that, at least in relation to civil proceedings, the reduction in trial time that is brought about by case management may be achieved at the cost of a total increase in costs, especially where multiple hearings are involved.

648 This amendment was made by s 108 of the *Criminal Law Amendment Act 1997* (Qld).

(b) the joinder of accused or joinder of charges; or

(c) the provision of a statement, report, proof of evidence or other information; or

(d) noting of admissions and issues the parties agree are relevant to the trial or sentence; or

(e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted; or

(f) ascertaining whether a defence of insanity or diminished responsibility or any other question of a psychiatric nature is to be raised; or

(g) the psychiatric or other medical examination of the accused; or

(h) the exchange of medical, psychiatric and other expert reports; or

(i) the reference of the accused to the Mental Health Tribunal; or

(j) the date of trial and directing that a date for trial is not to be fixed until it is known whether the accused proposes to rely on a defence of insanity or diminished responsibility or any other question of a psychiatric nature; or

(k) the return of subpoenas and notices to Crown witnesses; or

(l) encouraging the parties to narrow the issues and any other administrative arrangement to assist the speedy disposition of the trial.

An examination of the existing pre-trial procedures for criminal proceedings is generally beyond the terms of the Commission's reference.[649] However, the Commission is concerned with two particular purposes that may be served by the use of pre-trial hearings in relation to trials involving child witnesses.

The more matters that can be resolved prior to trial, the less the time that will need to be taken up resolving these matters once the trial has commenced. This proposition is true of all trials. However, concerns have been expressed to the Commission about the adverse effects that delays in courtroom proceedings have on the ability of the courts to receive the best possible evidence from child witnesses.[650] This makes the pre-trial resolution of matters especially important in cases involving child witnesses.

Further, it has been suggested that it is highly desirable for a child witness to know in advance whether he or she will be able to use closed-circuit television or other alternative arrangements to give evidence.[651] For example, if a child knows before the commencement of the trial whether he or she will be giving evidence from the courtroom or from another room via closed-circuit television, the child is afforded the opportunity to become familiar with the facilities he or she will be using.

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649 The terms of this reference are set out at p 1 of this Discussion Paper.

650 See Chapter 8 of this Discussion Paper.

651 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.5.2.

2. PRE-TRIAL HEARINGS TO RESOLVE MATTERS IN RELATION TO CHILDREN'S EVIDENCE

The Law Reform Commission of Western Australia concluded that all matters relevant to procedure in cases involving child witnesses, whether at committal, at trial on indictment or summary trial, should be settled at a pre-trial hearing.[652] The Western Australian Commission suggested that the pre-trial hearing should be held on application being made by either party to the court.[653] The purpose of the proposal was to ensure that all parties (including children and other special witnesses) would be able to prepare appropriately for the relevant hearing (whether it be a committal or a trial).[654]

The Law Reform Commission of Western Australia recommended that:[655]

> (a) in a case where a child under 16 at the time the proceedings are initiated is to be a witness in court proceedings; or
>
> (b) in a case where a person whom it is sought to have declared a "special witness" is to be a witness in court proceedings,
>
> it should be possible to make an application for a pre-trial hearing to be held under the supervision of the trial judge or magistrate at which the following issues should be settled:
>
> (1) an application to declare a witness a "special witness";
>
> (2) the identity of a suitable support person for a child witness under 16 or a "special witness";
>
> (3) arrangements for preparation for court of a child witness under 16 or a "special witness";
>
> (4) the identity of any child interpreter or other specialist interpreter;
>
> (5) whether a prior statement of a child witness under 16 is to be admitted;
>
> (6) whether, in a case where the evidence of a child under 16 is to be offered in the form of a videotape;
>
> (a) the child is to appear at committal proceedings or trial to be cross-examined; or
>
> (b) whether an informal hearing in advance of the trial is to be held;
>
> (7) if the evidence of a child under 16 is to be offered in the form of a video-tape, the

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652 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 10.1.

653 Ibid.

654 Law Reform Commission of Western Australia, Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1990) at para 1.22. The Western Australian Commission recognised that pre-trial proceedings of this kind are used widely in civil cases: Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 10.3.

655 Law Reform Commission of Western Australia, Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1990) at para 10.3.

video-tape should be viewed (or arrangements made for the viewing of the tape) by the trial judge, the accused and defence counsel, and a decision should be made by the judge as to whether any part of the tape requires to be excised for the purposes of the trial on the ground that it offends against the rules of evidence other than the hearsay rule;

(8) whether, in the case of a "special witness", an informal hearing in advance of the trial is to be held;

(9) whether a child under 16 or a "special witness" is to give evidence with the assistance of closed-circuit television or a screen;

(10) if closed-circuit television is to be used to facilitate the giving of evidence by a child under 16 or a "special witness", whether the witness should give evidence over closed-circuit television while the accused remains in the courtroom, or whether the witness should give evidence in the courtroom while the accused observes proceedings by closed-circuit television.

An evaluation of the United Kingdom policy in relation to the expedition of child abuse prosecutions reached a similar view about the need for pre-trial hearings:[656]

> For fast track children's cases, issues to be resolved ahead of trial include applications for use of the TV link or screens, the admissibility of videotaped interview and questions concerning disclosure of social services' records. We found that these decisions were often made on the morning of trial, sometimes while the child waited to give evidence.

3. THE NEED FOR SPECIFIC LEGISLATION

In *R v His Honour Judge Noud; ex parte McNamara*,[657] the Full Court of the Supreme Court of Queensland held that, at common law, there was no general authority enabling evidence to be taken, or its form and admissibility to be determined, before the commencement of the trial.[658] In that case, after the presentation of the indictment, but before the accused was called upon to plead, a District Court Judge who, it was anticipated, would be the trial judge was asked to make certain orders relating to the conduct of the trial and the giving of evidence at the trial. In particular, the Judge ordered that the complainant in a corruption trial of two police officers be identified only as "Miss X". The accused sought to quash the orders that had been made.

McPherson J considered the extent of the court's jurisdiction between the filing of the indictment and the commencement of the trial:[659]

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656 Plotnikoff J and Woolfson R, *Prosecuting Child Abuse: An Evaluation of the Government's Speedy Progress Policy* (1995) at 88.

657 [1991] 2 Qd R 86.

658 Id per McPherson J at 92 and per Williams J at 101.

659 Id at 91-92.

> It seems clear that a court in which an indictment has been presented can exercise some jurisdiction in respect of the proceedings before the trial. For example, proceedings can be stayed ... , or the trial postponed ... ; or the indictment may be quashed. ...
>
> We were referred to no decision at common law in which an order has been made before trial to admit or exclude testimony to be taken at trial. ... Trials on indictment are governed by common law rules of procedure and evidence, according to which admissibility falls to be determined at the time the evidence is tendered, which takes place only at trial. Statutory enactment was required in order to authorise the admission at trial of evidence taken on commission or by other methods before trial. ...
>
> Subject to specific statutory exceptions like these, I know of no general authority enabling evidence to be taken or its form and admissibility to be determined in advance of a trial on indictment.

The Court was of the view that a trial on indictment commences when the accused is called on to plead in accordance with section 594 of the *Criminal Code* (Qld):[660]

> The jurisdiction to deal with a particular matter stems from the presentation of the indictment to the court; the indictment, like the plaint on the civil side, enlivens the court's jurisdiction to deal with the matter thereby brought before it (s. 560 of the Code) ...
>
> But though the jurisdiction of the court is enlivened by the presentation of the indictment, the trial does not commence until the accused is called upon to plead to the indictment; that is expressly provided for by s. 594 of the Code. There may be a lapse of some months between the presentation of the indictment and the accused being called upon to plead ...

McPherson J suggested that the ruling made could be justified, if at all, only as a preliminary intimation of a view that the judge would take with respect to the issue if and when it arose before him at the trial. It could not be binding on the particular judge; nor could it be binding on any other judge who presided at the trial.[661]

The effect of this decision is that, if it is thought desirable to enable binding orders as to the admissibility or form of evidence to be made prior to the commencement of a criminal trial on indictment, legislation is required to achieve that purpose. In *R v His Honour Judge Noud; ex parte McNamara*,[662] Williams J expressed the view that consideration should be given to introducing such legislation:[663]

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660 Id per Williams J at 99-100.

661 Id at 93.

662 [1991] 2 Qd R 86.

663 Id at 108.

> Since writing the above I have had occasion to read again ss 7 to 11 inclusive of the *Criminal Justice Act* 1987 (Eng.).[664] Following decisions such as *Vickers* [665] it was considered desirable in England to make statutory provision for preparatory hearings in criminal trials. The sections in question are invaluable in dealing with a long, complex criminal trial and they could be utilised in a situation such as occurred here thereby enabling the judge to make binding orders prior to trial. In my view consideration should be given to introducing legislation along similar lines in Queensland. [notes added]

The Australian Institute of Judicial Administration, in discussing the importance of pre-trial hearings, has recently recommended that any pre-trial hearing should be "formally part of the trial proper so all rulings and directions given are binding from then on".[666] A similar recommendation relating to the binding nature of orders made has been made in the United Kingdom:[667]

> The Royal Commission speculated that it may require a change in the law to empower the judge at a pre-trial hearing to make decisions which bind the trial judge ... If such decisions cannot now be made binding, then greater consideration needs to be given to ensuring that the trial judge is available to handle specific pre-trial matters in contested cases.

A number of jurisdictions have provisions that enable the judge to determine questions regarding the trial before the jury has been empanelled, but only after the accused has been arraigned.[668] It is doubtful whether these provisions would permit the court to make pre-trial orders that would bind the conduct of the trial.

Significantly, the recently introduced section 592A of the *Criminal Code* (Qld) provides that, once an indictment has been presented, the court may make a number of rulings, including a ruling as to the admissibility of evidence.[669] By enabling such a ruling to be made prior to the commencement of the trial (that is, before the accused is required to plead), the section provides an exception to the common law rule that evidence cannot be taken, and its admissibility cannot be determined, before the commencement of a

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664 These sections enable "preparatory hearings" to be held where it appears to a judge that the evidence on indictment reveals a case of fraud of such seriousness or complexity that benefits are likely to accrue from a hearing before the jury are sworn: *Criminal Justice Act 1987* (UK). Section 9 of that Act confers a number of powers on the judge, including the power to determine any question as to the admissibility of evidence (s 9(3)(b)) and any other question of law relating to the case (s 9(3)(c)).

665 In *R v Vickers* [1975] 1 WLR 811 the Court of Appeal considered the status of a ruling given on agreed facts before the trial had begun. Following the ruling, the charge was put to the appellant, who pleaded guilty. The Court of Appeal held (at 814) that the proceedings in which the ruling was given were not part of the trial:

> Arraignment is the process of calling a defendant forward to answer an indictment. It is only after arraignment, which concludes with the plea of the defendant to the indictment, that it is known whether there will be a trial and, if so, what manner of trial.

666 The Australian Institute of Judicial Administration Incorporated, *Anatomy of Long Criminal Trials* (1997) at para 6.2.4.

667 Plotnikoff J and Woolfson R, *Prosecuting Child Abuse: An Evaluation of the Government's Speedy Progress Policy* (1995) at 89.

668 See for example *Evidence Act 1958* (Vic) s 149B; *Crimes Act 1958* (Vic) s 391A; *Criminal Law Consolidation Act 1935* (SA) s 285A; *Criminal Code Act 1924* (Tas) s 361A.

669 *Criminal Code* (Qld) s 592A(2)(e). Section 592A(1), (2) is set out at pp 186-187 of this Discussion Paper.

trial on indictment.[670]

A ruling made under section 592A of the *Criminal Code* (Qld) will generally be binding at the trial. Sections 592A(3) and (4) provide:

> (3) A direction or ruling is binding unless the trial judge, for special reason, gives leave to re-open the direction or ruling.
>
> (4) A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence.

However, although the court is authorised by section 592A(2)(e) of the *Criminal Code* (Qld) to decide "questions of law including the admissibility of evidence", section 592A does not include an express power to make a ruling about the form or manner in which a witness is to give evidence at trial. A more specific power is arguably desirable if the court is to have the power to decide questions as to the various facilities that might be used to assist a child witness to give evidence.

4. MODELS FOR PRE-TRIAL HEARINGS

In Western Australia, the Law Reform Commission's recommendation for pre-trial hearings[671] was implemented by the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA), which amended several Acts, including the *Evidence Act 1906* (WA). Section 106S of the *Evidence Act 1906* (WA) provides:

> (1) In any proceeding in which -
>
> (a) the giving of evidence by a person; or
>
> (b) a matter affecting a person as a witness,
>
> is likely to require the making of an order or the giving of directions under sections 106E(2) [approval of a support person], 106F(1) [appointment of a communicator], 106J [giving of evidence-in-chief by video-tape], 106K [giving of all evidence at pre-trial hearing], 106O [application that the mandatory provision relating to use of closed-circuit television should not apply], or 106R [declaration that a person is a special witness], the party who is to call that person as a witness is to apply for a pre-trial hearing for the purpose of having all such matters dealt with before the trial.
>
> (2) In subsection (1) "pre-trial" in relation to a Court means a hearing provided for by rules of that Court for the purposes of this section. [words in square brackets added]

The Western Australia legislation also provides that, before or after the filing of the indictment, the court can, if it thinks fit, determine any question of law or procedure

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670 See the discussion of *R v His Honour Judge Noud, ex parte McNamara* [1991] 2 Qd R 86 at p 189 of this Discussion Paper.

671 This recommendation is set out at pp 188-189 of this Discussion Paper.

anticipated to arise or determine any question of fact.[672] These procedures can be conducted by a judge other than the trial judge, and are considered part of the trial itself.[673]

The Judges of the Supreme Court of Western Australia have indicated that all decisions at the pre-trial hearing will normally be made on the basis of depositions and affidavits, rather than on oral evidence.[674]

In Victoria, the court has a broad power, if a presentment[675] has been filed, to give "any direction for the conduct of the proceeding which it thinks conducive to its prompt and economical determination, including directions relating to":[676]

* the form or manner of giving evidence; and

* the determination of questions of law, including questions about the admissibility of evidence.

The Victorian legislation provides that the judge who constitutes the court for the trial must be the judge who dealt with the directions hearing unless it is impracticable or contrary to the interests of justice for the court to be constituted by the same judge.[677] The legislation also provides that, if a matter is dealt with at a directions hearing, that hearing is taken to be part of the trial.

5. QUESTIONS FOR DISCUSSION

(1) If the facilities discussed in this Discussion Paper to assist children to give the best possible evidence are ultimately adopted, is it desirable to have a hearing before the committal or trial to determine which of those facilities should be utilised during the relevant proceeding?

(2) If "yes" to question (1), would it be appropriate to amend section 592A of the *Criminal Code* (Qld) to include a specific power to make pre-trial

672 *Criminal Code* (WA) s 611(A).

673 *Criminal Code* (WA) s 611A(3).

674 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court) at 1.

675 A "presentment" is a document that sets out the necessary details of an indictable offence. In some jurisdictions the terms "indictment" and "information" are used instead.

676 *Crimes (Criminal Trials) Act 1993* (Vic) s 5(1)(c).

677 *Crimes (Criminal Trials) Act 1993* (Vic) s 6. Note that the Australian Institute of Judicial Administration has recently recommended that, preferably, the trial judge should conduct the pre-trial hearing: Australian Institute of Judicial Administration Incorporated, *Anatomy of Long Criminal Trials* (1997) at para 6.2.4.

rulings about the manner in which children's evidence is given?

(3) **Are there any matters relevant to how a child witness may give evidence that are not considered appropriate for determination at a pre-trial hearing?**

(4) **Should pre-trial hearings be conducted in all cases involving child witnesses?**

(5) **Where possible, should the pre-trial hearing be heard before the magistrate or judge who will preside at the committal or trial?**

(6) **Should the orders made at a pre-trial hearing in general be binding at the committal or trial?**

CHAPTER 16

UNREPRESENTED ACCUSED

1. INTRODUCTION

A person who is accused of a criminal offence is allowed legal representation at his or her trial. Part of the legal representative's role, in an adversarial system of justice, is to cross-examine the prosecution witnesses. The purpose of cross-examination is to test the evidence that implicates the accused in the offence. Because of this, cross-examination may be rigorous.

Often it may be perceived that there is a fine line between acceptable questioning and harassment of the witness:[678]

> Cross-examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion and with due regard to the assistance to be rendered by it to the Court, not forgetting at the same time the burden that is imposed upon the witness.

However, the accused is not obliged to engage a legal representative. For instance, the accused may not be able to afford legal representation or may choose to represent himself or herself. In such a situation, the balance between legitimate cross-examination and intimidation of the witness may become even finer because the accused would normally have a more personal interest in discrediting the witness's versions of events than counsel.

Where the accused represents himself or herself, the court could be assumed to have a particular obligation to ensure that the accused receives a fair trial. On the other hand, the court has power to intervene to prevent an unrepresented accused abusing the court process by his or her cross-examination.

In the absence of statistics, the Commission believes that it is reasonable to assume that there would have been only relatively few cases in Queensland where an accused was in the position of directly examining a child witness.

2. CROSS-EXAMINATION OF A CHILD WITNESS

For a child witness, any cross-examination is likely to be a distressing experience. It may be even more traumatic for a child witness to be cross-examined by an

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678 *Mechanical and General Inventions Company, Limited, and Lehwess v Austin and the Austin Motor Company, Limited* [1935] AC 346 per Viscount Sankey LC at 359, quoting Lord Hanworth MR's censure in the Court of Appeal of the manner in which witnesses had been cross-examined at first instance.

unrepresented accused, particularly if the child is a complainant in an abuse case. To have to face the accused in court will be stressful for many child witnesses - to be questioned by the accused, despite the accused being presumed innocent at this stage, may very well result in the child being unable to provide the court with any worthwhile testimony because of the associated trauma. The New Zealand Law Commission explained this:[679]

> ... a child complainant in a sexual case may become very distressed if questioned by the defendant, because the defendant may be related to the child, and because of the intimate nature of what must be disclosed. [note omitted]

3. ALTERNATIVE APPROACHES

Alternative approaches have been recommended or implemented in a number of Australian and Commonwealth jurisdictions. These approaches restrict the right of an unrepresented accused to cross-examine a child witness, while at the same time seeking to maintain fairness to the accused by adopting an alternative method of cross-examination.

(a) United Kingdom

In the United Kingdom, the Pigot Committee recommended that an unrepresented accused should be prohibited from cross-examining a child witness.[680] That recommendation was implemented by section 34A of the *Criminal Justice Act 1988* (UK), which reads:

> **Cross-examination of alleged child victims**
>
> (1) No person who is charged with an offence to which section 32(2) applies shall cross-examine in person any witness who -
>
> (a) is alleged -
>
> (i) to be a person against whom the offence was committed; or
>
> (ii) to have witnessed the commission of the offence; and
>
> (b) is a child, or is to be cross-examined following the admission under section 32A above of a video recording of testimony from him.
>
> (2) Subsection (7) of section 32A above shall apply for the purposes of this section as it applies for the purposes of that section, but with the omission of the references to a person being, in the cases there mentioned, under the age of fifteen years or under the age of eighteen years.

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679 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at para 177.

680 Home Office (UK), *Report of the Advisory Group on Video Evidence* (The Pigot Committee, 1989) at para 2.30.

Commentators on the United Kingdom provision have suggested that it is "hedged about with detailed restrictions". For example:[681]

> It applies where (i) it is a trial for an offence of sex, violence or cruelty, (ii) the child is the alleged victim, or a witness to the commission of an offence, and (iii) the child is under 14, or in a sex case, 17; an age limit that rises to 15 or 18 if the videotape evidence is admitted ... The Act does not say what is to happen if the defendant is offered counsel, but stubbornly refuses. Presumably, the judge would then offer to put the defendant's questions for him, or such as he thought it proper to put.

(b) New Zealand

The *Evidence Act 1908* (NZ) prohibits a defendant in a sexual abuse case from personally cross-examining a child or a mentally handicapped complainant. Going further than the United Kingdom provision, however, the New Zealand provision provides that, if a defendant is unrepresented, his or her questions must be stated to a person approved by the judge. That person then repeats them to the complainant.

The New Zealand Law Commission, while accepting that there are good reasons for offering protection to child witnesses against the cross-examination of an unrepresented accused, has also considered the disadvantages of the existing provision:[682]

> It is ... questionable what protection the bar offers if the defendant, or party, must still be in court to state the questions, and if the appointed person is their friend. For these reasons the Commission feels that the use of an alternative way of giving evidence, such as closed-circuit television, may be more valuable in the case of cross-examination by unrepresented parties. Although use of such alternatives as closed-circuit television would mean the defendant was personally asking questions of the witness, there would be a greater sense of physical separation and therefore more security and comfort for the witness.

The Commission proposed:[683]

> ... to continue the absolute bar on personal cross-examination by defendants of child complainants in sexual cases but that bar will not be extended to adults. All other witnesses, including the intellectually disabled, may apply to the court to declare an unrepresented party ineligible to personally cross-examine them. The relevant criteria for this decision will be those used for a decision about alternative ways of giving evidence, and will include considerations of procedural fairness and efficiency, in particular fairness to the defendant in criminal proceedings ...
>
> It is envisaged that the factors considered relevant when making a decision that there should be no personal cross-examination, will also be taken into account by the judge when deciding *who* should be appointed to ask the questions of the witness. Although the judge may ask the questions, this could prove difficult in terms of the physical layout of the court, and the kind of control the defendant or party may wish to retain over the phrasing

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681 Spencer JR and Flin R, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 96.

682 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at para 180.

683 Id at paras 181-182.

of the questions. [original emphasis]

(c) Western Australia

The Law Reform Commission of Western Australia noted that the cross-examination of a child witness by an unrepresented accused may be particularly stressful for the child.[684] In such cases, it was considered desirable for questions to be put through an intermediary such a child communicator[685] or other person approved by the court.[686] That Commission recommended:[687]

> An unrepresented accused person should not be permitted to cross-examine a child witness. In such cases the court must appoint an intermediary to facilitate cross-examination.

