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THE RECEIPT OF EVIDENCE BY QUEENSLAND COURTS:

THE EVIDENCE OF CHILDREN

Report No 55

Part 1

Queensland Law Reform Commission

June 2000

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Queensland Law Reform Commission
June 2000

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

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present Part 1 of its Report on The Evidence of Children.

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Chairman

The Honourable Justice D A Mullins
Member

Mr W G Briscoe
Member

Professor W D Duncan
Member

Mr P J MacFarlane
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The Commission's premises are located on the 7th Floor, 50 Ann Street, Brisbane.
The postal address is PO Box 312, Roma Street, Q 4003.
Telephone (07) 3247 4544. Facsimile (07) 3247 9045
E-mail address: law_reform_commission@jag.qld.gov.au
Internet home page address: http://www.qlrc.qld.gov.au

Previous Queensland Law Reform Commission publication in this reference:

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

FOREWORD

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 project involves areas of law and procedure which are complex and, in some cases, controversial. There are difficult issues which require a careful balancing of competing interests. The Commission has carried out extensive research into these areas and has undertaken detailed analyses of reforms and proposals for change in other comparable jurisdictions.

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. In December 1998, the Commission completed a Discussion Paper which was widely distributed throughout Queensland. It was also made available on the Commission's home page. 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 children to be able to give evidence whilst, in a criminal proceeding, at the same time respecting the rights of the accused. More than 50 submissions were received in response to the Discussion Paper. The Commission has spent a great deal of time considering the views that were put forward and the legal issues involved, and the Report containing all of its final recommendations is in an advanced state of preparation.

The Report of the Taskforce on Women and the Criminal Code, presented to the Attorney-General and the Minister for Women's Policy in February this year, made a number of recommendations which overlap with some of the issues being considered by the Commission as part of its reference. The Taskforce was established as a joint initiative of the two Ministers in November 1998. Recently, the Premier of Queensland announced an intention to introduce legislation to implement recommendations made by the Taskforce. Although the Commission's Report is not finalised, it has presented the Attorney-General with the recommendations contained in this document in order that they may be considered in the context of the present reform initiatives. These recommendations should be seen in the context of the entirety of the Commission's proposed legislative scheme for the evidence of children. They will be incorporated in the Commission's final Report, which the Commission anticipates completing in the second half of this year.

That Report will deal with many other issues of significance to the way in which children give evidence. It will include recommendations in relation to the admissibility of out-of-court statements made by a child witness, the use of pre-recorded evidence and closed-circuit television for child witnesses, the requirement for child witnesses to give evidence at committal proceedings, expert evidence, support for child witnesses, the need for professional awareness about factors affecting children's evidence, children with special needs and children charged with criminal offences.

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CHAPTER 1

POWER TO RESTRICT INAPPROPRIATE CROSS-EXAMINATION

1. INTRODUCTION

Cross-examination of witnesses who give evidence for an opposing party in legal proceedings has two objectives:[1]

> … first to elicit information concerning facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross-examination is conducted, and, secondly, to cast doubt upon the accuracy of the evidence in chief given against such a party.

Questions asked in cross-examination must be relevant to either the issues in the case or the credibility of the witness. In addition to this requirement, there are a number of statutory restrictions on the kinds of questions that may be put to a witness. For example, under the *Evidence Act 1977* (Qld), a witness may not be cross-examined about certain criminal convictions.[2] In a proceeding for certain specified sexual offences, there are limits on cross-examination of the complainant about his or her previous sexual history.[3] A question which is relevant only to credit may be disallowed if the court considers that it would not materially affect the credibility of the witness.[4] There is also a more general restriction, which enables a court to disallow a question it considers to be scandalous or indecent, unless the question relates to a fact in issue in the proceeding,[5] or a question it believes is asked only for the purpose of insulting or annoying the witness or is needlessly offensive in form.[6]

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1 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 17430.

2 *Evidence Act 1977* (Qld) s 15A.

3 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4.

4 *Evidence Act 1977* (Qld) s 20.

5 *Evidence Act 1977* (Qld) s 21(1).

6 *Evidence Act 1977* (Qld) s 21(2).

2. CROSS-EXAMINATION AT COMMITTAL

(a) The purpose of a committal hearing

A committal proceeding is a preliminary hearing, usually before a magistrate,[7] to determine whether there is sufficient evidence against a person charged with an indictable offence for the accused person to stand trial in a higher court. It has been suggested that the committal "stands as a safeguard against speculative prosecutions in the higher courts".[8] The importance of the committal procedure has been acknowledged by the High Court:[9]

> … 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.

In addition to protection against unwarranted prosecution, the committal process provides an accused person with a number of advantages, including the opportunity to gain knowledge of what the Crown witnesses say on oath and the opportunity to cross-examine them.[10]

Although there is some authority to support the argument that a committal should not be regarded as a kind of "dress-rehearsal" for the trial,[11] nonetheless courts have recognised that it is a legitimate function of a committal hearing to give a person who has been charged with a criminal offence notice of the evidence which may be called at trial to support the charge:[12]

> … committal proceedings … fulfil a useful function in enabling it to be determined whether there is evidence to justify putting an accused person upon his trial, and in giving the accused, before his trial, an opportunity to learn what case he has to meet and to test its strength.

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7 A single justice of the peace (magistrates court) is also able to hear a committal: *Justices Act 1886* (Qld) ss 4 (definition of "examination of witnesses in relation to an indictable offence"), 104 and *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(b). See Queensland Law Reform Commission, Report, *The Role of Justices of the Peace in Queensland* (R 54, December 1999) at 226.

8 Bishop J, *Criminal Procedure* (1983) at 202.

9 *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J (with whom Aickin J agreed at 109) at 99.

