

**THE RECEIPT OF EVIDENCE BY QUEENSLAND
COURTS:**

THE EVIDENCE OF CHILDREN

Report No 55

Part 2A

Summary of Recommendations

Queensland Law Reform Commission
December 2000

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December 2000

To: The Honourable Matt Foley MP
Attorney-General, Minister for Justice and Minister for the Arts

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present Part 2 of its Report on The Evidence of Children.

The Honourable Mr Justice J D M Muir
Chairman

The Honourable Justice D A Mullins
Member

Mr W G Briscoe
Member

Assoc Prof P J M MacFarlane
Member

Mr P D McMurdo QC
Member

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The Commission wishes to acknowledge the contribution made to this Report by former members Professor W D Duncan and Ms S C Sheridan, whose terms of appointment expired on 25 September 2000, and by Legal Officer Ms K Schultz, who was on leave from the Commission at the time of publication.

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Previous Queensland Law Reform Commission publications in this reference:

Discussion Paper: The Receipt of Evidence by Queensland Courts: The Evidence of Children (QLRC WP 53, December 1998)

Report: The Receipt of Evidence by Queensland Courts: The Evidence of Children (QLRC R 55 Part 1, June 2000)

INTRODUCTION

The Queensland Law Reform Commission was requested, as part of its Fifth Program of references, 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 were settled in April 1997.

The Commission was also asked, by separate correspondence,¹ to examine the Report of an Inquiry into Sexual Offences Involving Children and Related Matters (the Sturgess Report).²

The terms of reference recognise that children may be required to give evidence in a number of different contexts. Children may be called as witnesses in civil proceedings - for example, in claims for damages for personal injuries resulting from a motor vehicle accident or some other accidental occurrence. They may be the subject of a custody dispute.³ If they have been victims of or observed the commission of an offence they may be witnesses in criminal proceedings relating to charges arising out of the offence. They may be applicants for compensation for injuries resulting from criminal offences, or they may appear as witnesses in civil proceedings arising out of the commission of an offence. Some children who have been accused of committing criminal offences may give evidence in their own defence.

Although no comprehensive data are available, it would seem that children appear as witnesses most frequently in criminal proceedings, to give evidence about what they have experienced as the victims of alleged offences or what they have observed of events that have happened to others.⁴ They are not often called upon to testify in civil proceedings other than those which are the result of a criminal offence.⁵

The Commission commenced its review by advertising for preliminary submissions to assist it in identifying relevant issues for consideration. Approximately 50 submissions were received from interested organisations and individuals.

1 Memorandum to the Secretary of the Queensland Law Reform Commission from Stephen Coates, Legal Adviser to Attorney-General and Minister for Justice, the Hon Denver Beanland MLA, 13 September 1996.

2 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985).

3 The role of the Commission is to make recommendations to the Queensland Attorney-General about possible changes to Queensland laws. Matters arising under federal law - for example, under the *Family Law Act 1974* (Cth) - are outside the Commission's terms of reference.

4 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 14.1, 14.9-14.10.

5 Id at para 14.13.

In December 1998, the Commission completed a Discussion Paper: *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53). The Discussion Paper was widely distributed throughout Queensland. It was also made available on the Commission's internet home page.⁶ The purpose of the Discussion Paper was to stimulate and encourage community debate about the need for, and the most appropriate way of achieving, measures to assist child witnesses to be able to give evidence effectively and of providing appropriate protection to vulnerable young witnesses whilst, at the same time, where the child is a complainant or other prosecution witness, respecting the rights of the accused.

More than 50 submissions were received in response to the Discussion Paper. One of these submissions included the responses of almost 20 non-government organisations concerned with children's issues, and some 25 children and young people who had experienced giving evidence.

The submissions received by the Commission in response to both its preliminary advertisement and its Discussion Paper have been of great assistance to the Commission in the formulation of its recommendations.

While the Commission was analysing the views that had been put forward in the submissions and examining the complex and, in some cases, controversial areas of law and procedure involved in the reference, a Taskforce on Women and the Criminal Code was established. The Taskforce was a joint initiative of the Attorney-General and the Minister for Women's Policy. The Report of the Taskforce, presented in February 2000, made a number of recommendations which overlapped with some of the issues that were being considered by the Commission as part of its reference. In May, the Premier of Queensland announced an intention to introduce legislation to implement the Taskforce's recommendations. Although the Commission had not finalised its Report, in June 2000 it presented the Attorney-General with those of its recommendations relevant to the work of the Taskforce, in order that they could be considered in the context of the Government's reform initiative. Those recommendations were published as *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1). They have now have been incorporated into a consolidated Report (R 55 Part 2).