The Commission's recommendation was implemented in 1992[688] by the introduction of section 106G of the *Evidence Act 1906* (WA) which reads:

> Where in any proceeding for an offence a defendant who is not represented by counsel wishes to cross-examine a child who is under 16 years of age, the defendant -
>
> (a) is not entitled to do so directly; but
>
> (b) may put any question to the child by stating the question to the Judge or a person approved by the Court
>
> and that person is to repeat the question accurately to the child.

The Judges of the Supreme Court of Western Australia have recommended that the intermediary be the Judge's Associate.[689]

(d) New South Wales

The Report of the New South Wales Children's Evidence Taskforce made three recommendations in relation to unrepresented accused. The Taskforce referred to section 106G of the *Evidence Act 1906* (WA), and considered that an equivalent provision ought to be adopted in New South Wales. The Taskforce noted that:[690]

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684 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.44.

685 See the discussion of child communicators in Chapter 4 of this Discussion Paper.

686 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.44.

687 Id at para 6.47.

688 By s 8 of the *Acts Amendment (Evidence of Children and Others) Act 1992* (WA).

689 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (April 1996, approved by the Judges of the Supreme Court) at 26.

690 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.1.2.

> Even where there is no "direct" threat or intimidation, it is generally accepted that children are much more sensitive to the cues used by an accused, and they should therefore be given the benefit of protection.

The Taskforce recommended that where the accused is unrepresented:[691]

> (a) the accused should only be allowed to cross examine the child witness through an intermediary who is accepted or approved by the court, regardless of whether CCTV is used;
>
> (b) and the interests of justice require, the judge may intervene in either of the above situations to either allow or disallow direct cross-examination of the child witness, as appropriate; and
>
> (c) it is also recommended that child witnesses be provided with some guidance as to the circumstances in which such a situation may occur so that the possibility of it occurring can be canvassed during court preparation.

In addition, the Taskforce suggested two qualifications on the prohibition upon an unrepresented accused directly cross-examining a child witness:[692]

> (a) where CCTV is not available and the accused is unrepresented then questions should be directed through a third party, preferably the trial judge; and
>
> (b) if the interests of justice require or unfair prejudice is caused to the accused then the Judge could allow direct cross examination.

In 1996 the *Crimes Act 1900* (NSW) was amended[693] to provide the right to alternative arrangements for children giving evidence where the accused is unrepresented.[694] The court may appoint a person to conduct the examination-in-chief, cross-examination or re-examination of any witness other than the accused who is a child.[695] Such a person must act on the instructions of the accused.[696] The court may choose not to appoint such a person if the court considers that it is not in the interests of justice to do so.[697] The provision applies whether closed-circuit television or similar technology is used and whether alternative arrangements are otherwise used.[698]

Where such evidence is given in a jury trial under the general provision for alternative arrangements or under the provision relating to an unrepresented accused, the judge must inform the jury that it is standard procedure for children's evidence in such cases

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691 Id at 60.

692 Id at para 8.1.5.

693 Amended by the *Crimes Amendment (Children's Evidence) Act 1996* (NSW).

694 *Crimes Act 1900* (NSW) s 405FA.

695 *Crimes Act 1900* (NSW) s 405FA(2).

696 *Crimes Act 1900* (NSW) s 405FA(3).

697 *Crimes Act 1900* (NSW) s 405FA(4).

698 *Crimes Act 1900* (NSW) s 405FA(5).

to be given by those means. The judge must also warn the jury not to draw any inference adverse to the accused or give evidence any greater or lesser weight because those means were used.

4. QUESTIONS FOR DISCUSSION

(1) **Have there been any instances in Queensland of which you are aware where a child witness was cross-examined at committal or trial by an unrepresented accused? If so, what, if any, concerns do you have with this situation?**

(2) **Should there be a presumption that a child will not be directly questioned by an unrepresented accused? If so, should such a presumption apply unless the court considers it not in the interests of justice?**

(3) **Should an unrepresented accused be prohibited from directly questioning a child witness in court and, in lieu thereof, the court be required to direct that the child be questioned through an intermediary?**

(4) **If so, should the prohibition relate only to certain, and if so what, types of matters?**

(5) **Should the appropriate intermediary be specified in the legislation or should this be left to the discretion of the court or to a pre-trial hearing?**

(6) **Where such a facility is used, should the judge be required to inform the jury that it is standard procedure for children's evidence in such cases to be given by those means? Further, should the judge warn the jury that they are not to draw any inference adverse to the accused or give evidence any greater or lesser weight because those means were used?**

(7) **Should the judge have the power to limit the questioning by the accused through the intermediary?**

CHAPTER 17

CHILDREN'S EVIDENCE IN OTHER TYPES OF PROCEEDINGS

1. INTRODUCTION

The Commission's main concern in this Discussion Paper has been the legal and practical impediments that may result in children, especially complainants, not giving the best evidence of which they are capable when appearing as witnesses in criminal proceedings. With that concern in mind, the Commission has considered a number of options that might assist children to give evidence.

Of course, children may give evidence in a number of other contexts,[699] for example:

* criminal proceedings where the child is a witness, but not the complainant;

* criminal proceedings where the child is the accused;

* non-criminal proceedings; and

* welfare proceedings.

In this Chapter, the Commission examines whether the concerns it has previously raised about children who give evidence as complainants in criminal proceedings are relevant when children give evidence in these other contexts, and, in particular, whether the options previously considered by the Commission are warranted in these areas.

2. CRIMINAL PROCEEDINGS WHERE THE CHILD IS A WITNESS, BUT NOT THE COMPLAINANT

(a) Introduction

The circumstances in which a child who is not a complainant gives evidence in criminal proceedings may vary considerably. In some circumstances, however, it is arguable that the issues raised by a child witness giving evidence would be similar to those already discussed in this Discussion Paper in relation to child complainants.[700] For example, a child who is giving evidence against a parent, a relative or a family friend

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699 See Chapter 1 of this Discussion Paper.

700 This premise is supported by a 1996 Report of the NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 6.3.3.

may find it equally difficult to give evidence in the presence of that person as a child complainant. In some circumstances, the child witness may also have been a victim of the accused. A child witness may experience similar problems to that of a child complainant in relation to the intimidating atmosphere of the court and delays both before, during and between court proceedings. The delays may affect the child witness's ability to remember relevant events.[701]

It is therefore necessary to consider whether any of the facilities or procedures discussed earlier in this Discussion Paper in relation to child complainants should be available to a child witness in a criminal proceeding, even if the child is not the complainant.

(b) Questions for discussion

(1) If the following facilities are made available to a child complainant, should any or all of them be available to a child who gives evidence in a criminal proceeding but is not the complainant:

(a) The option to pre-record any of the child's evidence (for example, evidence-in-chief or both evidence-in-chief and cross-examination)?[702]

(b) The option to admit an out-of-court statement, for example, the child's evidence-in-chief recorded for the purposes of criminal proceedings?[703]

(c) The use of closed-circuit television or screens?[704]

(d) The use of a support person?[705]

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701 See Chapter 8 of this Discussion Paper for a discussion of delays.

702 See the general discussion of this option in Chapter 10 of this Discussion Paper.

703 Ibid.

704 See the general discussion of this option in Chapter 11 of this Discussion Paper.

705 See the general discussion of this option in Chapter 13 of this Discussion Paper.

(e) Limiting the number of people who are present when the child gives evidence?[706]

(f) The use of a communicator?[707]

(2) If "yes" to one or more of the options referred to in question (1), in what circumstances should these facilities be available? For example:

(a) Should the use of these facilities be mandatory in certain types of proceedings?

(b) Should there be a statutory presumption in favour of the use of these facilities in certain types of proceedings unless the court is satisfied in a particular case that their use is not warranted?

(c) Should the party calling the witness bear the onus of satisfying the court that the use of these facilities is warranted?

(d) Should the court be able to order the use of these facilities even if no party seeks such an order?

3. CRIMINAL PROCEEDINGS WHERE THE CHILD IS THE ACCUSED

(a) Introduction

An obvious difference in the circumstances of children who are accused and other children who give evidence is the age of the children involved. In Queensland, a child under the age of 10 is not criminally responsible for any act or omission. A child aged between 10 and 14 years is criminally responsible only if it is proved that the child had the capacity to know that he or she ought not have done the act or made the omission which constituted the offence with which the child is charged.[708] While there is potentially a wide range of ages for complainants, the range of ages for children charged with criminal offences is necessarily narrower.

Some of the options discussed earlier in this Discussion Paper to assist children to give the best evidence of which they are capable, for example, the use of communicators, would arguably be more appropriate in relation to quite young children. While the age

706 See the general discussion of this option in Chapter 6 of this Discussion Paper.

707 See the general discussion of this option in Chapter 4 of this Discussion Paper.

708 *Criminal Code* (Qld) s 29.

group with the largest number of matters disposed of before the Childrens Court and the Magistrates, District and Supreme Courts in the 1996-97 financial year was young people of 16 years of age,[709] twelve 10 year olds were dealt with by those courts that year.[710]

The District Courts and Supreme Court listing processes recognise the importance of a speedy resolution of cases involving children as accused and as complainants by giving them a limited priority.[711]

(b) Principles of juvenile justice

"Child" is defined by section 5 of the *Juvenile Justice Act 1992* (Qld) to mean a person who has not turned 17 years of age.[712] Consideration of the law in relation to children who may be accused of a criminal offence therefore involves children and young people aged between 10 and 16 years.

The *Juvenile Justice Act 1992* (Qld) establishes a code for dealing with children who have, or are alleged to have, committed offences. It requires that all courts dealing with children apply the general principles of juvenile justice outlined in section 4 of that Act. These principles include:[713]

> (b) because a child tends to be vulnerable in dealings with a person in authority a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child; and ...
>
> (e) if a proceeding is started against a child for an offence -
>
> (i) the proceeding should be conducted in a fair and just way; and
>
> (ii) the child should be given the opportunity to participate in and understand the proceedings; and ...
>
> (j) the age, maturity and, where appropriate, cultural background of a child are relevant considerations in a decision made in relation to a child under this Act.

(c) Alternative arrangements for children as accused

An accused child is in the same position as an accused adult in that the accused child can choose whether to give evidence at the trial. If the accused child decides to give

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709 Childrens Court of Queensland, *Fourth Annual Report* (1996-97) at 90, 96 and 100.

710 Ibid (9 by the Magistrates Courts, 1 by the Childrens Court and 2 by the District and Supreme Courts).

711 Submission 41. See p 107 of this Discussion Paper.

712 There is provision in the *Juvenile Justice Act 1992* (Qld) for this age to be increased by one year by regulation: see *Juvenile Justice Act 1992* (Qld) s 6.

713 *Juvenile Justice Act 1992* (Qld) s 4(b), (e), (j).

evidence then, depending on the circumstances of the particular case, the child may be faced with some or all of the same difficulties that other child witnesses face. For example, an accused child may find the process of cross-examination as intimidating and the language as confusing as some other child witnesses do. As with any accused, it is fundamental to ensure a fair trial.

The *Juvenile Justice Act 1992* (Qld) makes two important references to the use of interpreters in relation to children who are charged with an offence. Section 58(1) provides that, in a proceeding before a court in which a child is charged with an offence, the court must take steps to ensure, as far as practicable, that the child and any parent of the child present has full opportunity to be heard and participate in the proceeding. The court must ensure, as far as practicable, that the child and parent understand: the nature of the alleged offence; the court's procedures; and the consequences of any order that may be made.[714] Included in the ways in which a court may achieve this goal is having an interpreter or another person able to communicate with the child and parent to give this explanation.[715] Section 118(2)(c) of the *Juvenile Justice Act 1992* (Qld) contains a similar requirement in relation to explaining the sentence imposed.

Section 21A of the *Evidence Act 1977* (Qld)[716] provides for the use of facilities such as closed-circuit television, screens, a support person, limiting the people present in a court room when the child is giving evidence and the pre-recording of the child's evidence, by a child accused when giving evidence at his or her hearing.[717] The use of these facilities is at the discretion of the trial judge. In some jurisdictions the use of some of these facilities is mandatory.[718] The Commission has no information about the frequency of the use of these facilities in proceedings involving a child accused.

The New Zealand Law Commission in its Preliminary Paper, *The Evidence of Children and Other Vulnerable Witnesses*, has suggested that alternative ways of giving evidence be available to anyone who establishes a need based on factors such as:[719]

* the age of the witness;

* the physical, intellectual, or psychological disability of the witness;

* the linguistic or cultural background of the witness;

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714 *Juvenile Justice Act 1992* (Qld) s 58(2).

715 *Juvenile Justice Act 1992* (Qld) s 58(3)(c).

716 See the general discussion of the facilities which may be available to a child witness under s 21A of the *Evidence Act 1977* (Qld) in Chapter 2 of this Discussion Paper.

717 *Evidence Act 1977* (Qld) s 21A(1A).

718 See for example the discussion on the use of closed-circuit television and screens in Chapter 11 of this Discussion Paper.

719 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at 34-36.

* the nature of the proceeding or criminal offence; and

* the relationship of the witness to any party in the proceeding (for example, a complainant's relationship with the defendant in a criminal case).

The New Zealand Law Commission considered that these provisions should also extend to defendants.[720]

(d) Specialised assistance for the court

In May 1997 his Honour Judge McGuire, President of the Childrens Court of Queensland, convened a special Childrens Court sitting at Cherbourg. During the proceedings, Judge McGuire invited Mr Neville Bonner AO, the then Chairman of the Indigenous Advisory Council, to act as an observer and assistant to the Court. Judge McGuire in the Court's 1996-1997 Annual Report described the experience:[721]

> ... Mr Bonner, at my suggestion spoke to the child and his family in a manner appropriate to indigenous culture. This was a new procedure. It proved highly enlightening. As we were to discover, Aboriginal people will much more readily respond to a respected authority figure of their own culture (call him or her an elder, if you like) than an authoritarian Judge or Magistrate not of the child's kin. What the child says in such circumstances is generally very revealing, and helpful in the proper disposition of the case.
>
> After all these steps in the proceeding were completed, Mr Bonner and I retired ... to deliberate. In each case I would explain to Mr Bonner the relevant law and the available sentencing options. We would then consider the facts, the submissions, the criminal history, if any, the family situation and all other relevant circumstances in a frank exchange of views. ... A consensus was reached; a decision was made. ...
>
> It has to be made abundantly clear that the final decision rested with me as the presiding Judge.

His Honour found the input of Mr Bonner, particularly in relation to sentencing, of great assistance.[722] Judge McGuire recommended the establishment of the position *Aboriginal Assistant to the Court* which could be modelled on the Cherbourg experience.[723]

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720 Id at 36.

721 Childrens Court of Queensland, *Fourth Annual Report* (1996-97) at 25.

722 Ibid.

723 Id at 27.

(e) Questions for discussion

(1) If the following facilities are made available to a child complainant, should any or all of them be available to an accused child who gives evidence in the criminal proceeding against him or her:

(a) The option to pre-record any of the child's evidence (for example, evidence-in-chief or both evidence-in-chief and cross-examination)?[724]

(b) The option to admit an out-of-court statement, for example, the child's evidence-in-chief recorded for the purposes of criminal proceedings?[725]

(c) The use of closed-circuit television or screens?[726]

(d) The use of a support person?[727]

(e) Limiting the number of people who are present when the child gives evidence?[728]

(f) The use of a communicator?[729]

(2) If "yes" to one or more of the options referred to in question (1), in what circumstances should these facilities be available? For example:

(a) Should the use of these facilities be mandatory in certain types of proceedings?

(b) Should there be a statutory presumption in favour of the use of these facilities in certain types of proceedings unless the court is satisfied in a particular case that their use is not warranted?

(c) Should the defence bear the onus of satisfying the court that the use

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724 See the general discussion of this option in Chapter 10 of this Discussion Paper.

725 Ibid.

726 See the general discussion of this option in Chapter 11 of this Discussion Paper.

727 See the general discussion of this option in Chapter 13 of this Discussion Paper.

728 See the general discussion of this option in Chapter 6 of this Discussion Paper.

729 See the general discussion of this option in Chapter 4 of this Discussion Paper.

of these facilities is warranted?

(d) Should the court be able to order the use of these facilities even if the defence does not seek such an order?

(3) Should a position similar to that of *Aboriginal Assistant to the Court* be created to assist the court in cases involving indigenous accused (as suggested by his Honour Judge McGuire)?

4. CHILDREN AS WITNESSES IN NON-CRIMINAL PROCEEDINGS

(a) Introduction

A child could potentially be called to give evidence in a range of matters that are not criminal proceedings. The nature of some types of proceedings may make the giving of evidence more traumatic for the child than other types of proceedings. For example, a child could be a witness to an accident, in which he or she is not related to and does not know any of the parties involved. On the other hand, a child could be the plaintiff in a civil action against a family member or friend for compensation for assault.

Section 21A of the *Evidence Act 1977* (Qld) applies to a special witness who is giving evidence in "any proceeding". It would, therefore, be possible for an order to be made under that section for special arrangements to be made in relation to the giving of the child's evidence.[730] Special arrangements include the use of closed-circuit television or screens, videotapes, providing a support person to accompany the child to court and limiting the people who are present when the child gives evidence.[731] The use of these facilities is not mandatory.

In Queensland the use of screens is limited to criminal proceedings.[732] There may be other proceedings, such as proceedings in relation to a complaint for an apprehended violence order where the use of screens may be of assistance.

In some jurisdictions, a child has a right to use certain facilities. For example, in New South Wales, a child under the age of 16 at the time of giving evidence[733] is entitled to choose a support person in civil proceedings arising from the commission of a personal assault offence and proceedings before the Victims Compensation Tribunal arising

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730 For the purposes of s 21A of the *Evidence Act 1977* (Qld), a child is person under the age of 12 years. However, a young person over 12 years may be classified as a special witness in certain circumstances. See p 22 of this Discussion Paper.

731 See Chapters 11, 10, 13 and 6 respectively of this Discussion Paper.

732 *Evidence Act 1977* (Qld) s 21A(2)(a).

733 *Crimes Act 1900* (NSW) s 405C.

from the commission of a personal assault offence.[734] In those types of proceedings and in proceedings in relation to a complaint for an apprehended violence order, the child is also entitled to give evidence by closed-circuit television unless the court orders that it is not to be used,[735] or to use screens or some other means to restrict visual contact if closed-circuit television is not available.[736]

In Tasmania, the *Evidence Act 1910* (Tas) provides that a child must give evidence by closed-circuit television in certain proceedings under the *Child Protection Act 1974* (Tas) and the *Criminal Code 1924* (Tas).[737] However, in any civil or criminal proceedings a person, including a child, may be given special witness status and be permitted to give evidence in the presence of a support person, by closed-circuit television or in a closed court.[738]

One consideration in the use of special arrangements in civil proceedings is that jury trials in such matters are a rare occurrence. Accordingly, the impact of the special arrangements on the minds of the jurors will in most cases not be a relevant consideration.

(b) Questions for discussion

(1) If the following facilities are made available to a child complainant, should any or all of them be available to a child who gives evidence in non-criminal proceedings:

(a) The option to pre-record any of the child's evidence (for example, evidence-in-chief or both evidence-in-chief and cross-examination)?[739]

(b) The option to admit an out-of-court statement?[740]

(c) The use of closed-circuit television or screens?[741]

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734 *Crimes Act 1900* (NSW) s 405CA.

735 *Crimes Act 1900* (NSW) s 405D.

736 *Crimes Act 1900* (NSW) s 405F.

737 *Evidence Act 1910* (Tas) s 122A (definition of "affected child"), s 122G.

738 *Evidence Act 1910* (Tas) s 122I.

739 See the general discussion of this option in Chapter 10 of this Discussion Paper.

740 Ibid.

741 See the general discussion of this option in Chapter 11 of this Discussion Paper.

(d) The use of a support person?[742]

(e) Limiting the number of people who are present when the child gives evidence?[743]

(f) The use of a communicator?[744]

(2) If "yes" to question (1), in what circumstances should these facilities be available? For example:

(a) Should the use of these facilities be mandatory in certain types of proceedings?

(b) Should there be a statutory presumption in favour of the use of these facilities in certain types of proceedings unless the court is satisfied in a particular case that their use is not warranted?

(c) Should the party calling the witness bear the onus of satisfying the court that the use of these facilities is warranted?

(d) Should the court be able to order the use of these facilities even if no party seeks such an order?

5. CHILDREN AS WITNESSES IN WELFARE PROCEEDINGS

(a) Introduction

There are three types of proceedings that may be held in relation to the welfare of a child:

* welfare proceedings under the *Children's Services Act 1965* (Qld);

* proceedings under the Supreme Court's *parens patriae* jurisdiction; and

742 See the general discussion of this option in Chapter 13 of this Discussion Paper.

743 See the general discussion of this option in Chapter 6 of this Discussion Paper.

744 See the general discussion of this option in Chapter 4 of this Discussion Paper.

* proceedings under the *Family Law Act 1975* (Cth).[745]

The Commission's terms of reference do not extend to a consideration of the way in which children give evidence before the Family Court,[746] which is a Commonwealth court.[747] However, to the extent relevant to proceedings in Queensland courts, reference is made to some issues which may arise in Family Court proceedings concerning children.

(b) Welfare proceedings under the *Children's Services Act 1965* (Qld)

(i) Care and protection orders

Part 6 of the *Children's Services Act 1965* (Qld) provides a regime for children who are - having regard to the circumstances set out in section 46 of the Act - deemed to be in need of care and protection to be admitted to the care and protection of the Director-General of the Department of Families, Youth and Community Care.[748] The Act provides two mechanisms by which a child may be admitted to the care and protection of the Director-General:

* *Voluntary admission*: A parent, guardian or relative of a child, or any person of good repute may apply to the Director-General to admit a child to the Director-General's care and protection;[749] and

* *Admission by court order*: An officer of the Department of Families, Youth and Community Care who is authorised by the Director-General or a police officer may apply to the Childrens Court for an order that a child be admitted to the care and protection of the Director-General. If the Childrens Court is satisfied that the child is in need of care and protection, it may make various orders, including orders against a parent or guardian as set out in section 49(4). The Court may also order that the child be admitted to the care and protection of the Director-General.[750]

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745 The Family Court may make orders affecting the welfare of a child under s 67ZC of the *Family Law Act 1975* (Cth). That section provides:

> (1) In addition to the jurisdiction that a court has under this Part in relation to children, the court also has jurisdiction to make orders relating to the welfare of children.
> (2) In deciding whether to make an order under subsection (1) in relation to a child, a court must regard the best interests of the child as the paramount consideration.