10 Ibid. See also *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J at 15.

11 *R v Epping and Harlow Justices; Ex parte Massaro* [1973] 1 QB 433 at 435; *Moss v Brown* [1979] 1 NSWLR 114 at 125-126.

12 *Ammann v Wegener* (1972) 129 CLR 415 per Gibbs J at 437. See also *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J (with whom Aickin J agreed at 109) at 99, and per Stephen J at 105.

If the accused is committed for trial, the opportunity provided by the committal to cross-examine prosecution witnesses before the trial takes place assists the preparation of the defence:[13]

> Counsel may conduct an exhaustive cross-examination without penalty, because answers unfavourable to the defendant will not be heard by a jury. … Close cross-examination of the prosecution witnesses may also be used to "freeze" the testimony of witnesses on critical issues, thus providing a basis for cross-examination on any discrepancies that may arise at trial. [note omitted]

(b) Cross-examination of child witnesses

A child who is a prosecution witness at a committal proceeding is likely to be subjected to rigorous cross-examination. This is a result of the recognised role of the committal process in screening out prosecutions which should not proceed to trial because there is insufficient evidence, and in informing the defence of the strength of the case to be answered if the matter does proceed. One of the principal aims of the cross-examination will be to discredit the child as a witness. However, while the aim itself is not open to criticism, the methods used by some defence counsel to achieve it are likely to place child witnesses at a significant disadvantage in giving their evidence. Techniques such as prolonged and repetitive questioning and complex grammatical structures are not merely confusing to a child but, as a result of the way in which a child's communication skills develop, may actually distort the child's answers and make the child's evidence appear to be inconsistent or untruthful.

The Commission is not in a position to establish the extent to which cross-examinations of this kind actually take place. However, anecdotal material supplied to the Commission in preliminary submissions and in submissions received in response to the Discussion Paper, and the Commission's review of a number of transcripts of committal proceedings where child witnesses were cross-examined, suggest that they are not uncommon.

One submission, from a group of nineteen non-government organisations concerned with child welfare and related issues stated:[14]

> Young people's views of the cross-examination procedure were particularly pertinent. …
>
> Some young people commented on the "use of big words" and the way they "twist your words". They also said the defence "mixed things around so you don't understand". All agreed the adversarial nature of the cross-examination was the worst part of the entire court process. They felt that the whole objective was to discredit them rather than establish the truth.

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13 Bishop J, *Criminal Procedure* (1983) at 202.

14 Submission 33.

> Most of the organisations observed that defence lawyers applied inordinate pressures to child witnesses.

In its response to the Commission's Discussion Paper, the Bar Association of Queensland drew attention to section 111(2) of the *Justices Act 1886* (Qld), which it considered might influence the conduct of cross-examination by defence counsel.[15] Section 111(2) provides that, where an accused person has been charged with an indictable offence of a sexual nature alleged to have been committed on a child under the age of 12 years and has been committed for trial, the written deposition of the evidence of the complainant or any other child witness under the age of 12 years or, if the child gives oral evidence at the committal, the certified transcript of the child's evidence may, in the discretion of the trial judge, be admitted as evidence at the trial. The Association suggested that this provision might "have something of a 'tempering effect' on any cross-examiner aware of its existence".

However, it appears that this provision is rarely used and has little effect on cross-examination of child witnesses at committal. The Commission has examined a number of transcripts of cases identified to it as containing unnecessarily aggressive cross-examination of child complainants. The following exchange comes from one of those transcripts:

Prosecutor:	Your Worship, obviously the witness is upset. Perhaps my friend can just keep his tone down, it doesn't need to be an unpleasant experience.
Defence Counsel:	Well, the Crown calls a witness. You're allowed to cross-examine them vigorously and properly. I've not acted in any way improperly. The Crown puts up this witness, they get the appropriate cross-examination.
Prosecutor:	Your Worship, she's a child.
Defence Counsel:	No, no, well if she's a child then the Crown shouldn't call her. They've called her, they've put her in the dock, it's their responsibility now, they have to sleep with it.

In another case, the magistrate cautioned the defence counsel on several occasions about the manner of cross-examination of a complainant in her early teens. Initially, the magistrate warned:

> … let's keep the voice down a bit when questioning this witness Mr [X]. It'll come to a situation of badgering the witness or harassing the witness with your attitude to her. Ask the questions calmly and properly and let her answer those questions.

A few moments later the magistrate repeated:

15 Submission 53.

> As I stated before, I don't want any badgering, harassing, raising your voice. Just ask the witness her questions. I can understand what the witness is saying. I don't want any words put into her mouth. Before you said that she [had given certain evidence] which she hadn't. She hadn't given that evidence at all. That was just put into her mouth.

Despite the magistrate's intervention, the defence counsel continued to cross-examine the complainant in an aggressive and intimidating manner.

3. CROSS-EXAMINATION AT TRIAL

Although the presence of the jury may mean that cross-examination at trial is not conducted as aggressively as cross-examination at committal, questions may nonetheless be framed in such a way as to confuse the child and to unfairly destroy the child's credibility as a witness by making the child's answers appear inconsistent or untruthful. The child's confidence may also be undermined by questions which are phrased in language the child does not understand, so that the child is perceived by the jury to be hesitant and, perhaps, unreliable.

At present, section 21 of the *Evidence Act 1977* (Qld) enables the court to disallow a question, including one asked in cross-examination, if it is indecent or scandalous and does not relate to a fact in issue in the proceeding, or if it is intended only to insult or annoy or is needlessly offensive in form.

However, this provision does not enable the court to disallow a question which is misleading or confusing, rather than offensive or insulting, nor does it entitle the court to take into consideration any individual characteristic which may affect the ability of a child witness to comprehend and respond to the question.