The consolidated Report contains the Commission's general scheme for reforming the way in which children give evidence in Queensland courts. This volume contains a summary of the recommendations contained in the consolidated Report.

Because of the request by the then Attorney-General, the Hon Denver Beanland MLA, that the Commission have regard to the Sturgess Report on sexual offences involving children,⁷ the Commission has given some emphasis in its recommendations to cases involving allegations of child abuse and other particular

⁶ The Commission's internet home page address is <http://www qlrc.qld.gov.au>

⁷ Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985).

situations where, in the view of the Commission, a child witness may feel especially vulnerable.

In formulating its recommendations, the Commission has sought to achieve three objectives:

- to preserve, to the greatest extent possible, the integrity of the evidence of a child witness;
- to limit, to the greatest extent possible, the distress or trauma experienced by a child witness as a result of giving evidence;
- to ensure that, in a criminal matter, an accused person against whom evidence is given by a child complainant or other child witness receives a fair trial.

The Commission acknowledges that the achievement of these objectives involves a number of different, and sometimes, conflicting considerations.

Litigation of any kind inevitably involves competing interests. Litigation involving child witnesses, especially prosecutions for child abuse, brings those competing interests even more sharply into focus. However, in the view of the Commission, it would be overly simplistic to categorise cases where abuse is alleged as a contest between the rights of the child and the rights of the accused. It is not just a question of whether facilitating the evidence of a child witness detracts from the rights of an accused person.

For example, ensuring that an accused person has a fair trial is about more than the rights of the accused. The role of the courts in ensuring that justice is done, and seen to be done, is a vital element in the public interest in the fair and impartial administration of justice.

Similarly, limiting the distress caused to a child witness by giving evidence involves public interest factors as well as the welfare of the individual child. Research shows that the quality of a child's evidence is diminished if the child finds the experience of testifying a traumatic one. The effective administration of the criminal justice system is therefore likely to be adversely affected if the worth of the evidence of a child witness is significantly compromised or if the child is so intimidated that he or she is unable to give any evidence at all. Further, the community has an interest in ensuring that some of its most vulnerable members are not disadvantaged or even exploited because of their inexperience and immaturity, and courts have a responsibility to ensure that witnesses are treated appropriately, and that their own processes are not abused.

The Commission's recommendations are the result of the careful consideration and balancing of various interests. The Commission believes that the scheme it puts forward is the most appropriate in the overall interests of justice.

The recommendations are made in the context of the existing adversarial system of justice. Although a number of submissions received by the Commission argued that the present adversarial nature of court proceedings is inappropriate for child witnesses, especially in child abuse prosecutions, the Commission is of the view that it would not be desirable or practicable to recommend the adoption of a different system only for certain kinds of cases or for certain categories of witnesses. However, the Commission recognises the difficulties facing children who give evidence in adversarial proceedings, and its recommendations are designed to mitigate those difficulties consistently with the interests of justice.

Some of the Commission's recommendations do not require any change to the law. Rather, they involve a review of practices and procedures, or of administrative policies. The implementation of other recommendations will involve legislative amendment.

The Commission acknowledges that, since it started its research and consultation on this reference, some progress has already been made towards improving the conditions under which child witnesses give evidence. However, much remains to be done and, although some of the Commission's recommendations involve a commitment to expenditure, many others could be implemented at relatively little cost.

The Commission intends to supplement its general scheme by a further report to be prepared in 2001 about the position of a number of special categories of child witness. That report will deal with witnesses who may be under some kind of disadvantage in addition to their age and vulnerability, as a result of which they may need further consideration beyond the general scheme put forward in this Report to ensure that they are able to give evidence effectively. These witnesses would include, for example, indigenous children and children from non-English speaking backgrounds, and children with a physical or mental disability which affects the way that they give evidence. It will also deal with children who are accused of having committed a criminal offence, and consider whether the general scheme should apply to them, or whether the general scheme should be modified in its application.

SUMMARY OF RECOMMENDATIONS

The following recommendations set out the Commission's general scheme for the giving of evidence by child witnesses.

The Commission recognises that, in some circumstances, there may be a need for modification of the general scheme - for example, because the child has special needs as a result of cultural differences or the existence of a disability, or because the child is accused of committing a criminal offence. The Commission intends to address these issues in Part 3 of this Report.

The recommendations in Chapters 7, 13, 14, and 19 have been published previously in Part 1 of this Report: *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (Report 55 Part 1, June 2000).