746 The situation of children as witnesses in that court has been considered by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their recent report *Seen and heard: priority for children in the legal process* (ALRC 84, 1997).

747 The Commission's role is confined to reviewing the law of Queensland. It does not have jurisdiction to review areas of Commonwealth law: see *Law Reform Commission Act 1968* (Qld) s 10.

748 Part 6 of the *Children's Services Act 1965* (Qld) refers to a child being admitted to "the director's care and protection". "Director" is defined in s 8 of the Act to mean the chief executive for the purposes of the *Family Services Act 1987* (Qld).

749 *Children's Services Act 1965* (Qld) s 47.

750 *Children's Services Act 1965* (Qld) s 49.

(ii) Care and control orders

Part 7 of the *Children's Services Act 1965* (Qld) provides a similar regime for children who - having regard to the circumstances described in section 60 of the Act - are deemed to be in need of care and control.

An officer of the Department who is authorised by the Director-General, a police officer or a parent or guardian of the child concerned may apply to the Childrens Court for an order that a child be committed to the care and control of the Director-General.[751] If the Court is satisfied that the child is in need of care and control, it may make various orders to provide for the care and control of the child as set out in section 61(4) of the Act. When the Court orders that a person be committed to the care and control of the Director-General, the guardianship of that person vests in the Director-General.[752] The Court is given further powers to vary and supervise its orders for care and control by section 68.

(iii) The Childrens Court

The jurisdiction under Parts 6 and 7 of the *Children's Services Act 1965* (Qld) is exercised by the Childrens Court, which is constituted under the *Childrens Court Act 1992* (Qld).[753] For matters under Parts 6 and 7 of the *Children's Services Act 1965* (Qld), the Childrens Court may be constituted by a Childrens Court Magistrate, or by any Stipendiary Magistrate if a Childrens Court Magistrate is not available. If neither a Childrens Court Magistrate nor another Stipendiary Magistrate is available, the Court may be constituted by two justices of the peace.[754]

The *Childrens Court Act 1992* (Qld) regulates who may be present in the courtroom when the Court is hearing a matter in relation to a child. Section 20(1) provides as follows:[755]

> In a proceeding before the court in relation to a child, the court must exclude from the room in which the court is sitting a person who is not -
>
> (a) the child; or
>
> (b) a parent or other adult member of the child's family; or

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751 *Children's Services Act 1965* (Qld) s 61(1).

752 *Children's Services Act 1965* (Qld) s 64(1).

753 *Childrens Court Act 1992* (Qld) s 4.

754 *Childrens Court Act 1992* (Qld) s 5(3). For a discussion of the powers of justices of the peace, see Queensland Law Reform Commission, Issues Paper, *The Role of Justices of the Peace in Queensland* (WP 51, February 1998).

755 Section 20(1) of the *Childrens Court Act 1992* (Qld) does not apply to the Court when constituted by a judge exercising jurisdiction to hear and determine a charge on indictment: s 20(5). It would, however, apply to the Court when constituted to hear an application for a care and protection order or a care and control order in relation to a child.

(c) a witness giving evidence; or

(d) if a witness is a complainant within the meaning of the *Criminal Law (Sexual Offences) Act* 1978 - a person whose presence will provide emotional support to the witness; or

(e) a party or person representing a party to the proceeding, including for example a police officer or other person in charge of a case against a child in relation to an offence; or

(f) a representative of the chief executive of the department; or

(g) if the child is an Aboriginal or Torres Strait Islander person - a representative of an organisation whose principal purpose is the provision of welfare services to Aboriginal and Torres Strait Islander children and families; or

(h) a person mentioned in subsection (2) whom the Court permits to be present.

By section 20(2) the Court may permit to be present, amongst others, a person who, in the Court's opinion, will assist the Court.

Section 20(1) is expressed to apply subject to any order made by the Court under section 21A of the *Evidence Act 1977* (Qld)[756] excluding any person from the place in which the Court is sitting or permitting any person to be present while a special witness within the meaning of that section is giving evidence.[757]

(c) The *parens patriae* jurisdiction of the Supreme Court

The Supreme Court of Queensland is vested with a jurisdiction known as the *parens patriae* jurisdiction.[758] This jurisdiction was described by Lord Esher MR in *R v Gyngall* as follows:[759]

> The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child.

Although the jurisdiction has been likened to a parental role, a court acting in its *parens patriae* jurisdiction has wider powers than those of a natural parent.[760] Application may

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756 Section 21A of the *Evidence Act 1977* (Qld) (Evidence of special witnesses) is set out at pp 23-24 of this Discussion Paper.

757 *Childrens Court Act 1992* (Qld) s 20(3).

758 See *Supreme Court Act 1867* (Qld) s 22 and *Carseldine and Another v The Director of the Department of Children's Services* (1974) 133 CLR 345 per McTiernan J at 350.

759 [1893] 2 QB 232 at 241.

760 *Secretary, Department of Health and Community Services v JWB and SMB* (*Marion*'s case) (1992) 175 CLR 218 per Mason CJ and Dawson, Toohey and Gaudron JJ at 258-259.

be made to the Supreme Court of Queensland under its *parens patriae* jurisdiction[761] by anyone with an interest in the welfare of a child.[762] This jurisdiction tends to be used only in exceptional cases, with most matters affecting the welfare of a child being heard either by the Childrens Court or by the Family Court.

(d) Children as witnesses in welfare proceedings

(i) Introduction

Although the *Evidence Act 1977* (Qld) allows children to give evidence,[763] as a general rule, the courts involved in welfare matters discourage children from giving direct evidence in court.

In practice, children rarely give evidence in the Childrens Court, as it is not considered to be in the best interests of the child.[764] The views of the child are usually admitted by reports prepared at the request of the Court.[765]

In New South Wales, there are limitations on children giving evidence before the New South Wales Childrens Court. The Court may consent to a child giving evidence only once it has considered the child's age, maturity, level of understanding, the nature of the evidence, the importance and likely reliability of the evidence and the effect of giving evidence on the child's emotional well-being and relationships with others.[766] A Senior Childrens Court Magistrate, Stephen Scarlett, when commenting on the frequency of use of this section stated that:[767]

> Instances (of requests) are few and far between and we'd consent less often.

In the Family Court, children are similarly discouraged from giving evidence.

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761 It is possible for the *parens patriae* jurisdiction of the Supreme Court to be displaced by legislation. However, it will be displaced only if the legislation in question does so expressly or by necessary or inescapable implication: *Carseldine and Another v The Director of the Department of Children's Services* (1974) 133 CLR 345; *Johnson and Another v The Director-General of Social Welfare (Victoria)* (1976) 135 CLR 92.

762 See for example *Re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185, where an application in the equivalent jurisdiction in England was brought by a service provider. See also *Re X (a Minor) (Wardship: Jurisdiction)* [1975] Fam 47, where an application was brought by the child's stepfather to prevent publication of a book about the child's father which contained material likely to be grossly psychologically damaging to the child.

763 Sections 9, 9A, 21A and 93A of the *Evidence Act 1977* (Qld) apply in "any proceeding", which is defined to include civil as well as criminal proceedings: *Evidence Act 1977* (Qld) s 3.

764 Meeting between representatives of the Commission and Mr Deer CSM and Mr Pascoe SM, Childrens Court Magistrate, 23 April 1998; meeting between representatives of the Commission and McGuire DCJ, President of the Childrens Court, 23 April 1998.

765 *Childrens Court Rules 1997* (Qld) s 22.

766 *Children's Court Rule 1988* (NSW) R 18.

767 "Getting the best value from children's testimony: Advice from the Senior Children's Court Magistrate" 34 *Law Society Journal* (1996) No 11 at 72.

The *Family Law Rules*[768] prevent children from giving evidence or swearing an affidavit without the leave of the Court. Even filing an affidavit by a child without leave has been held to constitute contempt.[769] In this respect, it is similar to the practice followed in the Childrens Court. The Chief Justice of the Family Court, the Honourable Justice Alastair Nicholson, has explained the rationale for generally excluding direct evidence of children as follows:[770]

> A family report prepared by the counselling service is generally considered the most appropriate way of informing decision-making about children [plus, in certain cases, expert evidence!]. Children frequently express a clear wish to Counsellors that they do not want to be drawn into their parents' conflicts, and since the early days of the Court's operation it has been assumed to be undesirable for children to give evidence in proceedings in which they are involved.
>
> ...
>
> A common general objection to permitting the use of children's evidence is the desire to protect them from the distress of cross examination. Family law matters also raise the possibility of parental manipulation and the harm to future family relationships which can follow if they are perceived to be taking sides.

The reasons outlined by Nicholson CJ for excluding direct evidence of children may equally apply to welfare proceedings.

(ii) The use of indirect or hearsay evidence

One way to allow a child's voice to be heard at a trial without the child appearing personally as a witness is by admitting evidence of a third party as to statements made by the child. Such statements would generally be inadmissible as being hearsay.[771] However, the use of indirect evidence may be permitted in welfare proceedings if it is in the best interests of the child. For example, the practice of the Queensland Childrens Court is flexible when the Court hears care and protection proceedings. Section 52(2) of the *Children's Services Act 1965* (Qld) provides:

> Upon every application made to the Childrens Court under this part the court shall determine the matter in the manner which appears to the court to be in the best interests of the child or child in care concerned. [emphasis added]

In *Taylor v L, ex parte L*,[772] the Full Court of the Supreme Court of Queensland

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768 *Family Law Rules 1975* (Cth) O 23 r 5(5).

769 *Cooper and Cooper* [1980] FLC 90-870.

770 Nicholson, the Hon Justice A, Chief Justice of the Family Court of Australia, "Current Family Law and Imminent Changes: Some Implications for Child Psychiatrists" *Bulletin of the Faculty of Child and Adolescent Psychiatry* (May 1996) 2 at 4.

771 See p 120 of this Discussion Paper for an explanation of the rule against hearsay. In civil cases, the Supreme Court of Queensland has the power to dispense with rules of evidence relating to the proof of a fact, if the Court considers that strict proof of the fact might cause unnecessary or unreasonable expense, delay or inconvenience in the proceeding or that the fact is not seriously in dispute: *Rules of the Supreme Court 1900* O 40 r 56.

772 [1988] 1 Qd R 706.

held that the evidence of Departmental officers of statements made to them by a 3 year old girl were admissible in an application for the care and protection of the child as evidence capable of supporting the truth of the child's allegations.[773] In *Gallagher v Brooks & Brooks; ex parte Gallagher*, McPherson J held in relation to the question of admitting hearsay evidence:[774]

> Authority for adopting such a course is found in s 52(2) of the Act, which requires that upon application to the Childrens Court under Part VI the Court is to determine the matter "in the manner" which appears to be in the best interests of the child. If, as may frequently be the case, nothing much else is available, then the best interests of the child will no doubt ordinarily require that the "manner" of determining the matter of the application should not exclude hearsay.

In the United Kingdom in *re K (Infants)*,[775] it was held that in wardship proceedings the welfare of the child is paramount and that the "rules of evidence should serve and certainly not thwart that purpose".[776] On appeal to the House of Lords, Lord Devlin quoted this statement with approval.[777] In relation to the rule against hearsay, Lord Devlin said:[778]

> An inflexible rule against hearsay is quite unsuited to the exercise of a paternal and administrative jurisdiction. The jurisdiction itself is more ancient than the rule against hearsay and I see no reason why that rule should now be introduced into it.
>
> I agree that the liberty to tender hearsay evidence could be abused. I cannot imagine that any judge would allow a grave allegation against a parent to be proved solely by hearsay, at any rate in a case in which direct evidence could be produced. I agree that in such a case if a lot of hearsay material was produced a party might be embarrassed by not knowing what steps he ought to take to meet it. But I think that it is well within the inherent powers of a judge exercising this sort of jurisdiction to deal with such a situation.

Clause 82(1) of the now withdrawn *Children and Families Bill 1997* (Qld) proposed a very broad provision in relation to the receipt of evidence.[779] It provided:

> In a proceeding under this Act, the Childrens Court is not bound by the rules of evidence, but may inform itself in any way it thinks appropriate.

There is some doubt whether such a provision would allow hearsay to be admitted in all cases. For instance, Higgins J of the Supreme Court of the

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773 However, on the facts of the case the child's statements were insufficient to prove abuse by the girl's father.

774 Unreported, Full Ct of Qld, Connolly, McPherson and Williams JJ, No 35 of 1987, 5 May 1988 at 5.

775 [1963] Ch 381.

776 Id per Ungoed-Thomas J at 387.

777 [1965] AC 201 at 240.

778 Id at 242-243.

779 This Bill was withdrawn on 3 March 1998. It would have repealed the *Children's Services Act 1965* (Qld).

Australian Capital Territory stated, in relation to an almost identical section in the *Childrens Services Act 1986* (ACT), that:[780]

> ... it should be recognised that such provisions do not render the rules of evidence irrelevant. They should still be applied unless, for sound reason, their application is dispensed with.

His Honour went on to find that there was no sound reason in that particular case for dispensing with the rules of evidence and held that hearsay evidence in relation to the abuse of children as well as expert opinion evidence should not have been admitted.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recently recommended:[781]

> **Recommendation 171.** The national care and protection standards should specify that direct evidence by a witness should be preferred, except when the witness is the subject child. Hearsay evidence of statements by the subject child should as far as possible be presented in the child's own words.

The Family Court provides children with an opportunity to contribute to the proceedings through a child's representative, who acts as an independent advocate for the child.[782] In rare cases, the judge may interview the child alone in his or her chambers.[783]

In the Family Court, the rule against hearsay has been altered by the insertion of section 100A of the *Family Law Act 1975* (Cth) in 1991. Section 100A provides:

> (1) Evidence of a representation made by a child about a matter that is relevant to the welfare of the child or another child, which would not otherwise be admissible as evidence because of the law against hearsay, is not inadmissible solely because of the law against hearsay in any proceedings under Part VII.
>
> (2) A court may give such weight (if any) as it thinks fit to evidence admitted pursuant to subsection (1).
>
> (3) This section applies in spite of any other Act or rule of law.
>
> (4) In this section:
>
> "child" means a child under 18 years of age;
>
> "representation" includes an express or implied representation, whether oral or in writing, and a representation inferred from conduct. [emphasis

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780 *A and B v Director of Family Services* (1996) 132 FLR 172 at 177.

781 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 444.

782 *Family Law Act 1975* (Cth) s 68L. Formerly called a "separate representative".

783 *Family Law Rules 1975* (Cth) O 23 r 5.

added]

This section was inserted into the *Family Law Act 1975* (Cth) as a result of recommendations made by the Family Law Council in its report on child sexual abuse.[784] In his second reading speech when introducing the Bill, the Attorney-General said:[785]

> One amendment to be made by the Bill will give statutory force to the Family Court's established practice of admitting hearsay evidence of statements made by children to adults about abuse they have suffered. The Family Court already admits evidence of this kind because of its long established policy that children should not be drawn into Family Court proceedings by being called as witnesses for either side in a custody or access dispute. The weight to be given to any hearsay evidence will, of course, remain a matter for the Court to determine in each particular case.

Although the second reading speech speaks specifically of statements made by children about abuse, section 100A is drafted broadly to include "a representation ... about a matter that is relevant to the welfare of the child".

The United Kingdom has also given statutory recognition to this exception to the hearsay rule in the *Children (Admissibility of Hearsay Evidence) Order 1993* (UK).[786] The order provides:

> In civil proceedings before the High Court or a county court and in family proceedings, and civil proceedings under the Child Support Act 1991 in a magistrates' court, evidence given in connection with the upbringing, maintenance or welfare of a child shall be admissible notwithstanding any rule of law relating to hearsay. [emphasis added]

In the United Kingdom the rule against hearsay was abolished for all civil proceedings with the commencement of the *Civil Evidence Act 1995* (UK) on 31 January 1997.

(iii) Criticisms of preventing children from giving evidence

The Chief Justice of the Family Court has expressed concern that by preventing children from giving evidence the Court may be breaching Article 12 of the United Nations *Convention on the Rights of the Child* which provides:[787]

> 1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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784 Family Law Council, *Report on Child Sexual Abuse* (1988) recommendation 14 at para 5.3.4.

785 House of Representatives (Cth), *Parliamentary Debates* (Vol 171 1990) at 664-665.

786 SI 1993/621, made on 3 March 1993 by the Lord Chancellor under s 96(3) of the *Children Act 1989* (UK), commenced on 5 April 1993, and repeals and replaces *Children (Admissibility of Hearsay Evidence) Order 1991* SI 1991/1115.

787 (New York, 20 November 1989): entry into force for Australia 16 January 1991, Australian Treaty Series 1991 No 4.

> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The Chief Justice proceeded to say:[788]

> The need for appropriate safeguards should not prevent us from thinking again about how children who wish to be heard may become directly involved ...

Another commentator has also suggested the possibility of the more direct use of children's evidence with appropriate safeguards:[789]

> It may well be that the way forward will be to seek to have the direct evidence of children, where possible, rather than to follow the course of expanding the use of their indirect statements through adults. This will, one would hope, treat the child as a significant person rather than an object. If a child is capable of giving accurate statements to a welfare officer or a court counsellor, because of the training of those persons, then with appropriate environments and training, the same child should be capable of giving truthful evidence in a court, and protected from the stress of litigation and the rancour of participation.
>
> The direct evidence of a child has the significant advantage of safeguarding against misreporting, manipulative reporting, biased or malicious reporting, and the other evils to which such matters are prey.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have recommended that, in some circumstances, the practice of not calling children to give evidence should be modified:[790]

> The Family Court practice that children generally not be called to give evidence should be retained where the evidence proposed to be given by a child relates to disputes of fact between the parties. However, where the child is of sufficient maturity and is anxious to give evidence concerning his or her wishes about a parenting order the practice should be relaxed.

(iv) Special arrangements to assist children to give evidence personally

The procedures afforded to "special witnesses" by section 21A of the *Evidence Act 1977* (Qld) generally apply in any proceedings. They could, therefore, be used in welfare proceedings to assist children to give evidence personally. However, as previously noted, in practice, the Childrens Court does not allow children to give evidence, as it is considered not to be in the best interests of the child.

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788 Nicholson, the Hon Justice A, Chief Justice of the Family Court of Australia, "Current Family Law and Imminent Changes: Some Implications for Child Psychiatrists" *Bulletin of the Faculty of Child and Adolescent Psychiatry* (May 1996) 2 at 4.

789 Meyer M, "Hearsay evidence in children's matters" in *A family law day: with the Family Law Section of the Law Council of Australia*: CLE Department, College of Law, Sydney (1994) 189 at 205-206.

790 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 151 at 410.

A number of other jurisdictions have similar provisions, which could also be used to assist children to give evidence in proceedings concerning their welfare. The Commission is not aware whether these provisions are used for this purpose:

* *Australian Capital Territory*: The *Evidence (Closed-Circuit Television) Act 1991* requires that, unless the court orders otherwise, the evidence of a child[791] is to be given by means of closed-circuit television, if facilities are available, in certain types of proceedings.[792] Those proceedings include proceedings under Part V of the *Children's Services Act 1986* (ACT),[793] which deals with children in need of care,[794] and proceedings for a protection order under the *Domestic Violence Act 1986* (ACT).[795]

* *South Australia*: The *Evidence Act 1929* (SA)[796] empowers the court to order special arrangements (such as giving evidence by closed-circuit television, the use of screens and a person to provide emotional support) to protect witnesses from embarrassment or distress, from being intimidated by the atmosphere of the courtroom, or for any other proper reason. This provision is not limited to any particular type of proceeding.

* *The Northern Territory*: The *Evidence Act 1939* (NT)[797] provides that a court may order that a vulnerable witness be allowed to give evidence by closed-circuit television, with a screen, and have a support person available or close to the court. These protections are available in any proceeding, including civil proceedings. "Vulnerable witness" is defined to include a witness who is under the age of 16 or who suffers from an intellectual disability.[798]

* *Western Australia*: The *Evidence Act 1906* (WA) provides that a child under 16 is entitled to a support person[799] or a communicator[800] in any proceedings, including civil proceedings. However, the right to give evidence by video-tape or at a pretrial hearing[801] or by way of closed-circuit

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791 *Evidence (Closed-Circuit Television) Act 1991* (ACT) s 2 (definition of "child"), s 3A (definition of "prescribed witnesses").

792 *Evidence (Closed-Circuit Television) Act 1991* (ACT) s 4A.

793 *Evidence (Closed-Circuit Television) Act 1991* (ACT) s 4(1)(d).

794 See for example *Children's Services Act 1986* (ACT) s 78.

795 *Domestic Violence Act 1986* (ACT) s 4.

796 *Evidence Act 1929* (SA) s 13.

797 *Evidence Act 1939* (NT) s 21A(2).

798 *Evidence Act 1939* (NT) s 21A(1).

799 *Evidence Act 1906* (WA) s 106E.

800 *Evidence Act 1906* (WA) s 106F.

801 *Evidence Act 1906* (WA) s 106I.

television or screens[802] is available only in proceedings listed in Schedule 7. Schedule 7 proceedings include care and protection proceedings under the *Child Welfare Act 1947* (WA) as well as proceedings involving specified criminal offences, mainly of a sexual or violent nature.

* *Tasmania*: The *Evidence Act 1910* (Tas) provides that, with the leave of the court, a child may have a support person present when giving evidence in any proceeding.[803] A child must give evidence by closed-circuit television in certain proceedings under the *Child Protection Act 1974* and the *Criminal Code 1924* (Tas).[804]

The provisions of the New South Wales *Crimes Act 1900* allowing for a support person[805] and closed-circuit television[806] apply only in a limited range of civil proceedings, namely those arising from the commission of a personal assault offence and proceedings before the Victims Compensation Tribunal in relation to such an offence. A "personal assault offence" is defined in section 405C of the Act to include "an offence under section 25 (Child abuse) of the *Children (Care and Protection) Act 1987*". It does not appear, however, that the provision would apply generally to welfare proceedings.