4. THE COMMISSION'S VIEW

The Commission is of the view that the existing legislation is not sufficiently specific to deal with inappropriate cross-examination of a child witness. It agrees with the conclusion reached by the Taskforce on Women and the Criminal Code that it is too narrowly framed to prevent improper questioning.[16]

The Commission has given consideration to a number of other possible models.

Section 23F(5) of the *Evidence Act 1908* (NZ) provides:

> … the Judge may disallow any question … that the Judge considers is, having regard to the age of the complainant, intimidating or overbearing.

16 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal* Code (February 2000) at 314-315.

Section 21B(1) of the *Evidence Act* (NT) enables the court to disallow a question put to a child witness that is "confusing, misleading or phrased in inappropriate language". In deciding whether to disallow a question the court must have regard not only to the age of the child, but also to the child's culture and level of understanding.[17]

The Commonwealth and New South Wales legislation provides:[18]

> **Improper questions**
>
> (1) The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:
>
> (a) misleading, or
>
> (b) 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, personality and education, and
>
> (b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

The Taskforce on Women and the Criminal Code recommended the adoption of the New South Wales and Commonwealth provision.[19] This approach has the advantage of promoting uniformity of legislation among the various Australian jurisdictions. The amendment proposed by the Taskforce is more comprehensive than the existing Queensland provision. It significantly broadens the kinds of question which the court may disallow. It also allows the court, in considering the nature of the question, to take into account particular characteristics of the individual witness. However, it does not specifically refer to questions which, in the light of the individual characteristics of the particular witness, are phrased in inappropriate language. Nor does it permit the court to take into account the culture or level of understanding of the witness. These matters are expressly included in the equivalent Northern Territory provision.[20]

In the view of the Commission, the *Evidence Act 1977* (Qld) should be amended by inserting a slightly wider provision giving the court specific power to disallow, during the cross-examination of a child witness, a question which, having regard to the

17 *Evidence Act* (NT) s 21B(2).

18 *Evidence Act 1995* (Cth) s 41; *Evidence Act 1995* (NSW) s 41.

19 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal* Code (February 2000) Recommendation 73.2 at 320.

20 *Evidence Act* (NT) s 21B(2).

child's age, level of understanding and culture, is intimidating, overbearing, confusing, misleading, unduly repetitive or phrased in inappropriate language. The Commission agrees, however, that the Commonwealth and New South Wales provision is a suitable model and could be redrafted to accommodate the Commission's concerns.

It is not intended to imply that, in the absence of an express legislative provision, a court has no power to control the manner in which witnesses are cross-examined; it clearly has. It is part of the everyday role of judges and magistrates to ensure that witnesses are not confused or misled by questioning in the course of cross-examination and that the cross-examination is conducted fairly.[21]

Much of the recommended redraft of the Commonwealth and New South Wales provision, to a substantial degree at least, duplicates powers already held by the courts. Such a redraft, though, has the benefit of providing a convenient re-statement of such powers and a continuing reminder of their existence.

However, any such provision should not be seen as providing an immediate and simple solution to a long-standing and complex problem. Courts will continue to be called on to exercise difficult discretionary judgments as to when and how to interfere with cross-examination. The problem is, in part, illustrated by reference to the following passage from the joint judgment in *Wakeley v R*:[22]

> The limits of cross-examination are not susceptible of precise definition, for a connection between a fact elicited by cross-examination and a fact in issue may appear, if at all, only after other pieces of evidence are forthcoming. Nor is there any general test of relevance which a trial judge is able to apply in deciding, at the start of a cross-examination, whether a particular question should be allowed. Some of the most effective cross-examinations have begun by securing a witness' assent to a proposition of seeming irrelevance. Although it is important in the interests of the administration of justice that cross-examination be contained within reasonable limits, a judge should allow counsel some leeway in cross-examination in order that counsel may perform the duty, where counsel's instructions warrant it, of testing the evidence given by an opposing witness. …
>
> … It is the duty of counsel to ensure that the discretion to cross-examine is not misused. That duty is the more onerous because counsel's discretion cannot be fully supervised by the presiding judge. Of course, there may come a stage when it is clear that the discretion is not being properly exercised. It is at that stage that the judge should intervene to prevent both an undue strain being imposed on the witness and an undue prolongation of the expensive procedure of hearing and determining a case. But until that stage is reached - and it is for the judge to ensure that the stage is not passed - the court is, to an extent, in the hands of cross-examining counsel.

21 See *Mooney v James* [1949] VLR 22 at 28-29.

22 (1990) 93 ALR 79 per Mason CJ, Brennan, Deane, Toohey and McHugh JJ at 86.

5. RECOMMENDATIONS

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

Improper questioning of child witness[23]

(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.

23 The Commission is aware that this provision may be equally applicable to adult witnesses. However, the Commission's reference is confined to factors affecting the ability of courts to receive the evidence of children.

CHAPTER 2

COMPETENCY

1. INTRODUCTION

A person is a competent witness if that person may lawfully be called to give evidence.

The common law required a prospective witness to swear an oath on the Bible that what he or she was about to say was the truth, and evidence was receivable only when given on such an oath.[24] A witness who had no religious belief or who held a religious belief which prevented an oath from being binding on his or her conscience was therefore incompetent to give evidence.[25] Similarly, a witness who was incapable of understanding the nature and obligations of such an oath was also incompetent at common law.

As the competency test was based on understanding rather than age, the common law allowed a child to give sworn evidence provided that he or she could demonstrate sufficient knowledge of the nature and consequences of the oath:[26]

> … 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; but if they are found incompetent to take an oath, their testimony cannot be received.