CHAPTER 2 - THE COURT ENVIRONMENT

The Commission recommends that:

- 2.1 Child witnesses should be provided with a waiting area which is comfortable and age-appropriate and where their privacy is secure. If there is no suitable facility available within the court precinct, then the party calling the child as a witness should be responsible for making and incurring the costs of alternative arrangements.
- 2.2 A courtroom in which a child witness gives evidence should be equipped with:
 - a suitable chair, which enables the child to be seated comfortably; and
 - adequate amplification to enable the child to be clearly heard.
- 2.3 Future courtroom design, including furniture and fittings and means of access, should take into consideration the needs of child witnesses.

2.4 The *Evidence Act 1977* (Qld) should be amended by:

- deleting section 21A(2)(b);
- inserting a new provision, which should apply to a complainant or other witness who is a child, equivalent to section 5 of the *Criminal Law (Sexual Offences) Act 1978* (Qld); and
- inserting a new provision to the effect that, in a criminal proceeding for an offence of violence, in a civil proceeding arising from the commission of an offence of a violent or sexual nature or in a proceeding for a domestic violence order, the court has a discretion to exclude from the courtroom while a child witness is giving evidence all persons other than those specified by the court.

2.5 The wearing of robes and wigs while a child witness is giving evidence in a proceeding should be a matter of discretion for the court, taking into consideration the need for consistency if the child's evidence is presented partly in the form of a pre-recorded videotape and partly at the hearing.

CHAPTER 3 - DELAYS

3.1 The Commission recommends the issue of a practice direction requiring a prosecutor or the legal representative of a party intending to call a child as a witness to notify the court of the intention to call the child so that the matter can be identified as needing priority in the court's listing system.

CHAPTER 4 - FACILITATING COMMUNICATION WITH A CHILD WITNESS

4.1 The Commission recommends that legislative provision should not be made for the use of a child communicator in cases involving a child witness.

CHAPTER 5 - SUPPORT FOR CHILD WITNESSES

The Commission recommends that:

- 5.1 Consideration should be given to establishing a service within the justice system to provide educational programs for child witnesses, to facilitate contact between various agencies involved in a proceeding in which a child is a witness and to enhance communication between those agencies and the child and his or her family.
- 5.2 To the extent that it applies to child witnesses, section 21A(2)(d) of the *Evidence Act 1977 (Qld)* should be repealed.
- 5.3 A new provision should be inserted in the *Evidence Act 1977 (Qld)* to the effect that:
 - (a) in a proceeding for a charge of a sexual offence or an offence of violence, or in a civil proceeding arising from the commission of such an offence, or in a proceeding for a domestic violence order, a child witness who is under the age of 16 years is entitled to the presence of a support person while he or she gives evidence;
 - (b) in any other proceeding where a child under the age of 16 years is to give evidence, the court may order that a support person is to be present while the child gives evidence;
 - (c) in any proceeding where a young person aged 16 or 17 years who is, in the opinion of the court, a “special witness” under section 21A(1) of the *Evidence Act 1977 (Qld)* is to give evidence, the court may order that a support person is to be present while the young person gives evidence;
 - (d) a child who is entitled to the presence of a support person while giving evidence may waive the entitlement unless, in the opinion of the court, it is not in the child’s best interests to waive the entitlement;
 - (e) a party proposing to call a child witness must apply to the court for approval of the proposed support person;
 - (f) a person who has provided professional therapy or counselling to a child who is to be called as a witness is ineligible to act as a support person for that child; and
 - (g) a support person for a child who is giving evidence is to be permitted to be within reasonable physical proximity of the child.

- 5.4 The courts, in consultation with relevant interested parties, should develop guidelines setting out the scope of the support person's role.**
- 5.5 An information kit should be developed to inform support persons of the content of the guidelines and the scope of their role.**
- 5.6 Wherever possible, issues relating to the presence of a support person for a child witness should be determined at a preliminary hearing.**

CHAPTER 6 - TREATMENT BEFORE COMMITTAL OR TRIAL

- 6.1 The Commission recommends the development, in consultation with relevant stakeholders, of a protocol for the conduct of professional counselling of children suspected of having been abused.**

CHAPTER 7 - COMPETENCY⁸

The Commission recommends that:

- 7.1 The distinction between sworn and unsworn evidence should be retained for child witnesses.**
- 7.2 The test of competency for a child witness to give evidence on oath should be whether the child:**
- (a) understands that the giving of evidence is a serious matter, and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the truth; and**
 - (b) is capable of giving a rational answer to a question about a fact in issue.**
- 7.3 A child witness who is not competent to give evidence on oath should be able to give unsworn evidence if the child is able to give an intelligible account of events which he or she has observed or experienced.**

⁸

These recommendations have been published previously in Part 1 of this Report: *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000).