In Victoria, the relevant provisions in relation to special arrangements for the giving of evidence apply only in trials for certain criminal offences. They would not, therefore, be of any assistance in welfare proceedings.[807]

(v) Use of pre-recorded evidence

Although evidence of children in civil proceedings was outside the terms of reference of the United Kingdom's Pigot Committee,[808] the Committee proposed that evidence recorded on videotape for criminal proceedings should be made available to civil courts to reduce the number of times a child had to repeat distressing evidence.[809]

The Scottish Law Commission in its *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* recommended that, in civil proceedings, it should be possible to adduce the evidence of children by means of a pre-trial

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802 *Evidence Act 1906* (WA) s 106N.

803 *Evidence Act 1910* (Tas) s 122E.

804 *Evidence Act 1910* (Tas) s 122A (definition of "affected child"), s 122G.

805 *Crimes Act 1900* (NSW) s 405CA.

806 *Crimes Act 1900* (NSW) s 405D.

807 *Evidence Act 1958* (Vic) ss 37B and 37C.

808 Home Office (UK), *Report of the Advisory Committee on Video Evidence* (The Pigot Committee, 1989) at (i).

809 Id at para 7.12.

deposition:[810]

> Provision should be made to enable a child to give evidence by means of a live closed circuit television link or by means of a pre-trial deposition (appropriately adapted for the purpose of civil proceedings) in any case where the child is a witness in civil proceedings, or in a proof before the sheriff under section 42 of the Social Work (Scotland) Act 1968.

(e) Questions for discussion

(1) Should the exception to the hearsay rule that allows statements made by children to be admissible in civil proceedings involving the best interests and welfare of the child be given statutory expression?

(2) Should children be permitted to give evidence personally in proceedings concerning their welfare?

(3) If "yes" to question (2), should the court have a discretionary power to consent or otherwise to a child giving evidence after having taken into account such matters as the child's age, maturity, level of understanding, the nature of the evidence, the importance and likely reliability of the evidence and the effect of giving evidence on the child's emotional well-being and relationships with others?

(4) If "yes" to question (2), and if the following facilities are made available to a child complainant, should any or all of them be available to a child who gives evidence in welfare proceedings:

(a) The option to pre-record any of the child's evidence (for example, evidence-in-chief or both evidence-in-chief and cross-examination)?[811]

(b) The option to admit an out-of-court statement?[812]

(c) The use of closed-circuit television or screens?[813]

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810 Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Report No 125, 1990) recommendation 22 at 35.

811 See the general discussion of this option in Chapter 10 of this Discussion Paper.

812 Ibid.

813 See the general discussion of this option in Chapter 11 of this Discussion Paper.

(d) A support person?[814]

(e) Limiting the number of people who are present when the child gives evidence?[815]

(f) The use of a communicator?[816]

(5) If "yes" to question (4), in what circumstances should these facilities be available? For example:

(a) Should the use of these facilities be mandatory in welfare proceedings?

(b) Should there be a statutory presumption in favour of the use of these facilities in welfare proceedings unless the court is satisfied in a particular case that their use is not warranted?

(c) Should the party calling the witness bear the onus of satisfying the court that the use of these facilities is warranted?

(d) Should the court be able to order the use of these facilities even if no party seeks such an order?

(6) Should evidence recorded on videotapes for criminal proceedings be admissible in civil proceedings to reduce the number of times a child has to repeat the evidence?

(f) An alternative approach: a Children's Tribunal

The Commission has received submissions suggesting that there be a tribunal constituted as a "Children's Tribunal" to deal with at least some of the cases involving the evidence of children.[817]

The most detailed of these submissions suggested a new Children's Tribunal to exercise the jurisdiction in respect of care and protection orders under the *Children's Services Act 1965* (Qld). At present these orders are made by the Childrens Court,

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814 See the general discussion of this option in Chapter 13 of this Discussion Paper.

815 See the general discussion of this option in Chapter 6 of this Discussion Paper.

816 See the general discussion of this option in Chapter 4 of this Discussion Paper.

817 Submissions 15, 22, 42.

constituted by a Childrens Court Magistrate appointed to the Childrens Court.

The submissions do not specifically suggest the introduction of such a specialist tribunal for the trial of persons accused of committing offences against children.

Some of the suggestions with respect to a new Children's Tribunal raise matters that are outside the terms of this reference. Other suggestions involve matters that the State of Queensland alone could not implement. For example, the suggestion that there should be uniform laws and rules with respect to care and protection orders throughout Australia and the further suggestion that the Family Court should refer to such a Children's Tribunal any allegations of child abuse raised before that court, are not matters which could be pursued without the co-operation of the Commonwealth Parliament.

(i) Criticisms of the Childrens Court

A criticism made of the Childrens Court in its "care and protection" jurisdiction is that the proceedings are adversarial in nature, which is said to prevent all relevant information being put before the Court.[818] Of course, the Court can temper the adversarial nature of the proceedings by ordering such investigations and medical examinations as appear necessary or desirable.[819] The Court will then be furnished with reports of such investigations and examinations. These reports are made available to the parties. If the matter proceeds to trial, then the applicant usually subpoenas the authors of the reports to give evidence at the hearing.

(ii) Options for reform

One suggestion is that the tribunal should be constituted by a judicial officer and other professionals of an expertise relevant to the particular case, similar to the way in which the Mental Health Tribunal is constituted. That Tribunal is constituted by a Supreme Court Judge assisted by two psychiatrists.[820] Those psychiatrists are not, however, a constituent part of the tribunal.[821] Proceedings before the Tribunal combine both adversarial and inquisitorial aspects:[822]

> In particular, almost all expert evidence is obtained at the instigation of the tribunal, with the result that expert witnesses are seen to be free of partisan interest. Further all parties have the opportunity to consider the expert reports well in advance and to discuss them with the witnesses.

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818 Submission 22.

819 *Children's Services Act 1965* (Qld) s 49(3).

820 *Mental Health Act 1974* (Qld) s 28B(2).

821 *Mental Health Act 1974* (Qld) s 28B(2A). The Tribunal has powers under the *Commissions of Inquiries Act 1950* (Qld). Proceedings before the Tribunal are deemed to be judicial proceedings and are conducted in open court.

822 Supreme Court of Queensland, *Annual Report 1997-98* at 50. See also Chapter 5 of this Discussion Paper for a discussion of expert evidence.

It is important that the judicial officer constituting whatever tribunal hears applications for care and protection orders should be fully aware of the issues involved.[823] It may be appropriate for the work undertaken by the Childrens Court under the *Children's Services Act 1965* (Qld) to remain with that court, but with alterations to its present procedures and improvement of its resources.

One change that may be appropriate would be to provide for professionals who have the relevant expertise and experience to sit with and assist the court. However, such a requirement could be difficult in its operation in remote areas.

(iii) Questions for discussion

(1) Should the Childrens Court be assisted by professionals with an expertise relevant to the particular case?

(2) Is there a need for a specialised Children's Tribunal to hear matters concerning the welfare of children instead of the Childrens Court?

823 See Chapter 7 of this Discussion Paper for a discussion of the need for judicial awareness.

CHAPTER 18

CHILDREN WITH SPECIAL NEEDS

1. INDIGENOUS CHILDREN AND CHILDREN FROM A NON-ENGLISH SPEAKING BACKGROUND

The difficulties facing indigenous people and people from non-English speaking backgrounds who are called to give evidence in court generally fall into two main categories:

* difficulties associated with language; and

* difficulties associated with cultural characteristics.

The strategies to assist courts receiving evidence from child witnesses discussed earlier in the Discussion Paper are highly relevant, if not more important, for indigenous children and children from a non-English speaking background, who may be doubly disadvantaged by their youth, language or cultural differences.

The discussion in this chapter of the various issues that have the potential to impact on the evidence of Aboriginal witnesses, in particular, draws heavily on the work of the noted linguist, Dr Diana Eades.

(a) Language

Indigenous children often speak a form of English known as Aboriginal English.[824] Like other dialects, Aboriginal English often uses Standard English words to convey different meanings. This can create difficulties because, while the speaker appears to speak English, the language is being used in quite different ways, creating the potential for misinterpretation. Children from a non-English speaking background may also be especially disadvantaged in giving evidence if their level of language comprehension is less than that of other children of that age.

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824 Linguist Diana Eades estimates that at least 93% of Queensland's 61,223 Aborigines use "some kind of English in talking to non-Aboriginal people. But the kind of English that the majority of these people speak is not Standard English. They speak a dialect of English which is distinctly Aboriginal and is thus known as Aboriginal English": Eades D, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: a Handbook for Legal Practitioners* (1992) at 4.

Language problems, if identified, may largely be overcome by the use of interpreters.[825] In criminal proceedings in Queensland, a court may order that a complainant, defendant or witness be provided with an interpreter.[826] However, the onus is on the person requiring the interpreter to show that it would be in the interests of justice for the interpreter to be provided. This is in contrast to several provisions of the *Juvenile Justice Act 1992* (Qld) that impose a positive obligation on the court, where a child is charged with an offence, to ensure that the child understands, as far as practicable, various matters relating to the proceedings.[827] These provisions include the use of an interpreter as an example of steps that may be taken by a court.

It is arguable that the courts should have a more positive obligation to consider the use or interpreters to ensure, as far as practicable, that children - and, in particular, indigenous children and children from a non-English speaking background - who appear as complainants or as witnesses in criminal proceedings, are not disadvantaged in giving evidence.

The Commonwealth and New South Wales have adopted recommendations of the Australian Law Reform Commission[828] with respect to the use of interpreters, and provisions in those jurisdictions' respective *Evidence Acts*[829] allow a witness to give evidence of a fact through an interpreter "unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact". Thus the onus of proof is the reverse of the Queensland provision. The Criminal Justice Commission has recommended that the *Evidence Act 1977* (Qld) be amended to include a provision similar to that in the Commonwealth and New South Wales sections.[830]

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, in their report on children in the legal system, also recommend that children should have the right to an interpreter where a child witness requests or appears to need the assistance of an interpreter.[831]

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825 This area has been examined in detail in numerous reports: Commonwealth Attorney-General's Department, Report, *Access to Interpreters in the Australian Legal System* (1991); Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) at paras 111, 112; Australian Law Reform Commission, Report, *Multi-culturalism and the law* (ALRC 57, 1992) Chapter 3; Australian Law Reform Commission, Report, *Equality Before the Law: Justice for Women* (ALRC 69, 1994) at 136-142; Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Chapter 5; Bureau of Ethnic Affairs and Department of Justice (Qld), *Interpreters and the Courts: A Report into Provision of Interpreters in Queensland's Magistrates Courts* (1997).

826 *Evidence Act 1977* (Qld) s 131A.

827 *Juvenile Justice Act 1992* (Qld) ss 58(3)(c) and 118(2)(c). See pp 204-208 of this Discussion Paper for a discussion of children as accused.

828 Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) at paras 111, 112.

829 *Evidence Act 1995* (Cth) s 30; *Evidence Act 1995* (NSW) s 30.

830 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) recommendations 5.1 and 5.2 at 66.

831 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 117 at 350.

(b) Cultural issues

(i) Introduction

Apart from issues of language, cultural aspects of communication also have the potential to impede an indigenous witness or a witness from a non-English speaking background in giving his or her evidence effectively. People from different cultures use a variety of communication styles that are transparent to people of the same culture, but which may have serious implications for the way evidence is taken and the way it is interpreted by the court and jury.

(ii) Questions and answers

Evidence is usually given in court through the use of a question and answer technique. However, many Aboriginal people do not traditionally use a question-answer mode of communication.[832] Their culture has a strong story-telling and oral tradition and, generally, information is provided and conflicts are resolved through more indirect means. It has been suggested that a "guided narrative" is a more appropriate way for an Aboriginal witness to give evidence.[833] The Commonwealth and New South Wales adopted the recommendation of the Australian Law Reform Commission[834] that evidence be allowed to be given in narrative form, and provisions in the *Evidence Acts* of the two jurisdictions now allow evidence to be given, with the leave of the court, wholly or partly in narrative form.[835]

The Criminal Justice Commission has recommended that the *Evidence Act 1977* (Qld) be amended to allow evidence-in-chief to be given wholly or partly in narrative form.[836] This method of eliciting evidence is described as "guided", as the questioner's role is to elicit the witness's evidence in a natural way, while, at the same time, directing the witness away from inadmissible matters (such as hearsay or prejudicial material).[837] The Criminal Justice Commission did note that possible disadvantages of the narrative method were that it might take longer than the traditional question and answer method, and that the witness might include information that is prejudicial, or not relevant in the legal sense.[838] It suggested, however, that judicial intervention might be able to overcome at

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832 Eades D, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (1992) at 33.

833 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) at 49.

834 Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) Appendix A, *Draft Evidence Bill 1987* cl 33.

835 *Evidence Act 1995* (Cth) s 29; *Evidence Act 1995* (NSW) s 29. The original recommendation of the Australian Law Reform Commission did not impose a requirement to obtain the leave of the court.

836 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) recommendation 4.1 at 51.

837 Id at 49.

838 Id at 50.

least some of these possibilities.

(iii) Silence

Many Aboriginal people use silence differently from members of other cultural groups. Silence is "a positive and normal part of conversation" in Aboriginal English.[839] However, it can be misinterpreted by people unfamiliar with Aboriginal cultures as "evasion, ignorance, confusion, insolence or even guilt".[840]

(iv) Gratuitous concurrence

It has been suggested that some Aboriginal people have a tendency to say "yes" to a question, whether they agree with it or not, particularly when the question is asked by someone in power or in an oppressive environment.[841] This is known as "gratuitous concurrence". There may also be a reluctance on the part of some Aboriginal people to challenge openly statements of those who command respect by reason of age, status or authority.[842]

This tendency can extend to other young people from different cultures who speak English as a second language.[843]

(v) Body language

It is recognised that in many cultures body language is also highly culturally specific. For example, Aboriginal people often avoid eye contact, as they consider sustained eye contact to be rude or threatening, particularly if the other person is older, of the opposite sex, or owed respect for some other reason.[844] Avoiding eye contact can be interpreted by others as rude, evasive or dishonest - as if the witness has something to hide.

(vi) Cultural inhibitions

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839 Eades D, "Cross examination of Aboriginal Children: the Pinkenba Case" (1995) 75 *Aboriginal Law Bulletin* 10 at 11.

840 Eades D, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners (*1992) at 46.

841 Eades D, "Interpreting Aboriginal English in the Legal System", *Report of Proper True Talk National Forum: Towards a National Strategy for Interpreting in Aboriginal and Torres Strait Islander Languages* (1996) at 60; Eades D, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (1992) at 51-54; Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) at 21-22.

842 Cooke M, "Aboriginal evidence in the cross-cultural courtroom" in Eades D (ed), *Language in Evidence: Issues Confronting Aboriginal and Multicultural Australia* (1995) at 87.

843 Working Together (Australia), *Valuing Diversity: Facilitating Cross-cultural Communication and Conflict Resolution* (1996) at para 2.1.3.

844 Eades D, *Aboriginal English and the Law: Communicating with Aboriginal English Speaking Clients: A Handbook for Legal Practitioners* (1992) at 47; Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts (*1996) at 24-25.

In many cultures there may be a reluctance to speak about certain matters, for example sexual assault. The Criminal Justice Commission, in its report on Aboriginal witnesses, referred to a number of submissions made to that Commission that had commented on the difficulty that many Aboriginal women have discussing matters such as sexual assault because they are matters traditionally not discussed with members of the opposite sex.[845]

(vi) Family and kinship

Kinship and family relationships can also be highly relevant to the way people give evidence, particularly children. The Criminal Justice Commission also found that community pressure deterred many Aboriginal women from pursuing complaints against another Aboriginal person, especially where that community was small and close-knit.[846] This factor may also have an impact on the willingness of a child witness to give evidence against a member of his or her family or community.

(c) Options to assist children with special needs to give evidence

(i) Specific power to disallow certain questions

A number of jurisdictions have specific provisions to deal with the types of questions that may be put to witnesses. These may be of assistance in considering how to redress concerns about the language and cultural disadvantages to which some witnesses are subject.

The Commonwealth and New South Wales *Evidence Acts* contain provisions that set out the factors the court is to take into account when deciding whether to allow leading questions[847] in cross-examination. These include the extent "the witness's age, or any mental, intellectual or physical disability to which the witness is subject may affect the witness's answers".[848] The Criminal Justice Commission has recommended that the *Evidence Act 1977* (Qld) be amended to include a similar provision, but that it be extended to include as a further factor to be taken into account:[849]

> ... the extent to which the witness's cultural background or use of language may affect his or her answers.

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845 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) at 94.

846 Id at 95.

847 A leading question is one that suggests a particular answer. The general rule is that leading questions are allowed in cross-examination but not in examination-in-chief.

848 *Evidence Act 1995* (Cth) s 42(2)(d); *Evidence Act 1995* (NSW) s 42(2)(d).

849 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996), recommendation 4.2 at 53.

Section 21B of the *Evidence Act 1939* (NT) contains a more general provision about the sorts of questions that may be put to a child under the age of sixteen. It provides that the court may disallow a question if, having regard to the age, culture and level of understanding of the child, the question is confusing, misleading or phrased in inappropriate language. This gives a court specific power to control proceedings before it.

(ii) Alternative arrangements for special witnesses

The special witness procedures in section 21A *Evidence Act 1977* (Qld) are available to people who, as a result of "cultural differences", are likely to be disadvantaged as a witness. Consequently, a child over twelve who is precluded from claiming the benefit of the provision on the basis of age, may still be eligible to be a special witness on the basis of cultural differences. However the Criminal Justice Commission has found that section 21A is rarely used in this way.[850]

Where a support person is permitted, cultural issues, particularly those relating to gender and kin, should be considered when choosing an appropriate support person. However, in most cases, merely having a person sitting with the child witness will not overcome the language and cultural problems discussed in this chapter. The child needs not only support, but also assistance in understanding the language and procedures of the court and in being understood by the court. A person similar to the child communicator discussed earlier,[851] but who also plays a role as a cultural intermediary, may be of assistance in this respect.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their report on children in the legal system recommended:[852]

> Upon the application of a party or on its own motion, a court should have discretion to permit unconventional means of giving evidence for child witnesses from different cultural backgrounds. In addition, expert evidence explaining cultural behaviours or communication characteristics of a child from a particular cultural background should be admissible.

(iii) Assistance for the court

The Criminal Justice Commission considered the need for a "witness assistant" whose role would be not only to provide support to the witness, but also to clarify uncertainty when the witness was giving evidence.[853]

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850 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts (*1996) at 89-90.

851 See Chapter 4 of this Discussion Paper.

852 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 116 at 350.

853 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts (*1996) at 47.

As early as 1981, Judge McGuire of the District Court suggested an Aboriginal Assistant to the Court who would be present in court during the trial or sentencing of an Aboriginal person. The adviser would be a member of an Aboriginal community who would sit with the judge and would provide information and support to the Aboriginal person, while also advising the court on aboriginal issues.[854] In May 1997, Judge McGuire, as President of the Childrens Court, put these suggestions into practice by inviting Mr Neville Bonner to sit on the Bench with him at a specially convened session of the Childrens Court in the Aboriginal community of Cherbourg.[855]

(iv) Information to jurors

An alternative way of informing the court of cultural issues that may affect the receipt of evidence is for judges to provide jurors with information about relevant language and cultural differences. The Criminal Justice Commission's report on Aboriginal witnesses included an example, based on directions originally developed by Justice Mildren of the Northern Territory Supreme Court, of directions that could be given to juries in cases involving Aboriginal witnesses who speak Aboriginal English or Torres Strait Creole.[856] The proposed directions cover matters such as "Aboriginal English", word meaning, grammar and accents, ways of communicating and hearing problems. The following is an extract of the proposed direction in relation to Aboriginal English:[857]

> 3. Many Aboriginal people in North Queensland, including Aboriginal people of mixed descent, do not speak English as their first language. And many, in all parts of the State, who do speak English as their first language have learnt to speak English in a manner which is different from other speakers of English in Australia: they are speakers of Aboriginal English.
>
> ...
>
> 9. It is very common for Aboriginal people to avoid direct eye contact with those speaking to them, because it is considered to be impolite in Aboriginal societies to stare. On the other hand, in most non-Aboriginal societies people who behave like this might be regarded as shifty, suspicious or guilty. You should be very careful not to jump to conclusions about the demeanour of an Aboriginal witness on the basis of the avoidance of eye contact, as it cannot be taken as an indicator of the Aboriginal witness's truthfulness.

(v) Cross-cultural awareness for lawyers and the judiciary

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854 Submission to the Australian Law Reform Commission by McGuire DCJ, 7 May 1981, published in Childrens Court of Queensland, *First Annual Report* (1993) Chapter 23. Also see the model proposed by Judge McGuire in Childrens Court of Queensland, *Fourth Annual Report* (1996-97) at 27-28.

855 Judge McGuire consulted with Mr Bonner in relation to sentencing options, but made it clear that the final decision rested with him as the presiding judge. See Childrens Court of Queensland, *Fourth Annual Report* (1996-97) at 25. See further discussion in Chapter 17 of this Discussion Paper.

856 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Appendix 4. See also Mildren, the Hon Justice D, "Redressing the imbalance against Aboriginals in the criminal justice system" 21 (1997) *Criminal Law Journal* 7 at 12-13.

857 The proposed directions are set out in Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Appendix 4. Similar directions were formulated for speakers of Torres Strait Creole.