The common law has now been significantly modified by legislative reform. In some Australian jurisdictions, the test of competency to take the oath has been modified. In all jurisdictions, a witness may choose to give evidence on affirmation rather than on oath and a child may, in certain circumstances, give unsworn evidence.

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24 For a history of the use of oaths in the common law system, see Weinberg M, "The Law of Testimonial Oaths and Affirmations" (1976) 3 *Monash University Law Review* 25 at 27-28.

25 *R v Brown* [1977] Qd R 220 per Williams J at 232.

26 *R v Brasier* (1779) 1 Leach 199 at 200, 168 ER 202 at 203.

2. COMPETENCY TO TAKE THE OATH

(a) The traditional test

The traditional test of the capacity to appreciate the nature and effect of the oath was "belief in God and expectation that He will reward or punish in this world or the next".[27]

The questions asked to determine the competency of a witness were to be directed towards whether the witness believed in God, in the obligation of an oath and in a future state of rewards and punishments.[28]

This traditional oath competency test still applies in Queensland.

(b) Alternative approaches

Although the traditional test has been retained in Queensland, in other jurisdictions there have been significant changes to it.

In the United Kingdom, for example, the Court of Appeal adapted the test to better accommodate changing societal conditions:[29]

> The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.

The position in England with respect to criminal proceedings has been further modified by statute. Section 33A of the *Criminal Justice Act 1988* was enacted with the aim of abolishing the competency requirement for witnesses in criminal cases.[30] However, this provision has been criticised for failing to achieve its stated objective[31] and is to be repealed.[32]

The situation will then be governed by Chapter V of Part II of the *Youth Justice and Criminal Evidence Act 1999*. Section 53 of that Act provides that any person is

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27 *R v Brown* [1977] Qd R 220 per Wanstall ACJ at 221-222.

28 *R v Taylor* (1790) Peake 15, 170 ER 62.

29 *R v Hayes* [1977] 1 WLR 234 per Bridge LJ at 237.

30 This provision was inserted by s 52 of the *Criminal Justice Act 1991*.

31 See for example Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 62-65.

32 *Youth Justice and Criminal Evidence Act 1999* s 67(3), Sch 6. As at 14 June 2000, the paragraph in Sch 6 that will repeal s 33A of the *Criminal Justice Act 1988* had not commenced.

competent to give evidence at every stage in criminal proceedings provided that the person is able to understand questions put to the person as a witness and to give answers to them which can be understood. Section 55 further provides that a child under the age of 14 years may not be sworn for the purpose of giving evidence on oath. Any other person, including a child or young person aged 14 years or more, may give evidence on oath provided that the person has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath. A witness who is able to give intelligible testimony is presumed, in the absence of evidence to the contrary, to have sufficient appreciation of those matters. For the purposes of section 55, a person who is able to understand the questions put to him or her as a witness and to give answers to them which can be understood is able to give intelligible testimony.[33]

In Australia, Commonwealth legislation, which is mirrored in New South Wales, creates a general presumption of competency which applies to all witnesses irrespective of their age.[34] However, a person who is incapable of understanding that he or she is obliged to give truthful evidence is not competent to give evidence on oath.[35] Further, a person who is not capable of giving a rational reply to a question about a fact is not competent to give evidence about that fact, but may be competent to give evidence about other facts.[36] In South Australia, a witness of any age is presumed to be competent to give sworn evidence in any proceedings, unless the judge determines that the person does not have sufficient understanding of the obligation to be truthful which is entailed in giving sworn evidence.[37]

In Western Australia, the traditional test of competency to give evidence on oath has been modified for certain child witnesses. Section 106B(2) of the *Evidence Act 1906* (WA) provides that a child under the age of 12 years is competent to give sworn evidence if the child understands that the giving of evidence is a serious matter and that, in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth. This test was based on a recommendation of the Law Reform Commission of Western Australia, which adapted its proposal from the revised common law position in the United Kingdom.[38] The Western Australian Commission considered that the test would be sufficiently wide "to include most children of school age, and possibly also some younger children who have been adequately prepared for giving evidence".[39]

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33 As at 14 June 2000, these provisions had not commenced.

34 *Evidence Act 1995* (Cth) s 13(5); *Evidence Act 1995* (NSW) s 13(5). The Commonwealth Act applies in proceedings in all federal courts and in all courts in the Australian Capital Territory: *Evidence Act 1995* (Cth) s 4.

35 *Evidence Act 1995* (Cth) s 13(1); *Evidence Act 1995* (NSW) s 13(1).

36 *Evidence Act 1995* (Cth) s 13(3); *Evidence Act 1995* (NSW) s 13(3).

37 *Evidence Act 1929* (SA) s 9(1).

38 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at paras 2.12, 2.15.

39 Id at para 2.12.

3. UNSWORN EVIDENCE

(a) Existing Queensland legislation

There are at present two provisions which would allow a child to give unsworn evidence in Queensland.

(i) *Oaths Act 1867* (Qld)

Section 37 of the *Oaths Act 1867* (Qld) provides that, in certain circumstances, a prospective witness may give evidence in the manner declared by the judge. This provision applies if the witness objects to taking the oath, or if the witness appears incapable of understanding the nature of an oath, provided that the judge is satisfied that the taking of an oath would have no binding effect on the person's conscience and that the person understands that he or she will be liable to punishment if the evidence is untruthful.[40]

While removing the element of religious belief required by the common law, this provision - which is of general application and not directed particularly towards child witnesses - still involves a reasonably stringent test of competency. It has been observed that, to invoke a provision of this kind:[41]

> … the witness must demonstrate an understanding of the difference between truth and falsehood, an understanding of the general moral duty to speak truthfully, and an understanding that falsehood is punishable by criminal penalty. [note omitted]

For many potential child witnesses, who may be able to provide relevant information to the court, this threshold would be too high.