- 7.4** The *Evidence Act 1977* (Qld) should be amended by the insertion of a section which provides that a child who is otherwise competent to give evidence about a fact is competent to give evidence about that fact unless the child is incapable of hearing, or of communicating a reply to a question about that fact, and that incapacity cannot be overcome.

CHAPTER 8 - OUT-OF-COURT STATEMENTS

The Commission recommends that:

- 8.1** Section 93A of the *Evidence Act 1977* (Qld) should be amended to:

- apply to all children under 16 years of age;
- apply to young persons aged 16 or 17 years who qualify as a “special witness” under section 21A of the *Evidence Act 1977* (Qld);
- remove the requirement that a statement not made to a person investigating the facts to which the proceeding relates be made “soon after” the occurrence of those events;
- provide, where the child is a complainant or prosecution witness in a criminal proceeding, for notification of the contents of the statement to be given to the accused;
- confer on the court a discretion to exclude an out-of-court statement which otherwise complies with the requirements of the section;
- provide that, in a criminal trial heard before a jury, the contents of an out-of-court statement made by a child witness be transcribed and incorporated into the record of evidence given in the proceeding;
- give statutory expression to the decision of the Court of Appeal in *R v H* to the effect that, in a criminal trial, the jury may not take the statement into the jury room during their deliberations.

- 8.2** Guidelines for interviewing child witnesses should be developed by people with appropriate experience and expertise. The objective of the guidelines should be:

- to ensure that the evidence is taken at the earliest possible opportunity;
- to assist in minimising any likelihood that the child's evidence will be tainted by interviewing techniques;
- to ensure that, where the evidence is recorded on video or audio tape, the recording is of sufficient quality to enable it to give an accurate representation of the child's evidence.

CHAPTER 9 - PRE-RECORDED EVIDENCE

The Commission recommends that:

9.1 Section 21A of the *Evidence Act 1977* (Qld) should be amended by deleting all references to videorecording the evidence of a child witness.

9.2 A new provision should be inserted in the *Evidence Act 1977* (Qld) to provide that:

- in any trial where a child under the age of 16 is to give evidence, the party proposing to call the child as a witness may apply to the court in which the trial is to be held for an order that the child's evidence-in-chief be taken, in whole or in part, and presented to the court in the form of a videotaped recording of oral evidence given by the child;
- the application to pre-record the child's evidence-in-chief may be made before the trial;
- any opposing party be served with a copy of, and be entitled to be heard on, such an application;
- the judge who hears the application may make such order as the judge thinks fit, which may include directions as to -
 - (a) any facilities to be made available to assist the child;
 - (b) the procedure to be followed in the taking of the evidence and the presentation of the recording and the excision of matters from it; and
 - (c) the manner in which any cross-examination or re-examination of the child is to be conducted at the trial;

- (d) the persons, or classes of persons, who are authorised to have possession of the videotaped recording of the evidence; the conditions, if any, attached to such possession; and the giving up of possession;
 - (e) the playing, copying or erasure of the recording;
- the recommendations made by the Commission in Chapter 10 of this Report about the use of closed-circuit television and screens for the giving of evidence by a child witness apply to the pre-recording of the evidence-in-chief of a child witness;
- the child be available for cross-examination and re-examination at the trial;
- a copy of the videotape of the child's evidence-in-chief be made available to an opposing party for the purpose of preparing for cross-examination at trial;
- before the trial, the trial judge or a judge of equivalent jurisdiction may view the videotaped evidence and may order that any part of it be deleted or that the videotape not be admitted at the trial;
- the trial judge may, at the trial, order that any part of the videotape be deleted or that the videotape not be admitted at the trial;
- if, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a trial is a person who would qualify as a "special witness" under section 21A of the *Evidence Act 1977* (Qld), the court may order that the child's evidence-in-chief be taken, in whole or in part, in the manner outlined above.

9.3 A new provision should be inserted in the *Evidence Act 1977* (Qld) to provide that:

- in any trial where a child under the age of 16 is to give evidence, the party proposing to call the child as a witness may apply to the court in which the trial is to be held for an order that the child's evidence be taken at a pre-trial hearing;
- any opposing party be served with a copy of, and be entitled to be heard on, such an application;
- the judge who hears the application may make such order as the judge sees fit which may include directions as to -
 - (a) the persons who may be present at the pre-trial hearing;

- if, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a trial is a person who would qualify as a “special witness” under section 21A of the *Evidence Act 1977* (Qld), the court may order that the evidence of the child be given in the manner outlined above.
- 9.4 A new provision should be inserted into the *Evidence Act 1977* (Qld) to provide that, where the whole or part of the evidence of a child has been given by means of a pre-recorded videotape, the party who called the child as a witness may apply for an order that the videotaped recording of the child’s evidence be admitted at a rehearing or a retrial.