Information sessions on cross-cultural awareness for lawyers and the judiciary, and the availability of court liaison officers of different nationalities to familiarise witnesses with court setting and processes and to liaise with the relevant communities,[858] have been suggested as ways to help overcome the barriers faced by indigenous people and people from non-English speaking backgrounds.[859]

Cross-cultural awareness sessions are arguably desirable so that lawyers and judges may make informed decisions about the needs of witnesses. The Australian Institute of Judicial Administration presently conducts programs for the judiciary promoting cultural awareness.[860] The Queensland Bar Practice Course[861] also contains a component on cross-cultural awareness, as does the Legal Practice course for intending solicitors.[862]

(d) Questions for discussion

(1) What, if any, problems are experienced by indigenous children and children from a non-English speaking background who appear as witnesses in court proceedings in Queensland?

(2) Is there a need to use interpreters to assist indigenous children and children from a non-English speaking background to give evidence?

(3) Is it desirable for the court to have the express power to disallow a question that is put to a child if it is of the view that, having regard to the age, culture and level of understanding of the child, the question is misleading or phrased in inappropriate language?[863]

(4) If a support person[864] is to be used to provide emotional support for a child witness, is it desirable to specify factors (for example, cultural issues, gender, family relationships and religious beliefs) that should be taken into account by the court in choosing a support person?

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858 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts (*1996) at 83-86.

859 Id at Chapter 3.

860 Id at 32-34.

861 Completion of this course is a prerequisite for admission as a barrister.

862 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts (*1996) at 38.

863 See *Evidence Act 1939* (NT) s 21B.

864 See Chapter 13 of this Discussion Paper for a discussion of the role of support persons.

(5) To what extent should the child's wishes be taken into account in deciding on the most appropriate support person for the child?

(6) What other factors should be taken into account in choosing a support person?

(7) Is it desirable to use a child intermediary or communicator with relevant cultural knowledge and experience when indigenous children and children from a non-English speaking background give evidence?

2. CHILDREN WITH DISABILITIES

(a) Introduction

If a child has a disability over and above any disability associated with his or her age and level of maturity, it may be particularly difficult for a court to obtain the best possible evidence from that child. Barriers faced by a child with a disability may include: a perception that the evidence of the child is unreliable; and specific problems in communication which arise from his or her disability.[865]

In Queensland to date, apart from fairly wide discretionary provisions,[866] little attention has been paid by the legislature to the particular difficulties people with disabilities may have when faced with the prospect of giving evidence in court. Those disabilities may be as varied as intellectual disabilities, mental illness, psychological difficulties or physical disabilities. The difficulties faced by those people may vary from not being able to communicate their evidence to court in the usual way because of a physical disability, to not being able to face the accused in court because of a particular fear of seeing the person accused of assaulting him or her.

(b) Application of existing provisions to children with disabilities

Section 21A of the *Evidence Act 1977* (Qld) enables a "special witness", at the discretion of the court, to present his or her evidence in a variety of ways. A "special witness" is defined to include:

> (a) a child under 12 years; or
>
> (b) person who, in the court's opinion -
>
> (i) would, as a result of intellectual impairment or cultural differences, be

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865 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at paras 14.126, 14.129.

866 *Evidence Act 1977* (Qld) ss 21A and 93A.

likely to be disadvantaged as a witness; or

(ii) would be likely to suffer severe emotional trauma; or

(iii) would be likely to be so intimidated as to be disadvantaged as a witness;

if required to give evidence in accordance with the usual rules and practice of the court.

Section 93A of the *Evidence Act 1977* (Qld) provides that an out-of-court statement of a child under 12 years of age or of an older child or adult who is "intellectually impaired" may, at the discretion of the court, be admitted as evidence of the fact sought to be established.[867] The operation of that section is, however, restricted by the qualifications to which it is subject, in particular, that the statement was made soon after the occurrence of the fact or was made to a person investigating the matter to which the proceeding relates,[868] and that the child or intellectually impaired person is available to give evidence in the proceeding.[869]

The use of the facilities referred to in sections 21A and 93A of the *Evidence Act 1977* (Qld) is entirely at the discretion of the court. Neither section 21A nor section 93A refers expressly to the situation of a child with a physical disability. Further, it is not clear whether the references in those sections to "intellectual impairment" would encompass psychological conditions that might prevent some children from presenting their best possible evidence.

(c) Reform and proposals for reform elsewhere

In order to overcome the discounting of evidence by a person with an intellectual disability, the New South Wales Law Reform Commission recommended the admission of certain expert evidence:[870]

> On application by a party, the trial judge should have the power to allow expert evidence to be led to explain the characteristics and demeanour of a witness with an intellectual disability if his or her characteristics and demeanour are outside normal experience.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, in their report on children in the legal system, recommended that a court should be able to allow unconventional means of giving evidence for children with disabilities.[871]

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867 Section 93A of the *Evidence Act 1977* (Qld) is discussed in detail in Chapter 10 of this Discussion Paper.

868 *Evidence Act 1977* (Qld) s 93A(1)(b).

869 *Evidence Act 1977* (Qld) s 93A(1)(c).

870 New South Law Reform Commission, Report, *People with an Intellectual Disability and the Criminal Justice System* (Report 80, 1997) recommendation 31 at 254.

871 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) recommendation 118 at 352.

(d) Questions for discussion

(1) Are sections 21A and 93A of the *Evidence Act 1977* (Qld) broad enough to apply to children with differing special needs?

(2) What facilities or procedures could assist children with special language, cultural, developmental, physical, emotional or other needs to give their evidence?

(3) Should the use of such facilities or procedures be mandatory in the case of children with special needs, or should it remain in the discretion of the court?

(4) Should the court have the power to allow expert evidence to be led to explain the characteristics and demeanour of a witness with a disability if the witness's characteristics and demeanour are outside normal experience?[872]

872 See the recommendation made by the New South Wales Law Reform Commission, which is set out at p 238 of this Discussion Paper.

CHAPTER 19

SIMILAR FACT EVIDENCE, SEPARATE TRIALS AND MULTIPLE OFFENCES

1. INTRODUCTION

Sometimes, a person who is charged with an offence involving a child will already have a conviction for a similar offence. Alternatively, a person may be the subject of similar allegations by more than one complainant. In such circumstances, the court must determine whether evidence of the prior conviction or of the other allegations should be admitted into evidence as proof of the offence with which the accused is charged. If a number of complaints are made against the accused, the court must also determine whether those charges should be dealt with in one trial, or whether there should be separate trials for each charge.

Evidence of this type - which discloses the commission of offences other than those with which the accused is charged - is generally referred to as similar fact evidence or propensity evidence.[873] Questions about its admissibility - in particular, whether it should be admissible and, if so, what the test of its admissibility should be - are significant in two respects:

* **Corroboration of the child's evidence**

Evidence of convictions for similar offences, or of allegations of other similar conduct, if admitted, must inevitably strengthen the prosecution's case by bolstering the credibility of the child witness.[874] Further, in some cases where the child is too young to give evidence, the admission of such evidence could, depending on the circumstances, constitute important circumstantial evidence

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873 In *Pfennig v The Queen* (1995) 182 CLR 461, Mason CJ, Deane and Dawson JJ (at 464-465) made the following observation about the terms "propensity evidence" and "similar fact evidence":

> This appeal raises questions as to the admissibility of what has been described as propensity or similar fact evidence and the use to which it can be put. There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive. The term "similar fact" evidence is often used in a general but inaccurate sense.

874 Prior to the amendment of s 9 of the *Evidence Act 1977* (Qld) in 1989 (by s 61 of *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld)), the admissibility of similar fact evidence had a particular significance in relation to the corroboration of a child's evidence. Prior to the amendment of s 9, if the evidence of a child was admitted under that section, the judge was required to warn the jury of the danger of acting on that evidence unless they found that the child's evidence was corroborated in some material particular by other evidence implicating the accused. If evidence of other conduct of the accused was admissible in a particular case, it would provide the necessary corroboration so that the judge did not have to give the warning to the jury. Where a case would otherwise have been a contest between "the word of the child" and "the word of the accused", the admission of other evidence was obviously advantageous to the prosecution case.

tending to prove the guilt of the accused. For these reasons, the admission of this type of evidence is likely to be sought by the prosecution and resisted by the defence.

*** Multiple appearances in court**

If the complaints of a number of children against the one person may not be heard in the one trial, it will be necessary for a child who is a complainant in respect of one charge and a witness in respect of a second charge involving a different child to give evidence at both trials.[875] The Commission has previously discussed the trauma that may be suffered by a child who is required to give evidence on a number of occasions.[876] Further, the more often a child is required to repeat his or her evidence, the greater the possibility of inconsistencies arising, leading to the perception that the child is an unreliable witness.

2. THE ADMISSIBILITY OF SIMILAR FACT OR PROPENSITY EVIDENCE

(a) Introduction

The rule about the exclusion of propensity or similar fact evidence is a general rule of evidence. It is not a rule that operates only in cases involving allegations of offences against children. It is, however, the rule's effect in those cases with which the Commission is concerned in this reference.

(b) Reasons for the general exclusion of similar fact or propensity evidence

As a general rule, evidence is not admissible if it proves only that the accused has the propensity or disposition to commit a crime or a particular crime. The main reason for its exclusion is the prejudicial effect it may have on the mind of the jury. This was explained in *Pfennig v The Queen*[877] as follows:[878]

> Propensity evidence (including evidence of bad disposition and prior criminality) has always been treated as evidence which has or is likely to have a prejudicial effect in the sense explained. That is because the ordinary person naturally (a) thinks that a person who has an established propensity whenever opportunity arises has therefore yielded to the propensity in the circumstances of the particular case and (b) may ignore the possibility that persons of like propensity may have done the act complained of.

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875 See the discussion of the question of joint or separate trials for multiple offences at pp 254-258 of this Discussion Paper.

876 See Chapter 14 (Committals), Chapter 8 (Delays) and Chapter 10 (Out-of-Court Statement) of this Discussion Paper.

877 (1995) 182 CLR 461.

878 Id per Mason CJ, Deane and Dawson JJ at 488.

Other reasons advanced for the exclusion of propensity evidence include:[879]

* trials would be lengthened and expense incurred, often disproportionately so, in litigating the acts of other misconduct;

* law enforcement officers might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter; and

* rehabilitation schemes might be undermined if the accused's criminal record could be used in evidence against him or her.

(c) Basis for admissibility: the objective improbability of an innocent explanation

Despite the general rule, evidence of a person's propensity to commit a crime may nevertheless be admissible if the evidence possesses certain other qualities. Specifically, propensity or similar fact evidence will be admissible if it possesses a particular probative value or cogency such that, if accepted, it is objectively improbable that it has an innocent explanation; that is, that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.[880]

The strength of its probative force is sometimes said to lie in the fact that the evidence reveals "striking similarities", "unusual features", "underlying unity", "system" or "pattern" such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.[881] Striking similarity, underlying unity and other like descriptions of similar facts are not essential to the admission of such evidence, although the evidence will usually lack the requisite probative force if the evidence does not possess those characteristics.[882]

(d) Application of the admissibility test to undisputed facts and disputed facts

The test of the objective improbability of an innocent explanation applies both in cases where the similar facts are not in dispute (for example, where there is a conviction) and in cases where the similar facts are in dispute (for example, where there is a number of similar allegations of misconduct, all of which are denied), although the courts have drawn a distinction between these two types of cases.[883]

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879 Id per McHugh J at 513.

880 In *Pfennig v The Queen* (1995) 182 CLR 461 Mason CJ, Deane and Dawson JJ (at 481-482) endorsed this principle, which is derived from the judgment of Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen* (1988) 165 CLR 292 at 294.

881 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 294-295.

882 *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 484.

883 See *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482.

In relation to propensity or similar fact evidence that is not in dispute, the High Court has emphasised the importance of the accused's connection with the happening of one or more of those similar facts as supporting the inference that the accused is guilty of the offence charged:[884]

> Where the happening of the matters said to constitute similar facts is not in dispute and there is evidence to connect the accused person with one or more of the happenings evidence of those similar facts may render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously. The similar fact evidence is then admissible as evidence relevant to that issue.

Where the conduct said to constitute the propensity or similar fact evidence is in dispute, it may nevertheless be relevant to prove the commission of the acts charged.[885] For example, in *Hoch v The Queen*,[886] three boys who were living in a children's home made similar allegations of indecent dealing against the accused, who worked at the home. The accused denied the allegations. The Court made the following observation about the value of allegations of similar offences, the occurrence of which were themselves in dispute:[887]

> Where, as here, an accused person disputes the happenings which are said to bear a sufficient similarity to each other as to make evidence on one happening admissible in proof of the others, similar fact evidence bears a different complexion for the issue is whether the acts which are said to be similar occurred at all. ... [T]he better view would seem to be that it is relevant to prove the commission of the disputed acts: see *Boardman*, per Lord Hailsham and Lord Cross; *Sutton* per Deane J. Certainly that is the thrust of its probative value. That value lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred. [notes omitted]

(e) The possibility of collusion between witnesses

Although one possibility to account for the similarity between allegations made by different witnesses is that the events complained of occurred as alleged, an alternative possibility - which could also account for the similarity between the allegations - is that the witnesses have colluded in their evidence.

In Queensland, it is now the law that the possibility of collusion will not of itself preclude what would otherwise constitute similar fact evidence from being admitted into evidence. It is for the jury to decide what weight, if any, to attribute to the evidence.

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884 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 295.

885 *Reg v Boardman* [1975] AC 421 at 452, 458-459; *Sutton v The Queen* (1984) 152 CLR 528 at 556-557; and *Hoch v The Queen* (1988) 165 CLR 292 at 295, cited with approval in *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482.

886 (1988) 165 CLR 292.

887 Id per Mason CJ, Wilson and Gaudron JJ at 295. This principle was cited with approval in *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482-483.

Section 132A of the *Evidence Act 1977* (Qld) provides:[888]

> In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

Section 132A was inserted in 1997[889] following a recommendation in 1996 by the Criminal Code Advisory Working Group that the *Evidence Act 1977* (Qld) should be amended to overcome the decision of the High Court of Australia in *Hoch v The Queen*,[890] insofar as that decision applies to the possibility of concoction by witnesses.[891]

As mentioned above,[892] *Hoch*'s case concerned similar allegations of indecent dealing that were made by three boys. Although the Court held that the value of disputed similar facts lay in the improbability of witnesses giving accounts with the requisite degree of similarity unless the alleged happenings had occurred,[893] it went on to hold that the possibility of concoction could deprive the evidence of its probative value and render it inadmissible:[894]

> Similar fact evidence which does not raise a question of improbability lacks the requisite probative value that renders it admissible. ...
>
> [T]he evidence, being circumstantial evidence, has probative value only if it bears no reasonable explanation other than the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view - viz. joint concoction - is inconsistent both with the guilt of the accused person and with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility.

On the particular facts of *Hoch*'s case, the Court held that the three complainants had a close relationship (two were brothers and the third was a friend), as well as the opportunity to concoct their accounts. There was also evidence that one complainant

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888 See the suggestion that the effect of s 132A of the *Criminal Code* (Qld) is unclear in Franco P, "Pfennig Re-visited: Propensity Evidence in Queensland" (1988) 18 *The Queensland Lawyer* 169 at 175. It is suggested in that article that the effect of the section is unclear as it "was obviously drafted in response to the decision in *Hoch* and does not account for the more recent decision in *Pfennig*".

889 By the *Criminal Law Amendment Act 1997* (Qld) s 122 and Schedule 2.

890 (1988) 165 CLR 292.

891 See *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996) at 114-116. To the extent that *Hoch*'s case propounded the general test for the admissibility of similar fact evidence that was endorsed by the majority decision of the High Court in *Pfennig*'s case, it is still good law. It is only its effect where there is a possibility that witnesses have colluded in giving their similar accounts of events that has been changed in Queensland by the enactment of s 132A. The provision recommended by the Criminal Code Advisory Working Group (at 116) is cast in slightly different terms from s 132A, although it is intended to redress the same deficiency in the law.

892 At p 243 of this Discussion Paper.

893 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 295.

894 Id at 295-296.

had antipathy towards the accused even before the events the subject of the charges were alleged to have taken place. On that basis, the Court held that the evidence of each of the three complainants lacked the requisite probative force necessary to render it admissible as similar fact evidence in relation to the other offences charged.[895]

The Criminal Code Advisory Working Group was critical of this aspect of *Hoch*'s case:[896]

> Obviously enough, if the jury is ultimately not satisfied that the similar fact evidence was not concocted it will reject it. Such evidence is worthless. However to require the judge to exclude it because there is a mere possibility, not be it noted a probability or even a real chance of concoction, or other "infection" is quite unrealistic and sets up an almost insurmountable barrier against the reception of evidence which, if truthful, is almost overwhelming. It is commonplace for evidence which is strongly contested to become a central issue in a trial, its acceptance or rejection being a question for the jury. However, the requirement of disproof of a mere possibility is unknown to the common law.

When similar allegations are made by children who are siblings or friends, it is easy to allege that they have had an opportunity to collude in giving their accounts of events.[897] However, as a result of the recent amendment to the *Evidence Act 1977* (Qld), whether in fact there has been collusion will be a question for the jury. The mere possibility of collusion will not now prevent the similar fact evidence of one child from being admitted to prove the complaint made by another child.

(f) Flexibility of the rule

The rule dealing with the admissibility of similar fact or propensity evidence is undoubtedly complex. Its effect in any given case will depend very much on the facts of that case. This should not be seen necessarily as a defect in the rule. The value of the rule lies in its flexibility to serve two competing purposes: to admit evidence that is genuinely relevant to the question of the accused's guilt; and to exclude evidence that is simply prejudicial to the interests of the accused. The scope of the rule can be seen in its application to different types of evidence.

* *Evidence of a relevant conviction*

In *Pfennig v The Queen*,[898] the accused was convicted of the murder of a boy whose body was never found. At the trial, evidence was admitted that one year

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895 Id at 297. Because the evidence of each complainant was inadmissible in relation to the other charges, the Court held (at 297) that there had been a miscarriage of justice in refusing the application by the accused's counsel at the trial for each boy's allegations to be the subject of a separate trial. See p 255 of this Discussion Paper as to the relationship between the similar fact rule and the requirement, in certain circumstances, for multiple charges to be tried separately.

896 *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996) at 115.

897 This observation was made by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.87. See p 257 of this Discussion Paper.

898 (1995) 182 CLR 461.

after the disappearance of the boy M, the accused had been convicted of the abduction and sexual assault of another boy H and that, when arrested for the abduction of H, he said to his then wife that "he was lonely and had been thinking of 'it' on and off for the past twelve months".[899] On the facts of the case, there were sufficient similarities between the disappearance of M and the abduction of H that, combined with the fact that the accused was seen talking to M shortly before his disappearance, the Court held that evidence of the accused's subsequent conviction and of the statement made to his wife had been properly admitted into evidence.

* *Evidence of uncharged acts involving the one complainant*

In *R v Wackerow*,[900] the accused was convicted on two charges of indecently dealing with a girl, the two offences occurring some years apart. The accused appealed against the conviction, arguing that the girl should not have been permitted to give evidence of acts of indecent dealing other than those with which he was charged. That argument was rejected by the Court of Appeal. In weighing the probative value against the prejudicial effect of the similar fact evidence in that case, Byrne J held:[901]

> In this case, the risk of prejudice to a fair trial was slight. The evidence objected to was that of the complainant herself, and it related to sexual activity no more serious than that charged. The additional evidence was in narrow compass and presented no appreciable risk that it might lead to confusion or distract the jury from its proper functions. All considered, the testimony concerning the uncharged incidents was most unlikely to lead the jury to convict without being convinced that the evidence about the offences charged was truthful ... On the other hand, her testimony about the other incidents had probative worth beyond its tendency to prove a relevant propensity. It may have helped to persuade the jury of the accuracy of her account of the two charged offences for a reason other than that it portrayed the appellant as someone disposed to deal indecently with her. The other sexual activity indicated an ongoing sexual attraction. It could have resolved any doubts concerning the reliability of her account of the two incidents charged that might otherwise have arisen from restricting the evidence to telling of isolated acts occurring some time apart.

* *Evidence of similar, but disputed, allegations by a number of complainants*

In *Hoch v The Queen*,[902] three boys gave evidence that the accused had sexually assaulted them. The evidence of each boy was strikingly similar to that of the others. Although the Court held that, because of the possibility of concoction, the evidence of each boy was wrongly admitted to prove the other charges, the changes made by section 132A of the *Evidence Act 1977* (Qld) to the similar fact rule would now mean that, on the facts of that case, the evidence of each boy would by admissible on all charges. It would be for the jury to

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899 Id at 487.

900 [1998] 1 Qd R 197.

901 Id at 209.

902 (1988) 165 CLR 292. See the discussion of this case at pp 243-245 of this Discussion Paper.

decide whether in fact the similarities between the boys' allegations were the result of collusion.

(g) A special similar fact rule for particular offences in relation to children?

(i) The Sturgess recommendations

In his final report, *An Inquiry into Sexual Offences Involving Children and Related Matters*, Mr Des Sturgess QC, the then Director of Prosecutions, was critical of the similar fact rule:[903]

> [M]any times it shuts out evidence of considerable probative value and denies to the prosecution the right to produce the only corroborative evidence[904] available. [note added]

Sturgess recommended that the following special "similar fact" provisions apply in prosecutions for incest (or attempted incest) and for sexual offences involving children:[905]

> **Similar fact evidence in incest.**
>
> (1) Subject to subsection (2) in the prosecution of a person for incest or attempted incest evidence of a similar fact involving the person with whom it is alleged the incest occurred or the attempt was made or some other person shall be admitted.
>
> (2) Nothing in subsection (1) shall affect the discretion of the court to exclude the evidence on the ground of unfair prejudice.
>
> (3) If it is alleged the person with whom the incest that is charged was committed or attempted was a child the court, when considering whether it should exercise its discretion to exclude the evidence, shall take into account -
>
> (a) the age of the child and any difficulty the child has in appearing in court or giving full evidence;
>
> (b) the requirement for or the desirability of corroboration of the prosecution case and whether there exists other evidence capable of amounting to corroboration; and
>
> (c) whether the circumstances of the alleged offence are such it is impossible for the prosecution to produce other eye witnesses who are not children.
>
> **Similar fact evidence in sexual offences involving children.**

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903 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at para 7.126.

904 See note 874 of this Discussion Paper as to the significance of corroborative evidence at the time Sturgess delivered his Report.