(ii) *Evidence Act 1977* (Qld)

Section 9 of the *Evidence Act 1977* (Qld) makes specific provision for children to give unsworn evidence if they are not sufficiently competent to take the oath. It states:

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40 Section 37 of the *Oaths Act 1867* (Qld) states:

> 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.

41 Ligertwood A, *Australian Evidence* (3rd ed, 1998) at 440-441.

Evidence of children

9.(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 upon 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 does not specify any age 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.[42]

(b) The law in other Australian jurisdictions

In other Australian jurisdictions, the provisions enabling children to give unsworn evidence differ to some extent in the conditions which must be met in order for the child's evidence to be admitted.

In New South Wales, the court must be satisfied that the child understands the difference between the truth and a lie, the court must tell the child that it is important to tell the truth and the child must indicate, by responding appropriately when asked, that he or she will not tell lies in the proceeding.[43] A witness who is incapable of giving a rational answer to a question about a fact is not competent to give evidence about that fact, but may be competent to give evidence about other facts.[44] In South Australia, a witness who does not satisfy the test of competency to give sworn evidence may be permitted to give unsworn evidence if the judge is satisfied that the

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

43 *Evidence Act 1995* (NSW) s 13(2). See also *Evidence Act 1995* (Cth) s 13(2), which applies to proceedings in all federal courts and in all courts in the Australian Capital Territory: *Evidence Act 1995* (Cth) s 4.

44 *Evidence Act 1995* (NSW) s 13(3). See also *Evidence Act 1995* (Cth) s 13(3). These provisions apply to all witnesses.

witness understands the difference between the truth and a lie and tells the witness that it is important to tell the truth, and if the witness indicates that he or she will tell the truth.[45] In Tasmania[46] and in Western Australia,[47] 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.[48]

The age of the witnesses to whom these provisions apply also varies.

4. ISSUES FOR CONSIDERATION

The question of the competency of child witnesses gives rise to a number of issues for consideration in the context of the present position in Queensland.

At the outset, it is necessary to consider whether, in relation to child witnesses, the distinction between sworn and unsworn evidence should be retained. If the distinction is not to be retained, it will be necessary to consider the basis on which the evidence of children should be admitted. If the distinction is to be retained, it will be necessary to consider what is an appropriate test for competence to give evidence on oath and what, if any, test should be applied to determine whether a child should be allowed to give unsworn evidence.

(a) Retention of the distinction between sworn and unsworn evidence

In Queensland, a child who is competent to take an oath may, irrespective of his or her age, give sworn testimony. However, in some jurisdictions - in England, for example - children under a certain age may not give evidence on oath in criminal proceedings.[49]

Provisions of this kind raise the question of whether, in Queensland, all children below a certain age should give unsworn evidence.

It has been suggested that the oath ceremony fulfils three functions:[50]

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45 *Evidence Act 1929* (SA) s 9(2). This provision applies to all witnesses.

46 *Evidence Act 1910* (Tas) s 122C. This provision applies to a child under 14 years.

47 *Evidence Act 1906* (WA) s 106C. This provision applies to a child under 12 years.

48 *Evidence Act 1958* (Vic) s 23(1)(b). This provision applies to a child under 14 years.

49 See p 11 of this Report. The position is similar in many European countries. In France, for example, children under the age of 16 give unsworn evidence in criminal proceedings: Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 401-403.

50 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 115.

- evidentiary, to provide a record for subsequent potential prosecution for perjury;
- cautionary, to remind the witness of the requirement to be truthful; and
- ritual, to establish the solemnity of giving evidence and to underline the cautionary function.

According to the Australian Law Reform Commission:[51]

> The swearing of witnesses … is important as a symbol of the attempt by the trial system to make decisions on the basis of accurate fact-finding. It would seem also, on occasions, to make witnesses more careful and thus assist in fact-finding, securing a fair trial and the saving of time and costs.

The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission recommended that, as under the *Evidence Act 1995* (Cth) and the *Evidence Act 1995* (NSW),[52] all children should be presumed *prima facie* competent to give sworn evidence.[53]

The Law Reform Commission of Western Australia was also of the view that the distinction between sworn and unsworn evidence should be retained for young witnesses. That Commission was concerned that juries may regard unsworn evidence as less reliable than evidence given on oath, and therefore concluded that a child who was capable of giving evidence on oath should be allowed to do so.[54]

(b) Criticisms of the traditional oath competency test

The traditional test of competency to take the oath has been subject to a number of criticisms.

The first ground of criticism is that it may unfairly exclude the evidence of children who have the capacity to give a reliable account of what they have seen or experienced. The necessity for a child to satisfactorily answer questions about belief in God and the concept of divine retribution, putting aside the practical difficulties in implementing such a test, inevitably results in children who have sufficient intelligence to give coherent evidence being declared incompetent to give sworn

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51 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at 306.

52 See p 11 of this Report.

53 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 98 at 324.

54 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at paras 2.8, 2.10.

evidence because they lack awareness of the implications of the oath. This may be particularly significant if the child is the only witness:[55]

> It is argued that to impose such a conceptual understanding is to exclude testimony which is often sufficiently reliable to be received and acted upon. The bottom line is to receive as much relevant evidence as possible, and, although good reasons exist for having formal requirements, in most cases, these should not be permitted to stand in the way of the receipt of sufficiently reliable testimony, particularly where there may be no other evidence available and crimes will otherwise go unpunished. It is argued that there is no necessary connection between a witness's understanding of the moral duty to tell the truth and the reliability of the testimony the witness can give. And in practice, it is very difficult for a trial judge to conduct any meaningful enquiry about a child's understanding of moral concepts. [note omitted]

The traditional oath test may also exclude evidence from witnesses of other faiths. One of the respondents to the Commission's Discussion Paper[56] commented:[57]

> If the oath extends to the religious affirmations of earlier days, this would indicate that those with different religious beliefs from the mainstream are incompetent to testify. Reference to the divine sanction attending a breach of the oath as an essential prerequisite in this State to the swearing in of a witness … would appear to be out of touch with the current diversity of population and beliefs in Qld. There would be many intelligent children in Qld who would fully understand what telling the truth means but not what divine retribution means.