CHAPTER 10 - CLOSED-CIRCUIT TELEVISION

The Commission recommends that:

- 10.1 If a child under the age of 16 years is giving evidence in criminal proceedings for offences involving violence or sexual assault, in civil proceedings arising from the commission of an offence of a violent or sexual nature or in proceedings for domestic violence orders, the child’s evidence should be given by means of closed-circuit television.
- 10.2 Recommendation 10.1 should not apply if the court orders that it would not be in the interests of justice for the child’s evidence to be given in that way, or if the child chooses not to use closed-circuit television.
- 10.3 If a child under the age of 16 years is giving evidence in a proceeding specified in Recommendation 10.1 and closed-circuit television facilities are not available or such facilities are available but the child chooses not to use them, the child’s evidence should be given with the use of a screen which prevents the witness from seeing the accused person, but does not prevent the accused from seeing the witness.
- 10.4 Recommendation 10.3 should not apply if the court orders that it would not be in the interests of justice for the child to give evidence with the use of a screen or if the child chooses not to use a screen.
- 10.5 When a child witness under the age of 16 years gives evidence using closed-circuit television or a screen the jury should be given a warning to the effect that:
- (a) it is standard procedure in such cases for children’s evidence to be given by those means; and

- (b) the jury should not draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of closed-circuit television or a screen.
- 10.6 If, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a proceeding specified in Recommendation 10.1 is a person who satisfies the definition of “special witness” in section 21A of the *Evidence Act 1977* (Qld), the court may order that the child’s evidence be given using closed-circuit television or, if closed-circuit television facilities are not available, using a screen which prevents the witness from seeing the accused person.
- 10.7 When a witness referred to in Recommendation 10.6 gives evidence using closed-circuit television or a screen, the jury should be warned not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of closed-circuit television or a screen.
- 10.8 Where a child gives evidence by means of closed-circuit television, the evidence given by the child should be recorded on videotape.
- 10.9 Where a child has given evidence by means of closed-circuit television, the party who called the child as a witness may apply for an order that the videotaped recording of the child’s evidence be admitted at a rehearing or a retrial.

CHAPTER 11 - PRELIMINARY HEARINGS

The Commission recommends that:

- 11.1 A new provision should be inserted in the *Evidence Act 1977* (Qld) to enable a preliminary hearing to be held before trial in any matter in which a child is likely to be a witness.
- 11.2 Any party to the proceeding should be entitled to apply for a preliminary hearing to resolve an issue about the giving of evidence by a child witness.
- 11.3 If it is likely that the making of an order or the giving of a direction will be necessary in relation to the evidence of a child witness, the party proposing to call the child as a witness should be required to apply for a preliminary hearing to obtain such order or direction.
- 11.4 It should not be necessary for the judge who constitutes the court for the trial to preside at the preliminary hearing.

- 11.5 A direction given or an order made at a preliminary hearing should be binding in subsequent proceedings unless it is varied or set aside in the interests of justice by the trial judge or a judge of equivalent jurisdiction.**

CHAPTER 12 - COMMITTAL PROCEEDINGS

The Commission recommends that:

- 12.1 The committal process should be retained in cases involving child complainants.**
- 12.2 Section 110A(4) of the *Justices Act 1886* (Qld) should be amended to provide that, at a committal proceeding for a charge of a sexual offence or an offence of violence, the “hand up” procedure may be used, even though the accused does not have legal representation.**
- 12.3 At a committal proceeding for a charge of a sexual offence or an offence of violence, a child who is the complainant or other prosecution witness should be cross-examined only if there are substantial reasons for requiring the child to undergo cross-examination.⁹**
- 12.4 The term “substantial reasons” should not be restricted to questions affecting the magistrate’s decision whether or not to commit the accused for trial.**
- 12.5 Magistrates should develop guidelines for determining what constitutes substantial reasons for permitting cross-examination of a child witness at a committal proceeding involving a charge of a sexual offence or an offence of violence.**
- 12.6 Legislative provision should be made for the pre-recording of the evidence of a child who is a complainant or other prosecution witness and who is required to undergo cross-examination at a committal proceeding for a charge of a sexual offence or an offence of violence.**
- 12.7 Issues relating to the giving of evidence at committal by a child witness should, where practicable, be determined at a preliminary hearing.**
- 12.8 There should not be a requirement that committals involving child complainants be heard by a Childrens Court magistrate.**

⁹

This is a recommendation of a majority of the members of the Commission. Mr P McMurdo QC dissents from this recommendation. Mr McMurdo’s view is set out at pages xyz of this Report.