905 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at para 7.161.

(1) Subject to subsection (2) in the prosecution of a person for an offence of a sexual nature against a child evidence of a similar fact involving that child or some other person shall be admitted provided it tends to identify the person charged as a person who does not accept or disregards usual community standards with respect to the involvement of children in sexual activity.

(2) Nothing in subsection (1) shall affect the discretion of the court to exclude the evidence on the ground of unfair prejudice.

(3) The court, when considering whether it should exercise its discretion to exclude the evidence, shall take into account -

(a) the age of the child and any difficulty the child has in appearing in court or giving full evidence;

(b) the requirement for or the desirability of corroboration of the prosecution case and whether there exists other evidence capable of amounting to corroboration; and

(c) whether the circumstances of the alleged offence are such it is impossible for the prosecution to produce other eye witnesses who are not children.

Incest

Sturgess's first recommendation - in relation to prosecutions for incest - would seem to be based solely on propensity reasoning:[906]

> In any incest case, one would think, the real evidentiary value of the evidence of other acts of incest with other daughters is, if it is accepted, it shows the defendant disregards one of the most strongly and widely held taboos, the incest taboo. If a defendant in an incest case had stated he did not recognise the taboo, no one could argue that that evidence would not be of great probative value. And, as actions often speak louder than words, evidence of other acts of incest involving the other persons would be admissible on the same footing.

In making this recommendation, Sturgess was particularly concerned with the decision of the then Queensland Court of Criminal Appeal in the case of *R v Kelly*.[907] In that case, the Court held that, on the trial of the accused on a charge of incest of his daughter, evidence by another daughter of acts of incest upon her had been wrongly admitted. As a result, the conviction was quashed and a new trial was ordered, although the new trial never eventuated.[908] Thomas J held in that case:[909]

> The general principle justifying reception of such evidence depends upon the improbability that a certain series of events would occur in similar circumstances

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906 Id at para 7.134.

907 [1984] 1 Qd R 474.

908 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at para 7.130.

909 *R v Kelly* [1984] 1 Qd R 474 at 476.

> merely by coincidence, in which case such evidence may have probative force.
>
> The present evidence does not fall into any of the above categories. Nor does it satisfy the general principle. The well-known decision of *R. v. Ball* ... permits evidence of prior acts in the relationship between the two people involved in the eventual offence. But a man's passion for B tells nothing of his passion for A ... It follows that in the normal run of cases evidence of prior acts by a father with daughter B will not be admissible on a charge of incest with daughter A.

Other sexual offences

Sturgess's second recommendation - in relation to prosecutions for other sexual offences against children - would be very broad in its application. In particular, to base the admission of evidence on the fact that it "tends to identify the person charged as a person who does not accept or disregards usual community standards with respect to the involvement of children in sexual activity" would seem to render admissible evidence that did not connect the accused with the commission of the offence, but simply identified the accused as the sort of person who might commit such an offence.

Legislative response to the Sturgess recommendations

Neither of these recommendations was adopted in 1989 when a number of other recommendations made by Sturgess were implemented by amendments to the *Evidence Act 1977* (Qld).[910] In the Second Reading Speech for the *Criminal Code, Evidence Act and Other Acts Amendment Bill 1989* (Qld), the Honourable Brian Austin MLA, explained this decision in terms of the potential prejudice to the accused:[911]

> As a result of many representations made concerning the proof of propensity to commit offences which was drafted on the basis of recommendations made by the Director of Prosecutions, it has been decided to not continue with this proposal as it had the potential to unfairly prejudice an accused person.

(ii) The provisions of the *Evidence Act 1995* (Cth)

Part 3.6 of the *Evidence Act 1995* (Cth) deals with the admissibility of propensity or similar fact evidence in proceedings to which that Act applies.[912] It is outside the terms of the Commission's reference to review generally the law in relation to propensity evidence. However, if it is thought that some reform of the law in this area is required insofar as it applies in the context of offences involving children, it would be possible to model new provisions on the relevant provisions of the *Evidence Act 1995* (Cth), but limit their application to certain categories

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910 The *Evidence Act 1977* (Qld) was amended by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).

911 Legislative Assembly (Qld), *Weekly Hansard* (24 November 1988) at 3261.

912 The Act applies to all proceedings in a federal court or in a court of the Australian Capital Territory: see *Evidence Act 1995* (Cth) s 4.

of offences.[913]

The material provisions are sections 97, 98 and 101 of the *Evidence Act 1995* (Cth).[914] Those sections provide:[915]

> **97. The tendency rule**
>
> (1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:
>
> (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
>
> (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.
>
> (2) Paragraph (1)(a) does not apply if:
>
> (a) the evidence is adduced in accordance with any directions made by the court under section 100; or
>
> (b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.
>
> Note: The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.
>
> **98. The coincidence rule**
>
> (1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:
>
> (a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence; or
>
> (b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

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913 With the exception of s 101 of the *Evidence Act 1995* (Cth) - which applies only in a criminal proceeding - the provisions of Part 3.6 of that Act are of general application. Their operation is not limited in any way to particular types of offences.

914 Other sections of Part 3.6 deal with notice requirements (s 99) and when the court may dispense with the notice requirements (s 100).

915 These sections are virtually identical to ss 97, 98 and 101 of the *Evidence Act 1995* (NSW).

(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:

(a) they are substantially and relevantly similar; and

(b) the circumstances in which they occurred are substantially similar.

(3) Paragraph (1)(a) does not apply if -

(a) the evidence is adduced in accordance with any directions made by the court under section 100; or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note: Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

101. Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant. [emphasis added]

Section 97 (the tendency rule) deals with what would usually be categorised as propensity evidence. Section 98 deals with what would usually be categorised as similar fact evidence.[916] The general effect of these provisions, in conjunction with section 101, is that for evidence of this type to be admissible in a criminal proceeding:

* the party wishing to call the evidence must give reasonable notice in writing of his or her intention to call the evidence;[917] and

* the probative value of the evidence must substantially outweigh any prejudicial effect it may have on the defendant.[918]

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916 See, however, note 873 of this Discussion Paper as to the High Court's comments about the categorisation of, and the relationship between, these types of evidence.

917 *Evidence Act 1995* (Cth) ss 97(1)(a), 98(1)(a).

918 *Evidence Act 1995* (Cth) s 101.

This test of admissibility is arguably less stringent than the common law test, in that, if the evidence has only a slightly prejudicial effect, its probative value would not have to be as high as it would have to be for the evidence to be admissible at common law.

The test found in the *Evidence Act 1995* (Cth) is quite close to that suggested by McHugh J in *Pfennig v The Queen*.[919] In a minority judgment, McHugh J doubted that the test for admissibility propounded by the majority of the Court in that case[920] would always be warranted,[921] particularly in cases where the risk of prejudice to the accused was small:[922]

> If the risk of an unfair trial is very high, the probative value of evidence disclosing criminal propensity may need to be so cogent that it makes the guilt of the accused a virtual certainty. In cases where the risk of an unfair trial is very small, however, the evidence may be admitted although it is merely probative of the accused's guilt. Each case turns on its own facts.

In cases of sexual offences involving children, however, it is arguable that the risk of prejudice in admitting propensity evidence is so high that, in order to substantially outweigh any prejudicial effect it may have on the accused, it would have to be so highly probative that it would pass the common law test in any event.

(h) Questions for discussion

(1) Is there a concern about how the common law test as to the admissibility of propensity evidence operates in cases concerning sexual offences against children?

(2) If "yes" to question (1), what is the nature of that concern?

(3) If "yes" to question (1), should the common law be modified:

(a) By the adoption of either, or both, of the Sturgess recommendations?[923]

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919 (1995) 182 CLR 461. *Pfennig*'s case did not, however, impose any requirement to give notice to the other party of the intention to call the evidence. That requirement is a statutory innovation.

920 See p 242 of this Discussion Paper for a discussion of the admissibility test based on the objective improbability of an innocent explanation.

921 *Pfennig v The Queen* (1995) 182 CLR 461 at 530.

922 Id at 529.

923 The recommended provisions are set out at p 248 of this Discussion Paper and discussed at p 249.

(b) By the adoption of provisions based on sections 97, 98 and 101 of the *Evidence Act 1995* (Cth), but modified so as to apply only to certain offences involving children?

(c) In some other, and, if so, what, way?

(4) If the common law test for admissibility of propensity evidence is to be modified, to what types of offences should the modified test apply?

3. SEPARATE TRIALS

(a) Introduction

When a person is charged with a number of offences, a question arises as to whether all the charges should be heard in the one trial, or whether they should be the subject of separate trials.

(b) Statutory provisions

Generally, an indictment[924] should contain only one charge against an accused person.[925] However, in certain circumstances charges for more than one indictable offence may be joined in the one indictment. Section 567(2) of the *Criminal Code* (Qld) provides:

> Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.

However, the fact that a number of charges may be joined in the one indictment does not mean that all the "counts"[926] in the indictment must, or should, be heard together in the one trial. The *Criminal Code* (Qld) authorises the court to order a separate trial of any count or counts in an indictment where the joinder of those counts could prejudice the accused's defence. Section 597A(1) provides:

> Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in the person's defence by reason of the person's being charged with more than 1 offence in the same indictment or that for any

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924 An indictment is a document that contains details of the charges made against the accused: see s 1 of the *Criminal Code* (Qld).

925 *Criminal Code* (Qld) s 567(1).

926 Where more than one offence is charged in the same indictment, each offence shall be set out in the indictment in a separate paragraph called a "count": *Criminal Code* (Qld) s 567(3).

> other reason it is desirable to direct that the person should be tried separately for any 1 or more than 1 offence charged in an indictment the court may order a separate trial of any count or counts in the indictment.

(c) Prejudice

In *De Jesus v R*,[927] the High Court held that, particularly in relation to charges of sexual offences, if a person is charged with a number of offences, the charges should be tried separately if the evidence in relation to one charge would not be admissible in relation to the other charges.[928] The Court recognised the prejudice that would result if evidence that was not admissible to prove one offence could nevertheless be heard by the jury by reason only that it was admitted to prove another offence that was being tried with that offence:[929]

> [I]t is clear that the very nature of some offences is such that as a general rule they should not be tried together because of the risk of prejudice where the evidence admissible in proof of one is not admissible in proof of the other.
>
> The risk of prejudice is, of course, the risk that, notwithstanding any direction to the jury to consider the offences separately, they will treat the evidence upon one charge as evidence of similar facts in support of the other.

The issue would not arise if, on the facts of the particular case, the rule about similar fact evidence would permit the same evidence to be admitted in relation to both charges; even if separate trials were held, the evidence in relation to one offence could be admitted in the trial in relation to the other offence as tending to prove the commission of that offence:[930]

> Where evidence of the commission of one offence is, upon such a basis [that is, it is sufficiently probative to be admissible as similar fact evidence], admissible in proof of the commission of another, there will be nothing to be gained by directing separate trials because the same evidence would be admissible in each trial. [words in square brackets added]

If the rule about the necessity for separate trials were otherwise, it would defeat the object of the similar fact rule. A jury could be exposed to inadmissible evidence - inadmissible because it was not sufficiently probative - simply as a consequence of certain offences being tried together.

(d) Criticisms of the rule about separate trials

Three preliminary submissions to the Commission raised the issue of joint or separate

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927 (1986) 68 ALR 1.

928 Id per Gibbs CJ at 5, per Brennan J at 12, and per Dawson J at 16. This rule, therefore, requires the application of the similar fact rule to determine the question of admissibility.

929 Id per Dawson J at 16.

930 Ibid.

trials for offences against children:

* A submission by an experienced child psychiatrist proposed:[931]

> If one perpetrator has abused several children, the cases should be joined.

* A submission from Protect All Children Today included, amongst the indicia of delays in the judicial process, the complication of "several complainants/witnesses".[932]

* The Queensland Police Service, while acknowledging its concern for the rights of the accused, endorsed the proposals of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in relation to multiple proceedings:[933]

> [T]he ALRC draft recommendation concerning the joining of multiple proceedings in a single trial to avoid the necessity of children giving evidence in numerous proceedings over extended periods of time is in essence, an acceptable suggestion for the Service to make to the Queensland Law Reform Commission ... "To this end, there should be a review of joinder rules and rules against tendency and coincidence evidence in light of the hardship such rules cause to child victims." ... Once again, however, the Service acknowledges concerns for the rights of the accused.

These submissions are suggestive of some difficulty or unfairness in the way the question of separate trials is determined. The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their report on children in the legal process criticised this aspect of the law more directly, recommending reforms in this area:[934]

> **Recommendation 103.** Multiple proceedings involving more than one incident concerning the same child victim and accused or more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings over long periods of time and the problems associated with rules against tendency and coincidence evidence. To this end, joinder rules and rules against tendency and coincidence evidence should be reviewed in light of the hardship these rules cause to particular child victim witnesses.
>
> **Implementation.** The Attorney-General should recommend to SCAG that it convene a working group to conduct this review.

In coming to the conclusion that single trials were desirable to avoid the necessity of children giving evidence in numerous proceedings, the Commissions criticised two

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931 Submission 15.

932 Submission 40.

933 Submission 46.

934 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 335.

decisions of the High Court:[935]

* *De Jesus*'s case[936] was criticised on the basis that charges for sexual offences would almost always have to be tried separately, with the result that children may have to give evidence on a number of occasions.

  It is true that the effect of *De Jesus*'s case is that sexual offences have to be tried separately where the law about similar fact or propensity evidence would, on the facts of a particular case, render evidence of one offence inadmissible in relation to the other offence. However, the Commissions did not in their report suggest how a fair trial for the accused might be ensured if, in these circumstances, there were to be a single trial. Inevitably, a single trial in these circumstances would result in juries being exposed to what might be, in relation to at least some of the counts before them, inadmissible evidence.[937]

* *Hoch*'s case[938] was criticised because, in many cases where there were complaints by a number of children against the one accused, there would be "a possibility of concoction" that would render each child's evidence inadmissible in relation to the charges founded on the other children's complaints. This in turn would require separate trials for the complaints made by each child, and would result in the children having to give evidence in a number of trials. The Commissions seemed to be of the view that to treat the mere possibility of concoction in this way would operate particularly unfairly in relation to children:[939]

> [A] possibility of joint concoction based solely on a 'sufficient relationship between the victims' as described in *Hoch v R* necessarily arises when the child victims are siblings or friends and are abused by a parent, relative, family friend or teacher. [note omitted]

  Although *Hoch*'s case was a decision primarily about the admissibility of similar fact evidence (in particular, whether it should be admissible where there was a possibility of collusion between various complainants), the Court's finding on that point meant that, applying the rule in *De Jesus*'s case, separate trials should have been ordered initially in relation to the various counts charged. However, it is arguable that the unfairness resulting from *Hoch*'s case did not arise from the formulation of the rule about the necessity for separate trials, but from the formulation of the similar fact rule itself.

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935 Id at para 14.87.

936 (1986) 68 ALR 1.

937 The effect of *De Jesus*'s case is that, if the evidence of all complainants would be admissible in relation to all charges, there would be no need to have separate trials for the different charges.

938 See the discussion of this decision at pp 243-245 of this Discussion Paper.

939 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.87.

As mentioned above,[940] the similar fact rule has been modified in Queensland by section 132A of the *Evidence Act 1977* (Qld). As a result of that amendment, the similar fact evidence of multiple complainants will not be inadmissible merely because of a possibility of collusion. It follows that, in those circumstances, the various charges could be heard in the one trial and the complainants would not have to give evidence in multiple trials.

This change in Queensland evidence law would seem already to have addressed an important concern of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission without needing to change the principle for which *De Jesus v R* is authority.

(e) Questions for discussion

(1) Does the rule in *De Jesus*'s case - about when certain charges should be tried separately - present an obstacle in the prosecution of sexual offences involving children?

(2) If "yes" to question (1), how might that rule be modified to reduce the need for children to appear as witnesses at a number of trials, while still ensuring that the accused receives a fair trial?

4. ALLEGATIONS OF OFFENCES ON MULTIPLE OCCASIONS

(a) The law in relation to particulars of charges

It is not uncommon for a child complainant to make a quite generalised complaint of misconduct against an accused - for example, that certain conduct occurred "every couple of months for a year",[941] "every time my mum and dad went out",[942] or "whatever nights my mum worked".[943] When allegations of repetitive misconduct are made by a complainant, the particulars given of the charges made in the indictment and the extent to which the complainant's evidence relates to a specified charge assume a particular importance in ensuring a fair trial for the accused.

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940 See pp 244-245 of this Discussion Paper.

941 See *S v The Queen* (1989) 168 CLR 266 at 268.

942 See *The Queen v Rogers* (Unreported, CA, Sup Ct of Qld, Fitzgerald P, Davies JA and Dowsett J, CA No 445 of 1997, No 17 of 1998, 6 May 1998 per Dowsett J at 3).

943 See *The Queen v Waterreus* (Unreported, CA, Sup Ct of Qld, Pincus JA, Thomas and Dowsett JJ, CA No 476 of 1997, 12 May 1998 per Thomas J at 17).

The minimum requirement of particularity required in relation to charges has been described in *The Queen v Rogers*[944] as follows:[945]

> In general, as a minimum requirement, it is necessary that there be sufficient particularity in the allegations to demonstrate one identifiable transaction which meets the description of the offence charged, distinguishable from any other similar incidents suggested by the evidence.

It is not necessary that precise dates should be given; it may be possible for an individual occasion to be identified by reference to some feature:[946]

> One knows from experience that even quite young children are often able to particularize incidents by reference to location, or to the clothes which were being worn at the time, or to other events such as birthdays, Christmas, visits by or to relations, or incidents at school.

An insufficiency of particularity in the charges made against an accused, or the admission of evidence that meets the description of more than one of the offences with which an accused is charged, may constitute a miscarriage of justice. This may be a sufficient ground for a conviction to be quashed.

In *S v The Queen*,[947] the High Court addressed a number of issues associated with a lack of particularity of charges and with the admission of very generalised evidence. The accused was charged with three counts of carnal knowledge of his daughter. Each count charged one act on a date unknown within a specified twelve month period. The complainant gave evidence of two specific acts of intercourse, but there was no evidence to link either with any one of the specified periods. In addition, the complainant gave evidence that sexual intercourse had occurred "every couple of months for a year". The accused was convicted on all three counts. On appeal to the High Court, the convictions were quashed and a retrial was ordered.

Dawson J considered that the three counts in the indictment were framed in a permissible way, but that evidence of a number of offences, any of which fell within the relevant count, created an ambiguity that required correction if the accused was to have a fair trial.[948] Toohey J described the flaw in the trial as follows:[949]

> The trial was fundamentally flawed in that the jury were invited to convict the applicant so long as they were satisfied that within any of the periods specified in the indictment the applicant "carnally knew" the complainant. Put that way, the acts of intercourse described in the generalized evidence were available, not merely as going to prove any of the offences charged against the applicant but as the offences themselves. In respect of each count, the jury were not required to direct their attention to any particular occasion and to

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944 Unreported, CA, Sup Ct of Qld, Fitzgerald P, Davies JA and Dowsett J, CA No 445 of 1997, CA No 17 of 1998, 6 May 1998.

945 Id per Dowsett J at 24.

946 Ibid.

947 (1989) 168 CLR 266.

948 Id at 274.

949 Id at 283.

> satisfy themselves, beyond reasonable doubt, that there was such an occasion and that it occurred within the period specified in the count. There was a real likelihood that they would convict the applicant on the basis that since acts of carnal knowledge were frequent, an act must have occurred during each of the periods mentioned in the indictment.

Gaudron and McHugh JJ elaborated on the question of prejudice to the accused of admitting this type of generalised evidence:[950]

> The question of prejudice goes somewhat deeper than the question whether there was an effective denial of an opportunity to call alibi evidence. The evidence of a number of offences said to have been repeated at two-monthly intervals over a period of one year (which period might fall anywhere within a period of almost three years) had the same practical effect that was noted by Evatt J. in relation to the course proposed in *Johnson v Miller*. Effectively, the applicant was required to defend himself in respect of each occasion when an offence *might* have been committed. Additionally, by reason that the offences were neither particularized nor identified, the accused was effectively denied an opportunity to test the credit of the complainant by reference to surrounding circumstances such as would exist if the acts charged had been identified in relation to some more precise time or by reference to some other event or surrounding circumstance. [original emphasis]

(b) Sturgess's recommendation for reform

Well before the decision of the High Court in *S v The Queen*,[951] Sturgess expressed a concern about cases where the alleged sexual abuse of a child occurred on a number of occasions over a long period of time.[952] He suggested that the younger a child was when the abuse began and the more frequently it occurred, the more difficult it was under the law at that time for the prosecutor to draw charges against the accused with the required degree of particularity.[953] Frequently, the child would not be able to remember details sufficient to enable the charges to be drawn.

Furthermore, even if it were possible to be particular, to do so may produce a very long case and place intolerable pressure on the child witness.[954] Because of this, prosecutors were more likely to concentrate on the most recent acts.[955] However, if the accused were convicted of those charges, the other uncharged acts could not be taken into account by the court when sentencing the accused.[956]

Sturgess recommended that a provision be added to the *Criminal Code* (Qld) creating

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950 Id at 286.

951 (1989) 168 CLR 266.

952 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at paras 7.3-7.9.

953 Id at para 7.6.

954 Ibid.

955 Ibid.

956 See for example *R v D* [1996] 1 Qd R 363 and *R v Wackerow* [1998] 1 Qd R 197.

an offence when an adult enters into and maintains a relationship with a child of such a nature that he or she commits a series of sexual offences.[957] The provision sought to penalise repeated sexual abuse of children and avoid the problem of not being able to specify the dates on which the offences were committed. It also sought to better allow the court to do justice in these cases without imposing an intolerable evidentiary burden on the child witness.[958] Sturgess was not specific as to what had to be proved to establish the maintenance of an unlawful sexual relationship.[959]

Following this recommendation, the *Criminal Code* (Qld) was amended in 1989 to introduce the offence of "Maintaining a sexual relationship with a child under sixteen".[960]

(c) The offence of "maintaining a sexual relationship with a child"

Section 229B of the *Criminal Code* (Qld) provides:

> **Maintaining a sexual relationship with a child**
>
> (1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the prescribed age is guilty of a crime and is liable to imprisonment for 14 years.
>
> (2) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the accused person, as an adult, has, during the period in which it is alleged that he or she maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f), on 3 or more occasions and evidence of the doing of any such act shall be admissible and probative of the maintenance of the relationship notwithstanding that the evidence does not disclose the dates or the exact circumstances of those occasions.