Moreover, the same test is not applied to adults, who are generally presumed competent to take an oath without being subjected to questioning about the state of their religious knowledge and beliefs:[58]

> … if the essence of the sanction of the oath is a divine sanction, and if it is an awareness of that divine sanction which the court is looking for in a child of tender years, then here was a case, where, on the face of it, that awareness was absent. The court is not convinced that that is really the essence of the court's duty in the difficult situation where the court has to determine whether a young person can or cannot properly be permitted to take an oath before giving evidence. It is unrealistic not to recognise that, in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised.

The Law Reform Commission of Western Australia observed that:[59]

> The law and practice regarding competency to take the oath subjects children … to a more stringent test than adults, who are routinely allowed to give evidence on oath without any inquiry as to their religious beliefs.

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55 Ligertwood A, *Australian Evidence* (3rd ed, 1998) at 442.

56 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

57 Submission 37.

58 *R v Hayes* [1977] 1 WLR 234 per Bridge LJ at 236-237.

59 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 2.4.

A judge of the District Court of Western Australia doubted the continued relevance of the oath competency test and noted the different treatment of child and adult witnesses in relation to the test of competency to give evidence on oath:[60]

> I think the time has come when the whole issue of whether an oath adds anything other than in the context of perjury law, needs to be rethought. But if the oath is to be retained then I think for consistency and certainty, some distinct age (such as 12 years) should be the basis on which sworn evidence is to be given.
> …
>
> I might also add that the whole question of whether an oath is taken or not is not given much consideration in the context of adults who daily take the oath or affirmation but often ignore it.

The Australian Law Reform Commission acknowledged that the traditional test was appropriate in that it was formulated in terms of understanding rather than age, but criticised its narrow scope:[61]

> The common law test … is essentially one of moral and religious understanding. The test does not appear to meet directly the real issues of psychological competency. Factors such as memory, the ability to make inferences and the capacity to be appropriately informative and relevant are not considered. Only the criterion that the witness should have the capacity to be truthful is tested by the common law formula. The capacity to understand which information is required, extract it from other stored information and express it clearly, is not tested as it would be if the test were framed in terms of cognitive development.

A further criticism of the oath understanding test is that it is not always taken seriously.[62] It would seem that some judges and magistrates, presumably in an attempt to avoid the need to declare a potential child witness incompetent to testify on oath, adopt a perfunctory approach to the task of questioning the child about his or her religious knowledge. The following extract is from the transcript of a Queensland committal hearing involving a child complainant:

Magistrate:	Do you know the meaning of taking on oath on the Bible?
Witness:	Yes.
Magistrate:	Okay. You know what the Bible's all about?
Witness:	Yes.
Magistrate:	Okay. What, you did religious instructions at school did you or go to Sunday School or Church or something?
Witness:	Yeah.

60 Submission 54.

61 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at 129.

62 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 101.

> Magistrate: Okay and you know when you take the oath on the Bible, you must tell the truth and the whole truth, nothing but the truth, you realise that? And do you know if you tell lies or you don't tell the truth, you can get into trouble, do you realise that too? Okay, so you probably know about taking an oath on the Bible. Okay that's fine.

It was held that the child was competent to swear an oath.

The test of competency to take an oath has also been criticised because, in addition to excluding some children who may well be able to give evidence, it allows some children whose evidence may be inherently unreliable to testify:[63]

> The greatest weakness of the oath understanding test is that if a child demonstrates an understanding of the obligation to tell the truth, the child is competent to relate his or her perceptions even if there is good reason to believe them to be faulty. The oath understanding competency test does not screen at all for suggestibility, memory-fade or any other reliability risk. Qualifying a child as a witness based solely upon the child's abstract appreciation of an oath's obligations is a test that is both overinclusive and underinclusive. It can exclude some linguistically unsophisticated but truly reliable younger witnesses while failing to exclude the unreliable.

(c) Modification of the oath competency test

In a number of Australian jurisdictions, the test of competency for a child witness to take an oath has been modified.

The Law Reform Commission of Western Australia, in recommending that the distinction between sworn and unsworn evidence should be retained, was of the view that the ability of children to give evidence on oath would be enhanced by a modified test of oath competency.[64] The Commission considered that there should be no necessity for young children to profess belief in God, or in divine sanction for telling a lie, before they are able to take an oath.[65] It recommended that a child of any age should be able to take an oath where the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the ordinary duty to tell the truth.[66] The Commission's recommendation was implemented by section 106B(2) of the *Evidence Act 1906* (WA).[67]

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63 Id at 102. See also Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 56-57.

64 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 2.8.

65 Id at para 2.14.

66 Id at para 2.15.

67 See p 11 of this Report.

Similarly, the Commonwealth and New South Wales Evidence Acts, which are based on a recommendation of the Australian Law Reform Commission, also provide a modified test of oath competency.[68] The Australian Law Reform Commission, in framing its recommendation, focused only on those factors which might affect the ability of a person to function as a witness. It did not take into consideration factors - such as the powers of observation of a witness, or the time which has elapsed between the perception of an event and its eventual report - affecting the value of the evidence. The latter, in the view of that Commission, were relevant to the credibility of the witness rather than the competence of the witness to give evidence, and should therefore be taken into account at the stage when the weight to be given to the evidence is assessed.[69] The Commission recommended that the traditional oath competency test should be replaced by a requirement "that the witness understand the obligation to give truthful answers and be able to understand and respond rationally to questions".[70]

(d) Competency to give unsworn evidence

(i) Should there be a test?