CHAPTER 13 - POWER TO RESTRICT INAPPROPRIATE CROSS-EXAMINATION¹⁰

13.1 The Commission recommends that the *Evidence Act 1977 (Qld)* should be amended by inserting the following provision:

Improper questioning of child witness

- (1) The court may disallow a question put in cross-examination to a witness under the age of 18 years, or inform the witness that it need not be answered, if the question is:**
 - (a) misleading or confusing;**
 - (b) phrased in inappropriate language; or**
 - (c) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.**

- (2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:**
 - (a) any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding; and**
 - (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.**

CHAPTER 14 - UNREPRESENTED LITIGANTS¹¹

The Commission recommends that:

14.1 The *Evidence Act 1977 (Qld)* should be amended to prohibit, in a proceeding for a charge of a sexual offence or an offence of violence, direct cross-examination of a witness under the age of 18 years by an accused who does not have legal representation.

¹⁰ These recommendations have been published previously in Part 1 of this Report: *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000).

¹¹ These recommendations have been published previously in Part 1 of this Report: *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000).

- 14.2 The *Evidence Act 1977* (Qld) should be amended to prohibit, in a civil proceeding arising from the commission of a sexual offence or an offence of violence or in a proceeding for a domestic violence order, direct cross-examination of a witness under the age of 18 years by a defendant who does not have legal representation.
- 14.3 The *Evidence Act 1977* (Qld) should be amended to confer on the court a discretion to prohibit, in any other proceeding, direct cross-examination of a witness under the age of 18 years by a party who does not have legal representation if, in the opinion of the court, the ability of the child to testify effectively under cross-examination would be adversely affected if the cross-examination were to be conducted by the unrepresented party in person.
- 14.4 The *Evidence Act 1977* (Qld) should be amended to provide that, where an unrepresented party to a proceeding is prohibited from personally cross-examining a child witness, the court must:
- (a) direct the unrepresented party to arrange for a legal representative to act for the purpose of cross-examining the witness; and
 - (b) require the unrepresented party to notify the court within a specified period whether a legal representative is to act for that purpose.
- 14.5 The *Evidence Act 1977* (Qld) should be amended to provide that if, by the end of the specified period the unrepresented party has notified the court that no legal representative is to act for the purpose of cross-examining the child witness, or no notification has been received, the court must appoint a qualified legal representative to cross-examine the witness in the interests of the unrepresented party.
- 14.6 The *Evidence Act 1977* (Qld) should be amended to provide that the legal representation referred to in Recommendations 14.4 and 14.5 should be provided at public expense.
- 14.7 The *Evidence Act 1977* (Qld) should be amended to provide that a legal representative who is appointed by the court to cross-examine a child witness on behalf of an unrepresented party should have the same immunity as the legal representative would have had if he or she had been engaged by that party.
- 14.8 The *Evidence Act 1977* (Qld) should be amended to provide that where, in a trial by jury, an accused who is unrepresented is prohibited from personally cross-examining a child witness, the court must warn the jury that:

- (a) no inference adverse to the accused should be drawn from the appointment of a legal representative to conduct the cross-examination; and
- (b) the evidence given as a result of the cross-examination should be given no greater or lesser weight because the cross-examination was conducted by a legal representative whose appointment was ordered or made by the court.

CHAPTER 15 - EXPERT EVIDENCE

The Commission recommends that the *Evidence Act 1977* (Qld) should be amended to provide that:

- 15.1 The “common knowledge” rule should be abolished in relation to expert evidence about child witnesses.
- 15.2 If it is probative in the circumstances of the particular case, expert evidence should be admissible in relation to psychological factors which may lead to behaviour relevant to the credibility of a child witness. However, such evidence should be admissible in support of the credibility of a child witness only to rebut suggestions that the child is not a credible witness.
- 15.3 Expert evidence should be admissible on the questions of:
 - (a) whether a proposed child witness understands that the giving of evidence is a serious matter and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the truth; and
 - (b) whether the child is able to give an intelligible account of events which he or she has observed or experienced.
- 15.4 Expert evidence should be admissible in relation to the reliability of the evidence of a child witness.
- 15.5 Expert evidence should be admissible in relation to whether a child meets the criteria for consideration as a “special witness” under section 21A of the Act.

- 15.6 Where a court may order the use of special measures or facilities for a child witness whose ability to testify effectively would, in the opinion of the court, be adversely affected if it did not do so, expert evidence should be admissible in relation to the need of the child witness for the special measures or facilities.

CHAPTER 16 - PROPENSITY EVIDENCE

- 16.1 The Commission recommends that legislative provision should not be made for a rule to deal specifically with the admissibility of propensity evidence in criminal proceedings concerning sexual or other offences that are alleged to have been committed against children.