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957 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at para 7.9.

958 Ibid.

959 Id at para 7.9. Sturgess recommended:

> **223. Commission of series of offences of a sexual nature with a child by an adult.**
>
> (1) Any adult who enters into and maintains a relationship with a child of such a nature he commits a series of offences of a sexual nature with that child is guilty of a crime and is liable to imprisonment with hard labour for 7 years.
>
> (2) If he thereby commits a crime for which he is liable to imprisonment for 7 years or longer, but less than 14 years, he is liable to imprisonment with hard labour for 14 years.
>
> (3) If he thereby commits a crime for which he is liable to imprisonment for 14 years or longer, he is liable to imprisonment with hard labour for life.
>
> (4) The offender may be charged in the one indictment with, and convicted of, the crime defined in this section and the offences, or one or some of them, actually committed by him.
>
> (5) The second and third cases referred to in section 7 of this code do not apply to the child with whom the relationship is entered into and maintained.

960 Section 229B of the *Criminal Code* (Qld) (Maintaining a sexual relationship with a child under sixteen) was inserted by s 23 of *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld). Section 229B, including the heading of that section, was amended by s 33 of the *Criminal Law Amendment Act 1997* (Qld). Similar provisions are found in the *Crimes Act 1958* (Vic) s 47A; the *Criminal Code* (Tas) s 125A; the *Criminal Code* (WA) s 321A; the *Crimes Act 1900* (ACT) s 92EA; and the *Criminal Code* (NT) s 131A.

(3) If in the course of the relationship of a sexual nature the offender has committed an offence of a sexual nature for which the offender is liable to imprisonment for 14 years or more, the offender is liable in respect of maintaining the relationship to imprisonment for life.

(4) If -

(a) the offence of a sexual nature mentioned in subsection (2) is alleged to have been committed in respect of a child of or above 12 years; and

(b) the offence is defined under section 208 or 209;

it is a defence to prove that the accused person believed throughout the relationship, on reasonable grounds, that the child was of or above 18 years.

(5) If -

(a) the offence of a sexual nature mentioned in subsection (2) is alleged to have been committed in respect of a child of or above 12 years; and

(b) the offence is one other than one defined under section 208 or 209;

it is a defence to prove that the accused person believed throughout the relationship, on reasonable grounds, that the child was of or above 16 years.

(6) A person may be charged in 1 indictment with an offence defined in this section and with any other offence of a sexual nature alleged to have been committed by him or her in the course of the relationship in issue in the first mentioned offence and he or she may be convicted of and punished for any or all of the offences so charged.

(7) However, where the offender is sentenced to a term of imprisonment for the first mentioned offence and a term of imprisonment for the other offence an order shall not be made directing that 1 of those sentences take effect from the expiration of deprivation of liberty for the other.

(8) A prosecution for an offence defined in this section shall not be commenced without the consent of a Crown Law Officer.

(9) In this section -

"prescribed age" means -

(a) to the extent that the relationship involves an act defined to constitute an offence in section 208 or 209 - 18 years; or

(b) to the extent that the relationship involves any other act defined to constitute an offence of a sexual nature - 16 years.

Section 229B(2) provides that, to be convicted under the section, a person must have committed certain acts in relation to a child on three or more occasions. The section further provides that the evidence need not disclose the dates or the exact circumstances of those occasions.

Kirby J has described the rationale behind section 229B as follows:[961]

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961 *KBT v R* (1997) 149 ALR 693 at 703.

> The terms of s 229B(1) are inherently broad and imprecise in so far as they refer to the concept of a "relationship" of the given character. To that extent, the offence created by the section involves a departure from the offences of particularity found elsewhere in the Code with which our criminal law is more familiar. Nevertheless, parliament has provided the new offence. Clearly, it has done so to respond to community concern about the problem of child sexual abuse. [note omitted]

Kirby J has suggested that section 229B is "clearly intended to strike a balance between the need for a measure of precision in the proof of the offence, on the one hand and, on the other, the need to recognise that it may not be possible for a complainant to identify exactly the dates and circumstances of the events said to prove the maintenance of the relationship".[962]

(d) Interpretation of section 229B

In *KBT v R*,[963] the accused, who was the adoptive father of the complainant, was alleged to have maintained an unlawful sexual relationship with the complainant over a two year period - from when she was 14 to almost 16. The complainant's testimony was not specific as to dates. Generally, the complainant's evidence was of a course of sexual misconduct by the accused, rather than of specific sexual acts, although her evidence did fall into six broad categories of allegations, for example, acts that occurred during afternoon rests, acts that occurred during morning tea breaks, and acts that occurred while watching television.[964]

The accused was convicted of maintaining an unlawful sexual relationship with the complainant. He appealed against that conviction to the High Court, arguing that the trial judge had erred in failing to instruct the jury that it was necessary for them to be satisfied beyond reasonable doubt that at least three of the acts alleged to constitute the offences of a sexual nature had been established and to reach unanimous verdicts upon the same three offences.[965] Before the High Court, the Crown conceded that the trial judge should have directed the jury that they were required to be satisfied as to the commission of the same three acts before they could convict under section 229B. The Crown argued, however, that the failure to direct the jury to that effect had not resulted in a substantial miscarriage of justice.[966] The Court held that the failure to direct the jury as to the proper construction of section 229B had resulted in a substantial miscarriage of justice. As a result, the conviction was quashed and a new trial was ordered.

In a joint judgment, Brennan CJ, Toohey, Gaudron and Gummow JJ referred to the

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962 Id per Kirby J at 701.

963 (1997) 149 ALR 693. This decision concerned s 229B prior to its amendment in 1997 by s 33 of the *Criminal Law Amendment Act 1977* (Qld). The current provision does not differ, however, in terms of those matters that concerned the High Court in *KBT v R*.

964 (1997) 149 ALR 693 per Brennan CJ, Toohey, Gaudron and Gummow JJ at 695.

965 Id per Kirby J at 702.

966 Id per Brennan CJ, Toohey, Gaudron and Gummow JJ at 696.

requirement that the jury must be agreed as to the commission of the same three acts, and held that, as a result of the jury not being directed as to that requirement, the accused had been deprived of a chance of acquittal that was fairly open:[967]

> Having regard to the evidence, it is possible that individual jurors reasoned that certain categories of incident did not occur at all but that one or two did, and more than once, thus concluding that the accused did an act constituting an offence of a sexual nature on three or more occasions without directing attention to any specific act. It is, thus, impossible to say that the jurors must have been agreed as to the appellant having committed the same three acts. Indeed, it may be that, had the jury been properly instructed, they would have concluded that the nature of the evidence made it impossible to identify precise acts on which they could agree. It follows that the accused was deprived of a chance of acquittal that was fairly open. [note omitted]

In a separate judgment, Kirby J emphasised the importance of ensuring a fair trial for the accused: by ensuring that the elements of the offence are explained to the jury; and by giving full effect to the statutory requirement that acts on three or more occasions must be established:[968]

> It is the duty of courts to give effect to the will of parliament. But they must do so in a trial process which ensures, so far as they can, fairness to the accused. The obligation of the courts to ensure that a fair trial is had imposes upon judges the duty of explaining the elements of the offence created by s 229B of the Code with precision and accuracy. The greater the danger of prejudice contaminating a fair trial, the greater must be the vigilance of appellate courts to ensure that the trial is had strictly as the law requires ...
>
> Section 229B(1A) [now s 229B(2)] provides that the prosecution must prove that the offender has done an act constituting an offence of a sexual nature on three or more occasions. This statutory prerequisite must be given full effect. This is because it amounts to a parliamentary recognition of the risks involved in the offence. Those risks include the exposure of a person to conviction upon generalised evidence which it may be difficult or impossible to disprove, which need not be confirmed by testimony other than that of the complainant and which may result in a trial involving little more than accusation and denial. These risks provide reasons, quite apart from the general rule of construction ordinarily applied to a criminal statute, for adopting an approach to the preconditions laid down by Parliament which is rigorous and defensive of the fair trial of the accused. [words in square brackets added]

(e) Does section 229B achieve its purpose?

Even though no specificity as to dates or circumstances is required by section 229B, given the recent judicial interpretation of that section, three separate "occasions" must still be identified, and the jury must be agreed as to those three occasions. It is unlikely that a disclosure of "multiple occasions" would be sufficient to secure a conviction under the section.

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967 Id at 697-698. See also *The Queen v Hubbuck* (Unreported, CA, Sup Ct of Qld, Pincus and McPherson JJA and Moynihan J, CA No 358 of 1997, 17 February 1998), which concerned an appeal against a conviction of unlawful stalking, an offence created by s 359A of the *Criminal Code* (Qld). An element of that offence is that the person engages in conduct involving "a concerning act on at least 2 occasions". The Court of Appeal held (at 3) that that case was indistinguishable from the decision in *KBT v R*. The appellant's conviction was quashed because the trial judge did not direct the jury that they must all agree that the same two "concerning acts" had occurred.

968 *KBT v R* (1997) 149 ALR 693 at 703-704.

Doubts about the effectiveness of section 229B have been raised in two recent decisions of the Queensland Court of Appeal.

The Court of Appeal criticised the effect of section 229B(2) in *The Queen v Susic*.[969] In that case, the complainant gave evidence that the appellant had engaged in certain conduct every night for a period of some seven months. The appellant was convicted under section 229B and appealed on the basis that the trial judge failed to instruct the jury that they must be unanimous in finding that the same three or more acts had been committed.[970]

The Court of Appeal distinguished *KBT v R*, and held that, on the evidence of the particular case, the failure to instruct the jury as to the need to agree on the commission of the same three acts would not have made a difference:[971]

> Taken at face value, the complainant's evidence literally extended to every night in the period of some 150 or so nights between late January and the end of June or July 1992 comprehended in count 2. It covered many more than three occasions. According to the evidence she gave, no single act or occasion was distinguishable from any other such act or occasion so as to invite or permit the kind of potential dissension or disagreement envisaged in *KBT v. The Queen*. The jury were therefore left with no choice other than to reject, or entertain a doubt about, the whole of her evidence, or to accept its substance, which is what they did.
>
> In contrast to *KBT*, it could therefore make no difference to the result in this instance that the learned trial judge did not direct the jury that, in order to convict, they must be unanimous about the same three acts. Short of acquitting altogether on count 2 by reason of a doubt about the veracity or accuracy of what the complainant said in her evidence, they had no option but to fix on the same three or more acts for the purpose of s.229B(1A).

Notwithstanding that the Court of Appeal was able, on the facts, to distinguish *KBT v R*, the Court was critical of the wording of section 229B:[972]

> The decision in *KBT v. The Queen* is therefore distinguishable. The evidence in this instance is, however, exceptional. If s.229B(1) is to perform its function in most future prosecutions of this kind, legislative attention is needed to ensure that s.229B(1A), or as it now is s.229B(2), operates only as an evidentiary aid or exclusion and is not expressed in a form capable of being regarded as serving to define the offence or its actus reus under s.229B(1).

In *The Queen v Waterreus*,[973] the accused was charged with fourteen offences of a sexual nature, but not with an offence under section 229B.[974] Pincus JA doubted the

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969 Unreported, CA, Sup Ct of Qld, Pincus and McPherson JJA and Muir J, CA No 428 of 1997, 28 April 1998.

970 Id at 3.

971 Id at 6.

972 Id at 7-8.

973 Unreported, CA, Sup Ct of Qld, Pincus JA, Thomas and Dowsett JJ, CA No 476 of 1997, 12 May 1998.

974 Id per Thomas J at 2 where the fourteen charges are set out.

present utility of the section:[975]

> This is another case in which the problem of the way in which allegations of repeated sexual interference over a period of time are to be treated in the courts is raised. Section 229B of the *Criminal Code* was intended to be at least a partial answer; but since the construction of it adopted in *KBT* ... , the section may have little practical utility.

(f) Questions for discussion

(1) Does the requirement in section 229B of the *Criminal Code* (Qld) that three distinct offences of a sexual nature be established - with the result that a jury must be agreed as to the commission of the same three offences - present an obstacle to the prosecution of offences under that section?

(2) If "yes" to question (1), how might section 229B be amended to reduce the burden on child complainants of having to provide particulars of separate acts, while ensuring that the evidence is sufficiently particularised to ensure a fair trial for the accused.[976]

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975 Id per Pincus JA at 9.

976 See pp 258-260 of this Discussion Paper as to the purposes served by giving proper particulars of charges.

CHAPTER 20

POST-TRIAL USE OF EVIDENCE

1. INTRODUCTION

In the course of preparing for a criminal trial or an appeal, a defendant may obtain documents, videotapes, photographs or other items of evidence which are of a personal nature in relation to the complainant. This raises the question about what this material may be used for during or after the trial or appeal processes.

Particular concern has been expressed to the Commission about the possible misuse of evidence tendered in court proceedings involving child witnesses and the use of such evidence outside the court process. Specifically, it is alleged that the *Freedom of Information Act 1992* (Qld) has been used to obtain, or to attempt to obtain, copies of documents, videotapes or photographs relating to child abuse, sexual offences and domestic violence.[977] This concern has also been repeatedly expressed by the Queensland Police Service in the Department of Justice's *Freedom of Information Annual Reports* for both 1994/95, 1995/96 and 1996/97.[978] Recently, the press has highlighted this concern in relation to claims of "paedophile networks inside Queensland jails abusing legal documents for salacious purposes,"[979] and the account of a convicted paedophile's search for a copy of a manuscript he authored describing his exploits.[980]

These concerns raise two issues which will be addressed in this chapter:

* the use of the *Freedom of Information Act 1992* (Qld) to obtain material gathered in the investigation and prosecution of an offence; and

* the possession and inappropriate use of such material before, during and after the trial.

Although these issues do not relate directly to the court's ability to receive the best possible evidence from children and thus do not fall neatly within the Commission's

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977 Submission 14 (Queensland Police Service, Freedom of Information Unit).

978 Queensland Department of Justice and Attorney-General, *Freedom of Information Annual Report 1994-1995* (1995) at 20; Queensland Department of Justice, *Freedom of Information Annual Report 1995-1996* (1996) at 26; Queensland Department of Justice and Attorney-General, *Freedom of Information Annual Report 1996-1997* (1997) at 22.

979 Thomas S, "Attorney to examine jail document trade" *Weekend Independent* (October 1997) at 3; and Thomas S, "Videos, photos, tapes in prison paedophile trade" *Weekend Independent* (September 1997) at 1, 8. See also Callinan R, "Victims' pictures found in jail cells" *The Courier-Mail* (20 January 1996) and Michael P, "Perverts use rape cases as jail porn" *The Courier-Mail* (22 November 1995) at 5.

980 Koch T, "Paedophile appeals for sex book" *The Courier-Mail* (15 September 1997) at 6.

terms of reference, they have been the subject of a submission to the Commission and are matters which are inextricably linked to subject of the Commission's inquiry.

2. FREEDOM OF INFORMATION

The object of the *Freedom of Information Act 1992* (Qld) is to "extend as far as possible the right of the community to have access to information held by Queensland government".[981] The *Freedom of Information Act 1992* (Qld) is structured so that the reason or motive for a person seeking information is irrelevant to the decision to release the information. This has been confirmed by de Jersey J:[982]

> ... the *Freedom of Information Act* does not confer any discretion on the Information Commissioner, or the Supreme Court, to stop disclosure of information because of any particular motivation in the applicant.

The Information Commissioner has framed this point in terms of ignoring the interests of a particular applicant:[983]

> Because s 21 of the Qld FOI Act confers a legally enforceable right of access on any person with no requirement to show a special interest in obtaining particular information, an assessment of the effects of disclosure of a particular document (for the purpose of determining whether an exemption provision applies) generally requires that the interests of a particular applicant be ignored and the question be approached as if disclosure were to anyone who could make an application, or as it is sometimes said "to the world at large".

Prima facie, the *Freedom of Information Act 1992* (Qld) "exempts" - that is, it does not allow - disclosure of matter concerning the "personal affairs" of a person.[984] "Personal affairs" includes affairs relating to family and marital relationships, health or ill-health, relationships with and emotional ties with other real people and domestic responsibilities or financial obligations.[985]

This exemption is, however, subject to a public interest exception, as the Information Commissioner has stated:[986]

> Under s 44 (1) of the Queensland FOI Act information concerning the personal affairs of a person is prima facie exempt from disclosure. Only countervailing public interest considerations of sufficient weight to found a judgment that disclosure would on balance be in the public interest, can operate to displace the prima facie entitlement to exemption ...

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981 *Freedom of Information Act 1992* (Qld) s 4.

982 *State of Queensland v Albietz* [1996] 1 Qd R 215 at 222.

983 *Re Stewart and Department of Transport* (1993) 1 QAR 227 at 233.

984 *Freedom of Information Act 1992* (Qld) s 44(1).

985 *Re Stewart and Department of Transport* (1993) 1 QAR 227 at 257.

986 Id at 235.

Consequently, the *Freedom of Information Act 1992* (Qld) process admits the potential to seek information figuring in trials concerning children's evidence or child sexual abuse, such as:

* photographic or videotape exhibits used in evidence;

* victim or witness statements (in written, audiotape or videotape formats);

* transcripts of proceedings.

(a) Photographs

In 1996 in *Re Ferguson and Director of Public Prosecutions*,[987] the applicant sought access to certain photographs of children, a trial transcript and other documents held on the Director of Public Prosecution's files relating to the prosecution of charges against the applicant for sexual offences. The Information Commissioner decided that disclosure of the photographs would amount to disclosure of information concerning the "personal affairs" of the persons depicted in the photographs. The Information Commissioner considered it irrelevant that the photographs were trial exhibits, particularly given the fact that the photographs were of children:[988]

> It may be possible in some cases to argue that, if a photograph has been tendered as an exhibit in evidence at a trial, the weight to be accorded the privacy interest weighing against disclosure of the photograph is substantially diminished. Such an argument could not apply to these photographs, however, given the extent of the legislative protection from disclosure of the identities of children involved in court proceedings of this kind (see s. 138 of the *Children's Services Act 1965* Qld) and the importance of the public policy considerations which underlie those legislative provisions. [emphasis added]

(b) Witness statements

In 1997 in *Re Godwin and Queensland Police Service*,[989] the Information Commissioner decided that a witness statement was prima facie protected under the *Freedom of Information Act 1992* (Qld).[990] The Commissioner's rationale was that information that a particular person had co-operated with police related to their "personal affairs". This can be contrasted with information that is public knowledge or on the public record. For example, court proceedings are information on public record and hence "the weight to be attributed to the privacy interest in protecting disclosure of the information would be significantly diminished".[991]

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987 Unreported, Decision of the Information Commissioner, 96013, 31 July 1996.

988 Id at 10-11.

989 Unreported, Decision of the Information Commissioner, 97011, 11 July 1997.

990 By s 44(1) of the *Freedom of Information Act 1992* (Qld).

991 Unreported, Decision of the Information Commissioner, 97011, 11 July 1997 at 23.

In *Godwin*'s case, the applicant sought access to a witness statement obtained by police concerning a complaint of assault that was made against the applicant. As the prosecution did not proceed, the witness statement was prima facie protected under section 44(1) of the *Freedom of Information Act 1992* (Qld). But the Information Commissioner ultimately decided that public interest considerations favouring disclosure outweighed considerations favouring non-disclosure.

(c) Court transcripts

Where a matter has gone to court, a request for documents under the *Freedom of Information Act 1992* (Qld) may be refused as the information is "reasonably open to public access (whether or not as part of a public register) under another enactment",[992] or is "reasonably available for purchase by members of the community under arrangements made by an agency".[993] Refusal depends on the accessibility, in terms of availability and cost, of the transcript of proceedings. As District Court and Supreme Court transcripts are sold at the State Reporting Bureau, they are generally exempt from disclosure under section 22(a) of the *Freedom of Information Act 1992* (Qld).[994] The sole exception to this general availability is that, pursuant to the *Recording of Evidence Regulation 1992*,[995] a defendant in a Supreme or District Court criminal proceeding is entitled to a free printed copy of the transcript.

In Queensland, transcripts of proceedings in the lower courts are not as accessible as they are for Supreme and District Court proceedings. For instance, the public availability of transcripts of Magistrates Court proceedings, where an order is made or the defendant is committed to trial or sentence or discharged, is more restrictive. The *Justices Act 1886* (Qld) invests the Clerk of the Court with a discretion to refuse to supply a copy if he or she is of the opinion that the person requesting the copy lacks a sufficient interest in the proceeding or in securing the copy.[996] Transcripts from either Childrens Court proceedings or from proceedings where people are excluded from the courtroom under sections 70[997] or 71[998] of the *Justices Act 1886* (Qld) are available only to a person aggrieved by a conviction or order or where the Minister determines.[999]

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992 *Freedom of Information Act 1992* (Qld) s 22(a).

993 *Freedom of Information Act 1992* (Qld) s 22(b).

994 *Re Ferguson and Director of Public Prosecutions* (Unreported, Decision of the Information Commissioner, 96013, 31 July 1996).

995 *Recording of Evidence Regulation 1992* (Qld) s 3(2). By s 3(3) the copy may be issued to the defendant or the defendant's representative.

996 *Justices Act 1886* (Qld) s 154(1)(a).

997 Justices may exclude people from the court if it is in the interests of public morality.

998 Justices may exclude people from a room in which justices take the examinations and statements of persons charged with indictable offences for the purposes of committal for trial and the depositions of witnesses in that regard providing it appears to them that the ends of justice require them to do so.

999 *Justices Act 1886* (Qld) s 154(2).