In Queensland, a child who is not competent to swear an oath may give unsworn evidence provided the child meets the criteria set out in section 9 of the *Evidence Act 1977* (Qld).[71] Other Australian jurisdictions also impose a test of competency to give unsworn evidence.[72]

However, because there may be many potential child witnesses who would not be able to meet the requirements of such a test, there have been suggestions that the test should be abolished. The effect of this would be that all child witnesses would be able to give evidence, irrespective of their age, subject only to the general admissibility requirements. It would then be for the court - or, where relevant, the jury - to determine the weight to be given to the child's evidence. This view was put forward as early as 1904 by noted American authority on the law of evidence, John Wigmore:[73]

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68 *Evidence Act 1995* (Cth) s 13; *Evidence Act 1995* (NSW) s 13. The Commonwealth Act applies in proceedings in all federal courts and in all courts in the Australian Capital Territory: *Evidence Act 1995* (Cth) s 4.

69 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at 124.

70 Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) at 38.

71 See pp 12-13 of this Report.

72 See pp 13-14 of this Report.

73 Wigmore JH, *Wigmore on Evidence* (1904) § 509, 640 cited in McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 105.

> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable … Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth.

A more recent commentator observed:[74]

> 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 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.

A committee established to examine certain aspects of children's evidence in the United Kingdom made a similar recommendation:[75]

> 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. … 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 competency requirement which is applied to potential child witnesses should be dispensed with and that it should not be replaced.

The New Zealand Law Commission considered that there would be two principal benefits of abolishing the competency requirement - simplicity and consistency with the purposes of the law of evidence.[76]

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

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

76 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at 13.

It believed that simplicity would be promoted because there would be no need for a special examination to test the competence of a prospective witness in order for the witness to give evidence.[77]

In relation to consistency with the purposes of the law of evidence, the New Zealand Commission identified those purposes as the rational ascertainment of facts, and fairness to both defendants and witnesses.[78]

It noted that a witness who could not fulfil the requirements of a competency test may nonetheless be able to give relevant and reliable evidence, and expressed the view that it would be counter to the goal of promoting the rational ascertainment of facts to exclude the evidence of such a witness.[79] Abolition of the competency requirement would therefore enhance the rational ascertainment of facts by ensuring that an increased amount of relevant information is made available.[80]

The New Zealand Commission acknowledged that abolition of the competency test might cause concern for defendants in criminal cases, particularly if vital evidence is to be given by a child complainant. However, it observed that the main change proposed was simply that a child's evidence would not be "ruled inadmissible solely on the grounds of a failure to make and understand a promise".[81] It considered that the interests of a defendant would be adequately protected because a defendant would still be able to challenge the credibility and reliability of the child's evidence through cross-examination, and because the general rules as to the exclusion of evidence would still apply.[82]

The New Zealand Commission expressed the view that the finder of fact would still have to assess the child's credibility and the reliability of the child's evidence in order to determine the weight to be given to the evidence,[83] and that this assessment would address concerns about a witness's reliability which are meant to be addressed in the context of a competence test.[84] It agreed with what it termed "a strong body of opinion" that, because of the difficulty in defining and applying a standard of competence to give evidence, the better approach would be to admit the evidence of a child witness so that

77 Id at 16.

78 Id at 2-3.

79 Ibid.

80 Id at 13.

81 Id at 16.

82 Ibid.

83 Id at 17.

84 Id at 15.

the fact-finder's assessment of credibility and reliability is made in the light of the increased amount of relevant evidence.[85] It concluded that concerns about the reliability of the evidence of a witness should be addressed by testing the witness's credibility rather than through a preliminary competence test,[86] and that the fact-finder's process of determining the weight to be given to the evidence of a particular witness was the most useful method of assessing the witness's credibility.[87]

The New Zealand Commission accepted that, without a competency test, problems may arise with the evidence of some witnesses because of difficulties with communication and accuracy of perception and recall.[88] However, it considered that the differences between adult witnesses generally - who have not been routinely subjected to a test of competence - and child witnesses may have been exaggerated.[89] It observed:[90]

> … given that the evidence of adults of ordinary intelligence may also be unreliable for many reasons, including the problems that all people have in accurately interpreting and remembering an event, it is difficult to know whether the evidence of children, for example, is less reliable *per se* than that of adults. Many factors, other than age alone, contribute to the quality of a witness's evidence. [note omitted]

It concluded that, where difficulties do arise, "they may be more appropriately addressed by ensuring that procedures for giving evidence enhance reliability and effective communication, rather than by simply excluding the evidence".[91]

However, this approach has also been subject to criticism.

One commentator identifies three problems with the abolition of a competency test for children. Firstly, the writer does not agree that the difference in reliability between adults and children in giving evidence has been overestimated, but expresses the view that "data on the unreliability of adults seem less compelling than the accumulated data demonstrating the substantial risks of distortions in children's memory".[92] She concludes that unreliable child witnesses are a "much more predictable phenomenon" than

85 Id at 12-13, 17.

86 Id at 15.

87 Id at 17.

88 Id at 13.

89 Ibid.

90 Id at 10.

91 Id at 13.

92 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 107-108.