CHAPTER 17 - THE DISCRETION TO ORDER SEPARATE TRIALS

- 17.1 The Commission recommends that legislative provision should not be made to modify the existing law in relation to the circumstances in which it is appropriate for a court to order separate trials in respect of a count or counts in an indictment charging an accused person with sexual offences in relation to a child or a number of children.

CHAPTER 18 - IDENTIFICATION ISSUES

The Commission recommends that the *Evidence Act 1977* (Qld) be amended to provide that:

- 18.1 Where a child gives evidence by closed-circuit television, the court may make such order as it considers appropriate to allow the witness to identify a person or thing.
- 18.2 Where the court requires a child who gives evidence by closed-circuit television to be brought into the courtroom to make an identification of a person or thing, the identification evidence is to be given at the completion of the child's evidence-in-chief.
- 18.3 Where a child who gives evidence in the courtroom with the aid of a screen is required to identify an accused in person, the identification evidence is to be given at the completion of the child's evidence-in-chief.

- 18.4 The court must ensure that a child who is required to identify an accused in person is not in the presence of the person for any longer than is necessary for the child to give the identification evidence.**

CHAPTER 19 - ALLEGATIONS OF PERSISTENT SEXUAL ABUSE¹²

The Commission recommends that:

- 19.1 Section 229B of the *Criminal Code* (Qld) should be repealed and replaced with a new provision creating the offence of “Persistent sexual abuse of a child”. The new section 229B should, generally, be modelled on section 66EA of the *Crimes Act 1900* (NSW).**

19.2 The new provision should provide that:

- (a) a person who, on three or more separate occasions occurring on separate days during any period, engages in conduct, in relation to a particular child under the prescribed age, that constitutes a sexual offence commits a crime;¹³**
- (b) it is immaterial whether or not the conduct is of the same nature, or constitutes the same offence, on each occasion;**
- (c) it is immaterial that the conduct on any of those occasions occurred outside Queensland, so long as the conduct on at least one of those occasions occurred in Queensland;**
- (d) in proceedings for an offence against the new section, it is not necessary to specify or to prove the dates or exact circumstances of the alleged occasions on which the conduct constituting the offence occurred;**
- (e) a charge of an offence against the new section:**
 - (i) must specify with reasonable particularity the period during which the offence against the section occurred; and**
 - (ii) must describe the nature of the separate offences alleged to have been committed by the accused during that period;**

¹² These recommendations have been published previously in Part 1 of this Report: *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000).

¹³ The Commission makes no recommendation about the maximum term of imprisonment that may be imposed in respect of the crime.

- (f) an indictment charging a person with an offence against the new section must not contain a separate charge that the accused committed a sexual offence in relation to the same child during the period covered by the charge under that section;**
- (g) in order for the accused to be convicted of an offence against the new section:**

 - (i) the jury must be satisfied beyond reasonable doubt that the evidence establishes at least three separate occasions, occurring on separate days during the period concerned, on which the accused engaged in conduct constituting a sexual offence, in relation to a particular child under the prescribed age, of a nature described in the charge;**
 - (ii) the jury must be so satisfied about the material facts of the three such occasions, although the jury need not be so satisfied about the dates or the order of those occasions; and**
 - (iii) if more than three such occasions are relied on as evidence of the commission of an offence against the new section, all the members of the jury must be so satisfied about the same three occasions;**
- (h) a person who has been convicted or acquitted of an offence against the new section may not be convicted of a sexual offence in relation to the same child that is alleged to have been committed in the period during which the accused was alleged to have committed an offence against the new section;**
- (i) the recommendation in paragraph (h) does not prevent an alternative verdict under the recommendation in paragraph (k);**
- (j) a person who has been convicted or acquitted of a sexual offence may not be convicted of an offence against the new section in relation to the same child if any of the occasions relied on as evidence of the commission of the offence against the new section includes the occasion of that sexual offence;**
- (k) if, on the trial of a person charged with an offence against the new section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of the commission of the offence against that section, committed a sexual offence, the jury may acquit the person of the offence charged and find the person guilty of that sexual offence, provided that the jury is also satisfied that that offence was committed in Queensland.**