In *Re JM and Queensland Police Service*,[1000] the Information Commissioner decided that, while trial transcripts of restricted access under the *Justices Act 1886* (Qld) are eligible for *Freedom of Information Act 1992* (Qld) access, an application for their disclosure would be unsuccessful under section 22(a) of the *Freedom of Information Act 1992* (Qld) because the proceedings are not open to public access. Specifically, the case held that Magistrates Court and Childrens Court transcripts and transcripts of District and Supreme Court proceedings involving children are excluded from public access and that, although they may be open to a claim for access under the *Freedom of Information Act 1992* (Qld), generally the "personal affairs" exemption applies. Moreover, where children are involved, the Information Commissioner has been reluctant to find that a public interest in disclosure overrides a public interest in non-disclosure.[1001]

3. POSSESSION AND DISTRIBUTION

There is potential for material such as depositions and exhibits obtained through legitimate means to be used for inappropriate purposes. It has been suggested that legislative changes that make copies of depositions and exhibits the Crown's property and require them to be returned at the end of legal proceedings would go some way to solving the problem.[1002] However, it must be conceded that it would be very difficult to prevent the material being copied and distributed.

Queensland and Western Australia have attempted to prevent this type of material being used for improper means.

(a) Queensland

The *Police Service Administration Act 1990* (Qld) has recently been amended[1003] to create an offence of unlawfully possessing or supplying a print, video recording or a transcript of an audio or video recording which is the property of the Commissioner of Police.[1004] However, a defendant charged with an offence of which the article is evidence or the defendant's lawyer can be supplied with the material for the purpose of defending the charge.[1005] A person must not possess the material after the appeal time has expired unless the article is kept as part of court records or the file of the

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1000 Unreported, Decision of the Information Commissioner, 95008, 12 May 1995.

1001 *Re Ferguson and Director of Public Prosecutions* (Unreported, Decision of the Information Commissioner, 96013, 31 July 1996).

1002 Thomas S, "Videos, photos, tapes in prison paedophile trade" *Weekend Independent* (September 1997) at 8.

1003 The *Police and Other Legislation (Miscellaneous Provisions) Act 1998* (Qld) was assented to on 26 March 1998.

1004 *Police Service Administration Act 1990* (Qld) s 10.21A(1), (2), (5).

1005 *Police Service Administration Act 1990* (Qld) s 10.21A(3).

defendant's lawyer.[1006]

The Commissioner of Police may authorise the disclosure of information in the possession of the Police Service.[1007] The amending Act also enables the Commissioner of Police to impose conditions on the disclosure of such information.[1008]

Section 10.21A of the *Police Service Administration Act 1990* (Qld) provides:

> **Unlawful possession of prescribed articles**
>
> (1) A person must not unlawfully possess a prescribed article.
>
> Maximum penalty - 40 penalty units
>
> (2) A person must not unlawfully supply to someone else a prescribed article that is evidence of the commission of an offence.
>
> Maximum penalty - 40 penalty units.
>
> (3) Subsection (2) does not prevent a person supplying a print, an audio recording, or a transcript of an audio or video recording, to a person charged with an offence of which the article is evidence or the person's lawyer, for the purpose of enabling the person to defend the charge.
>
> (4) A person must not possess a print, an audio recording, or a transcript of an audio or video recording supplied under subsection (3) after the time allowed for any appeal against a conviction for an offence of which the relevant article is evidence ends, unless the article is kept as part of court records or the records of a lawyer acting for the person charged with the offence.
>
> Maximum penalty - 40 penalty units.
>
> (5) In this section -
>
> **"prescribed article"** means any of the following that is the property of the commissioner -
>
> (a) a print;
>
> (b) a video recording;
>
> (c) a transcript of an audio or video recording.

The then Minister for Police and Corrective Services and Minister for Racing declared in his second reading speech the purpose of, and underlying reasons for, the insertion of section 10.21A:[1009]

> The purpose of this amendment is to provide conditions that protect the information from wrongful use and send a clear message to the community that the release of information

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1006 *Police Service Administration Act 1990* (Qld) s 10.21A(4).

1007 *Police Service Administration Act 1990* (Qld) s 10.2.

1008 *Police Service Administration Act 1990* (Qld) s 10.2(1B), (1C).

1009 Legislative Assembly (Qld), *Weekly Hansard* (5 March 1998) at 265.

provided to the service is subject to strict control.

The reason for the amendment to ownership of photographs and the like in the new section 10.21(A) is illustrated by two recent instances, identified by members of the Office of the Director of Public Prosecutions, in which offenders retained police photographs. In the first instance, a prisoner was found to have a police photograph of his victim displayed on this cell wall. In another instance, a male attacker showed a police photograph of an injured victim to his female victim in a bid to scare her into submission. This is a disgusting state of affairs and will not continue.

An analogous amendment to the section on police prints includes new sections allowing prints to be obtained for the following purposes: to answer a charge of an offence, the subject matter of or arising out of a proceeding in which a print identical to the print required is an exhibit; for a proceeding started in a court or tribunal, whether it is the proceeding in which a print identical to the print required is an exhibit or another proceeding; for deciding whether to start a proceeding in a court or tribunal or to make a particular claim in the proceeding; for deciding whether to defend a proceeding that may be started in a court or tribunal or to make or resist a particular claim in the proceeding.[1010] Sections 9A.2 and 9A.3 of the *Police Service Administration Act 1990* (Qld) provide:

Entitlement to prints

9A.2(1) This section applies if the State or a police officer performing the police officer's duties tenders a print as an exhibit in a proceeding before a court or tribunal.

(2) A person who satisfies the person who has custody of the print that the person requires a print identical to the print tendered for a prescribed purpose is entitled to a print identical to the print tendered.

(3) This section does not entitle a person to a print the person requires for a proceeding started in a court or tribunal because of something alleged to have been done or not done by a police officer or a State employee in the performance of his or her duties, unless a print identical to the print required has been tendered as an exhibit in the proceeding.

Procedure to obtain print for prescribed purpose

9A.3(1) A person who requires a print mentioned in section 9A.2 (the "tendered print") for a prescribed purpose may, in writing, ask the person who has custody of the print or, if it is a photograph, the negative of the print, to give to the person a print identical to the tendered print.

(2) The request must indicate the purpose for which the person requires the print.

(3) However, it is not necessary to supply the print unless the person asking for it pays any amount fixed for the print under section 9A.1.

(4) If the person who has custody of the negative is satisfied that the person making the request is entitled to the print and has paid any amount fixed for supplying the print, the person must cause the print to be made and supplied.

(5) A person does not incur any liability at law merely because of the printing, marking or supply of a print under this part.

1010 *Police Service Administration Act 1990* (Qld) s 9A.4.

(b) Western Australia

The *Evidence Act 1906* (WA) was amended in 1992 to include provisions protecting the post-trial use of videotaped evidence.[1011] To avoid the possibility of trials being aborted due to leaks to the media or misuse of videotaped material, there are restrictions placed on the use to be made of the material.[1012] These restrictions extend to videotapes of evidence given by children and other vulnerable witnesses and to the possession and use of material after the trial.[1013] It is an offence to possess, supply or offer to supply videotaped evidence without authority.[1014] It is also an offence to play, copy or erase videotaped evidence without authority.[1015] Broadcasting videotaped evidence without the approval of the Supreme Court incurs a substantial penalty.[1016]

Sections 106MA and 106MB of the *Evidence Act 1906* (WA) provide:

> **106MA Unauthorised possession or dealing in video-taped evidence**
>
> (1) A person commits an offence who, without authority -
>
> (a) has a video-taped recording of evidence in his possession; or
>
> (b) supplies or offers to supply a video-taped recording of evidence to any person.
>
> (2) A person commits an offence who, without authority plays, copies, erases or permits a person to copy or erase a video-taped recording of evidence.
>
> (3) A person has authority for the purposes of subsection (1) or (2) only if he or she has possession of a video-taped recording of evidence or does anything mentioned in subsection (1) or (2), as the case may be -
>
> (a) in the case of a public official, for a purpose connected with the proceeding for which the recording was made or any resulting proceedings by way of appeal; or
>
> (b) in any other case, as authorized by a judge under section 106J, 106K or 106R.
>
> (4) A person who commits an offence against this section is liable to a fine of $5 000.
>
> **106MB Broadcast of video-taped evidence**
>
> (1) A person shall not broadcast a video-taped recording of evidence or any part of such a recording except with approval of the Supreme Court and in accordance

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1011 *Acts Amendment (Jurisdiction and Criminal Procedure) Act 1992* (WA).

1012 *Evidence Act 1906* (WA) s 106MA.

1013 Legislative Assembly (WA), *Parliamentary Debates* (25 November 1992) at 7231.

1014 *Evidence Act 1906* (WA) s 106MA(1).

1015 *Evidence Act 1906* (WA) s 106MA(2).

1016 *Evidence Act 1906* (WA) s 106MB: $100,000 or 12 months imprisonment or both.

with any condition attached to the approval.

Penalty $100 000 or imprisonment for 12 months, or both.

(2) An approval under subsection (1) is only to be given in exceptional circumstances.

(3) In subsection (1) "broadcast" means disseminate to the public by radio or television or otherwise by the transmission of light or sound.

In a number of respects, the Western Australian provisions are wider in their application than the Queensland provisions. In Western Australia, an offence is committed not only when a person without authority supplies a videotaped recording, but also when a person offers to supply a videotaped recording. Also, a further offence is committed when a person without authority plays, copies, erases or permits a person to copy or erase a videotaped recording. As well, broadcasting of a videotaped recording, or part thereof, is forbidden without approval of the Supreme Court. However, the Western Australian provisions apply only to videotaped recordings. The Queensland provisions also apply to prints and transcripts of audio recordings.

4. QUESTIONS FOR DISCUSSION

(1) Is the balancing of the public interests required by section 44(1) of the *Freedom of Information Act 1992* (Qld) sufficient to protect the evidence of children from use outside the court processes? Does it provide sufficient certainty?

(2) If "no" to question (1), should the definition of "personal affairs" be expanded to include recordings of a child's evidence?

(3) Is it desirable for legislation to:

(a) Create an offence of offering to supply material?

(b) Create an offence of, without authority, playing, copying, erasing or permitting a person to copy or erase a videotaped recording?

(4) If "yes" to question (3), in what Act should the new provisions be located?

(5) In relation to possession and inappropriate use of material, should the Queensland legislation include videotapes, photos, witness statements and other forms of material such as CD-ROMs?

CHAPTER 21

EVALUATION OF LEGISLATIVE REFORM

1. THE NEED FOR EVALUATION

In this Discussion Paper, the Commission has raised a number of issues concerning possible amendments to the *Evidence Act 1977* (Qld) in relation to evidence given by child witnesses. The approach adopted by the Commission has been to try to ensure that, to the extent consistent with the conduct of a fair trial, the court is afforded every possible opportunity to communicate as effectively as it can with the child witness, so that the case is decided on the best available evidence. The Commission believes that, if its final Report makes recommendations for legislative change, those recommendations should include a mechanism for evaluating the effect of any implemented changes.

In the view of the Commission, an evaluation tool should be developed in line with the legislative changes so that data is able to be collected from the time that the legislative changes come into effect. In this way the most complete data is collected. However, the design and implementation of an appropriate evaluation mechanism requires considerable thought and planning. Where such an evaluation is conducted, then the success or otherwise of the legislative reform can be determined with the best possible information. If further refinement to the legislation is required, such an evaluation can provide valuable information for the continued development and improvement of the operation of the legislative reform.

This chapter will consider some the issues surrounding the development and implementation of evaluation mechanisms and review some relevant evaluation models from other jurisdictions. The chapter is not intended to be an exhaustive review of the theory surrounding organisational evaluation techniques; rather, the chapter is designed to promote discussion about the need for evaluation in the area of legislative reform.

2. DEVELOPMENT OF AN EVALUATION MECHANISM

In developing a tool for evaluation, the first question is always: what are the aims of the evaluation or what exactly is being evaluated? In terms of evaluating a legislative reform, one must consider whether one is evaluating the ease with which the legislative reform is implemented, the degree of use of the reform or some other issue.

To date, evaluation of legislative initiatives does not appear to have been a priority for

those involved in legislative reform in Australia.[1017] One possible reason for this may be that it is not always clear what body should bear the responsibility for (and of course, the cost implications of) conducting such an evaluation. For example, an evaluation of a legislative reform could conceivably be conducted by:

* the body that recommended the reform (for example, a law reform body);

* the government department that administers the particular piece of legislation;

* if the reform relates to the courts, the courts affected; or

* an independent body.

The decision as to which body should bear the responsibility for the review may be dependent, in part, upon the particular government and court governance structure in place in the jurisdiction in question. Where all of the bodies involved in the legislative reform are administered within one structure, review and evaluation of legislative reform may be logistically easier to perform - for example, in terms of organising appropriate funding and personnel.[1018]

Another important decision which must be made before any evaluation is put in place is the timing of the review. Review which occurs too early may not be successful because of a lack of suitable data; most legislative change experiences some time lag before the changes have any meaningful effect. However, unless relevant statistics are kept from the commencement of the reforms, valuable evaluation information may be lost. Review which occurs too late can be affected by practices becoming subject to informal modification or becoming too settled, leading an aversion to change. Determining what groups are to be part of the evaluation and constructing the methodology to be used in the evaluation are important issues to be decided in large part by what performance indicators are selected.

The selection of appropriate performance indicators is the most daunting difficulty facing the proper implementation of evaluation of legislative reform. The selection of these indicators is a vital step in monitoring the extent to which any changes are in fact achieving their intended objective.

For example, performance indicators relevant to legislative reform to facilitate receipt by the courts of children's evidence might include quantitative factors such as the number of courts which have "child-friendly" facilities, or qualitative factors such as the fact that children feel more at ease giving evidence in court.

1017 See the discussion in Parker S, *Courts and the Public* (AIJA, 1998) Chapter 5, particularly at 121.

1018 For example, in Western Australia, the Ministry of Justice plays an important administrative role for all bodies involved in legislative reform. Arguably, this has facilitated the evaluations which have been conducted in that State.

Regardless of what performance indicators are selected, the data which should be collected might include comprehensive statistics of the number of court proceedings in which child witnesses are involved, the nature of those matters and a description of any tools (for example, closed-circuit television) utilised by the court in facilitating the receipt of the child's evidence.

3. EXISTING MODELS

If the Commission's final recommendations are to include a process for evaluating and reviewing any of its implemented proposals, a variety of relevant evaluation models should be reviewed before settling the evaluation and review process.

(a) Evaluation of the 1992 amendments to the *Evidence Act 1906* (WA)

This Western Australian evaluation, conducted at the request of the Attorney-General by the government department charged with administering the *Evidence Act 1908* (WA), followed amendments to the Act which created a presumption requiring the use of closed-circuit television for child witnesses. Where closed-circuit television facilities were not available the legislation required the use of removable screens. The survey took place approximately two years after the implementation of the new provisions.

(i) Terms of reference and methodology

The terms of reference of the evaluation were aimed at obtaining information about how often the new procedures were being used, the reactions of participants in trials where they were used, the need for improvements or modification and the effect of the new procedures on the administration of justice.[1019]

The evaluation involved observation over a sixteen month period of trials where children gave evidence about alleged sexual acts directed at them or alleged sexual offences committed against them, as well as interviews with child witnesses, prosecutors, defence counsel and the presiding judges in some of the trials.[1020]

(ii) Jurors' responses

As part of the reference the Attorney-General requested an evaluation of the jurors' responses to the changes. This part of the evaluation was conducted by means of a survey. The aims of the jury survey were listed as obtaining

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1019 Ministry of Justice (WA), *Evaluation Report, Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996) at 137.

1020 Ibid.

information about:[1021]

* jurors' reactions to the use of CCTV and removable screens;

* jurors' confidence in their ability to judge the size and age of child witnesses when evidence was given by CCTV; and

* the effect the equipment had on the ease of reaching a verdict.

Survey forms were sent, with the approval of the presiding judge, to jurors in seventeen trials held over a six month period. In some trials the child witness gave evidence by CCTV from a separate room. In others, the child gave evidence in court, but a screen was provided.[1022]

The jurors were not contacted until after the jury had given its verdict and had been dismissed. All contact with jurors was by mail, to satisfy jury confidentiality requirements.[1023]

(b) Evaluation of the *Victims of Crimes Act 1994* (WA)

An example of an evaluative mechanism inserted within the terms of the legislation itself is provided by the *Victims of Crimes Act 1994* (WA). This Act was proclaimed on 19 January 1995. Section 6 of this Act requires the Minister for Justice to ensure that a review of the operation and effectiveness of the Act is conducted on an annual basis. A report of each review is to be prepared and tabled in Parliament.

In 1997, the Ministry of Justice conducted its first evaluation of the *Victims of Crime Act 1994* (WA). The purpose of the evaluation was to determine whether the Act had been efficient and effective in its implementation and whether the Act had achieved its aims. The specific objectives of the evaluation were:[1024]

1. To determine the extent to which victims of crime feel that they are accorded a significant role in the criminal justice process through the use of victim impact statements and the application of guidelines under the Act;

2. To determine the extent to which victims of crime feel that their needs are being properly considered and addressed by public officers in the criminal justice process;

3. To determine the extent to which public officers are aware of, and act on, their responsibilities under the Act; and,

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1021 Ministry of Justice Strategic and Specialist Services Division, *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (November 1995) at i-ii.

1022 Id at ii.

1023 Ibid.

1024 Ministry of Justice (WA), Evaluation Report, *Review of the Operations and Effectiveness of the Victims of Crime Act 1994* at 2, quoting from the Ministry of Justice, *Statement of Requirements Evaluation of the Victims of Crimes Act 1994 MOJ Contract No. 180/96* at 1.

4. To determine if the most efficient and effective processes are in place to address the operational aspects of the Act.

The Ministry of Justice noted that it is relatively straight-forward to determine whether the Act has been efficiently and effectively implemented:[1025]

> Essentially it is a matter of looking at what the relevant bodies have done to meet the requirements set out in the Act and then checking with victims and other interested parties whether it has worked. Those responsible for implementing particular aspects of the Act are also generally knowledgeable about any shortcomings and have constructive suggestions for improvement.

But the Ministry of Justice has suggested that, in the case of this particular Act, it is more difficult to determine "the extent to which the Act has met victims' needs".[1026] This is because of the difficulties inherent in identifying and enumerating the needs of what is potentially quite a diverse group - that is, victims of crime. The evaluation attempted to enumerate some fundamental needs of victims.[1027]

The methodology of the evaluation of the *Victims of Crime Act 1994* (WA) involved focus groups of victims of crime and interviews with key stakeholders within the relevant agencies. These people included members of the police force, judicial officers, relevant personnel from the Ministry of Justice and the Department of Public Prosecutions, the Sexual Assault Referral Centre, Family and Children's Services, the Victim Support Service and victims of crime. A further telephone survey of 189 victims of crime was also conducted.[1028] Public submissions on the Act formed part of the evaluation, as did a review of the information systems and written material.[1029]

In conducting an evaluation of the implementation of legislation, the Ministry of Justice recognised the importance of a "broad brush" approach, but also suggested that there could be value in conducting evaluations of particular population groups affected by the operation of the Act.[1030]

4. QUESTIONS FOR DISCUSSION

(1) Should the Commission's final recommendations include a proposal for reviewing the operation of any legislative changes implemented as a result of its recommendations?

1025 Id at 2-3.

1026 Ibid.

1027 Id at 2-3.

1028 Id at Chapter 2.

1029 Id at 8.

1030 Id at 4.

(2) **If “yes” to question (1), which body should bear the obligation for ensuring the conduct of the evaluation?**

(3) **If “yes” to question (1), how should such an evaluation be conducted? What types of information should be collected for such a review?**

(4) **How should the performance indicators, or goals for success, be selected?**

(5) **What performance indicators should be considered appropriate for determining the success of the legislative reform?**

APPENDIX

RESPONDENTS TO THE CALL FOR PRELIMINARY SUBMISSIONS

Brown, Dr John
Bundaberg Area Sexual Assault Service Inc (Ms Kathy Prentice)
Campbell, Mr Clem MLA
Child and Youth Mental Health Service
Children's Commission Of Queensland
Cleaver, Mr Mark
Connolly, Mr Frank G
Cox, Ms Margaret
Crighton, Ms Lorraine
Dethlefs, Mr Geoff
Director of Public Prosecutions (Queensland) - RN Miller QC
Doomadgee Women's Shelter (Mrs Hillyer Johnny)
Doyle, Superintendent John
Dwyer, Ms Kim
Fitton, Mrs Margaret C
Forrester, Ms Mary
Hanger, Dr Marika
Haughton, Ms Julie
Howard, Ms Carmel
Kay, Ms Margaret H
Kerswell, Ms Dawn
Latham, Dr Simon (FRACP)
Legal Aid Office (Qld) (Ms Caroline Reynolds)
Miss P (Anonymous) [Foster parent to a number of child sexual assault complainants]
Mr Mcl (Anonymous) [Father of child sexual assault complainant]
Mrs J (Anonymous) [Mother of child sexual assault complainant]
Ms M (Anonymous) [Mother of child sexual assault complainant]
Mrs O (Anonymous) [Mother of child sexual assault complainant]
Mrs W (Anonymous) [Mother of child sexual assault complainant]
Ms A (Anonymous) [Wife of person falsely accused of child sexual abuse]
Osborne, Ms Kathy
Protect All Children Today (PACT)
Queensland Deaf Society (Inc) (Ms Merie Spring)
Queensland Department of Families, Youth and Community Care (The Rev Allan C Male)
Queensland Department of Health, Social Work Department (Ms Judith Benfer & Ms Elisabeth Drew)
Queensland Department of Justice (Courts Division)
Queensland Police Service
Ryan, Ms S
Ryan, Mr T
Speech Pathology Australia (Queensland Branch) (Ms Narelle Anger)
Trudinger, Mr Philip
Turnbull, Mr D
Tyszkiewicz, Mr M
Violence Against Women Unit [now Victims Support Unit] (Ms Helen Taylor)
Warlow, Dr John
Women's Legal Centre (Ms Angela Lynch)
Youth Advocacy Centre Inc (Ms Anne McMillan)