- 19.3** It should continue to be a requirement under the new provision that a prosecution for an offence defined in that provision must not be commenced without the consent of a Crown Law Officer.
- 19.4** The new provision should contain the following definitions:
- (a)** “prescribed age” means:
 - (i)** to the extent that the occasions in question involve an act defined to constitute an offence in section 208 or 209 of the *Criminal Code* (Qld) - 18 years;
 - (ii)** to the extent that the occasions in question involve any other act defined to constitute an offence of a sexual nature - 16 years;
 - (b)** “sexual offence” means:
 - (i)** an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f) of the *Criminal Code* (Qld); or
 - (ii)** an offence under the law of a place outside Queensland that would, if it had been committed in Queensland, be an offence referred to in paragraph (i).
- 19.5** The defences presently available under section 229B(4) and (5) of the *Criminal Code* (Qld) should continue to apply to a charge brought under the new provision. Those provisions should be incorporated into the new provision with such modifications as are necessary to reflect the fact that the new provision is no longer to refer to “the maintaining of a relationship”.
- 19.6** The Commission makes no recommendation for any change to the term of imprisonment that may be imposed in respect of an offence under the new provision. Accordingly, those aspects of section 229B(1) and (3) that relate to the question of punishment should be incorporated into the new provision with such modifications as are necessary to reflect the fact that the new provision is no longer to refer to “the maintaining of a relationship”.
- 19.7** The new provision should provide that, after the commencement of that provision:
- (a)** no further prosecutions may be brought under section 229B in its form prior to the commencement of the new provision; and

- (b) any act that could have been relied on to prosecute a charge under section 229B before its repeal and replacement should be able to be relied on as evidence of the commission of a relevant act for the purposes of the new provision, regardless of whether the act is alleged to have been committed before or after the commencement of the new provision.

19.8 Recommendation 19.7 should not apply where, before the commencement of the new provision, a person has already been charged with an offence under section 229B. The prosecution of such a person should proceed on the basis of the charge as laid.

CHAPTER 20 - PROFESSIONAL AWARENESS

The Commission recommends that:

- 20.1 The Chief Justice of the Supreme Court of Queensland, the Chief Judge of the District Court and the Chief Magistrate should give consideration to continuing to provide information about issues relating to the ability of children to give evidence as part of the program of ongoing legal education for judicial officers in their respective jurisdictions.
- 20.2 The Queensland Law Society and the Bar Association of Queensland should conduct continuing legal education programs for the members of the profession about issues relating to children as witnesses, and that such programs should include input from members of other relevant professions.
- 20.3 Deans of Queensland Law Schools should give consideration to the ways in which issues relating to children as witnesses can be included in law school undergraduate curricula.

CHAPTER 21 - INAPPROPRIATE USE OF EVIDENTIARY MATERIAL

The Commission recommends that:

- 21.1 A new provision should be inserted in the *Freedom of Information Act 1992 (Qld)* prohibiting the disclosure under the Act of prescribed matter unless the person seeking access to the prescribed matter shows cause why access should be granted.

- 21.2** The provision should state that, where a person deciding an application for access to “prescribed matter” forms the view that the applicant has shown cause why access should be granted, the application should be decided in accordance with the procedure specified in the *Freedom of Information Act 1992* (Qld).
- 21.3** The provision should state that access to prescribed material is not to be granted unless reasonable steps have been taken to ascertain whether a person to whom disclosure of the matter is likely to be of substantial concern is of the view that:
- (a) the applicant has shown cause why access should be granted; or
 - (b) the matter is exempt.
- 21.4** “Prescribed matter” should be defined as the following items in relation to the prosecution of a sexual offence or an offence of violence, or to a civil proceeding arising from the commission of such an offence or to an application for a domestic violence order:
- audio and videotapes of the statements of a child or pre-recorded videotapes of the child’s evidence;
 - medical records relating to a child;
 - photographs of a child;
 - witness statements relating to a child; and
 - a transcript of evidence given by or relating to a child witness.
- 21.5** An item listed in Recommendation 21.4 is “prescribed matter” if it was used or intended to be used as evidence in the proceeding or collected during the course of the investigation of an offence.
- 21.6** The Criminal Practice Rules should be amended to restrict access to transcripts of evidence given by or relating to a child witness in a proceeding listed in Recommendation 21.4 unless the person requesting a copy of the transcript demonstrates a sufficient interest in the proceeding or in obtaining a copy of the record.
- 21.7** The *Recording of Evidence Regulation 1962* (Qld) should be correspondingly amended.

- 21.8** The definition of “prescribed article” in section 10.21A of the *Police Service Administration Act 1990* (Qld) should be amended to include other forms of evidence in child abuse cases, such as witness statements and reports of medical examinations.

CHAPTER 22 - EVALUATION

- 22.1** The Commission recommends that the legislation implementing the changes set out in this Report should include a provision to the effect that:
- (a)** the Attorney-General and Minister for Justice must cause a review of the operation of the changes to be carried out;
 - (b)** the review is to be conducted by a multi-disciplinary panel;
 - (c)** the panel is to be constituted prior to the commencement of the changes;
 - (d)** the review is to take place two years after the commencement of the change; and
 - (e)** the review is to be completed within a period of six months.