"the occasional inefficiency created by the unreliable adult witness".[93] Secondly, she considers that abolition of the competency test for child witnesses makes questionable assumptions about the adversarial system of justice:[94]

> It assumes that the adversarial system produces equal prowess so that cross-examination will be conducted effectively. It also assumes that cross-examination is capable of exposing the reliability risks of any witness's testimony. … Studies of lawyers' awareness of social science data, including the potential reliability risks in children's testimony, demonstrate that lawyers are only slightly more knowledgeable than the average juror. … Research also reveals that cross-examination of children is often counter-productive and typically powerless to dislodge error, such as suggestive matter from pretrial interviews that children may have absorbed into their "memory" of past events. [notes omitted]

Thirdly, she observes that total abolition of the competency test means the loss of an opportunity to be more efficient in improving the quality of children's evidence in the future:[95]

> Echoing Wigmore, we can only continue to hear children's testimony "for what it's worth," and it may be worth very little.

While acknowledging the validity of criticisms of some existing competency tests, she nonetheless opposes its "wholesale rejection".[96]

The Irish Law Reform Commission also opposed the complete abolition of a competency test. Although recognising the argument that the victim of an offence should be able to be heard even though he or she may be too young to understand the concept of being under an obligation to tell the truth,[97] that Commission foresaw practical difficulties in an assumption that all children are competent to give evidence:[98]

> 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 on which a court could safely act.

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93 Id at 108.

94 Ibid.

95 Ibid.

96 Ibid.

97 The Law Reform Commission (Ireland), *Report on Child Sexual Abuse* (LRC 32, 1990) at para 5.16.

98 Id at para 5.13.

The Irish Commission did not believe that it could be assumed that all children under a specified age would be incompetent to give evidence; rather, that Commission was of the view 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.[99] It recommended that:[100]

> … 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.

This test is based on the child's ability to communicate, and does not refer to an obligation to give truthful evidence. The Irish Commission was concerned that such a requirement would involve 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".[101] The Commission acknowledged that a test of this kind would raise the possibility of a conviction based on the uncorroborated testimony of an immature child who does not understand the difference between truth and falsehood. However, the Commission believed that the risk of an innocent person being so convicted was outweighed by other safeguards in the criminal justice process:[102]

> 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 be reasonably discounted.

The Irish Commission's recommendations resulted in the enactment of legislation to allow the unsworn evidence of a child under the age of 14 years to be admitted in any criminal proceedings "if the court is satisfied that he is capable of giving an intelligible account of events which are relevant to those proceedings".[103]

The Irish Commission's approach was endorsed by the Law Reform Commission of Western Australia. That Commission noted that there is no necessary correlation between an understanding of the duty to tell the truth and the reliability of evidence, and that quite young children may be able to

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99 Ibid.

100 Id at para 5.18.

101 Id at para 5.15.

102 Id at para 5.17.

103 *Criminal Evidence Act 1992* (Ireland) s 27(1), (3) <http://www.bailii.org> (18 June 2000).

give an intelligible and accurate account of events even though they may not understand the difference between abstract concepts such as truth and lies.[104] It recommended that "a child under the age of 12 years who is not competent to swear an oath or affirm 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".[105] This recommendation was implemented by section 106C of the *Evidence Act 1906* (WA).

In its Discussion Paper,[106] this Commission sought submissions as to whether there should be a test of competency for child witnesses to give unsworn evidence.[107] The majority of respondents who addressed this issue favoured the retention of a competency requirement.[108] However, two respondents opposed a competency requirement.[109] One of these respondents commented:[110]

> The competency requirement should be abolished on the basis that the child may be the only witness except for the offender and justice may hinge on that child's sole testimony. It would be an extreme injustice to deny the child the right to speak on the basis that that child might not understand the obligations of the oath, or doesn't satisfy some other intellectual requirement. The validity of the child's testimony should be determined by the jury.

(ii) What is an appropriate test?

In Queensland, the present test of competency for a child witness to give unsworn evidence is that, whether or not the child understands the duty to tell the truth, the child has sufficient intelligence to give reliable evidence.[111]

The majority of submissions received by the Commission on this issue rejected this test as inappropriate. A number of submissions noted that there is no necessary correlation between the level of intelligence of a child witness and the reliability of that child's evidence.[112] The Acting Director of Public

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104 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 2.34.

105 Id at para 2.35.

106 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

107 Id at 58.

108 Submissions 18, 19, 20, 32, 40, 53.

109 Submissions 2, 7.

110 Submission 2.

111 *Evidence Act 1977* (Qld) s 9(1).

112 Submissions 18, 19, 29, 32, 42.

Prosecutions in Western Australia observed:[113]

> Certainly whether the child is intelligent enough to give evidence is a factor, but it should not be the overriding factor - the *reliability* of their evidence should be the primary consideration. A child may give an entirely intelligent, but utterly *unreliable* account of the events. The test in s 9 of the Queensland *Evidence Act* is deceptive because although it refers to "reliable evidence", the test itself is not whether the child *can* give reliable evidence, it is whether the child is sufficiently intelligent *to give* reliable evidence. [original emphasis]

Two respondents also emphasised the need for the test of competency to include an appreciation of the need to tell the truth.[114] In the view of the Queensland Director of Public Prosecutions:[115]

> Surely if the child's evidence is to have any value at all there must be at least an understanding by him or her of the difference between the truth and a lie, the child knows it is wrong to lie, understands the necessity to tell the truth, and promises to do so.

5. IMPAIRED ABILITY TO COMMUNICATE

Although the common law oath competency test is restricted to the ability of a witness to understand the nature of an oath and does not take into consideration the ability to understand and answer questions, a witness whose ability to communicate is significantly impaired can be declared incompetent to give evidence. In one case, for example, it was held that a deaf mute could not testify.[116]

However, that case was decided in 1866. Since then there have been significant developments in technologies which assist people with communication difficulties. There has also been a change in community attitudes to people who have disabilities which affect their ability to hear and speak. This change has been reflected in the attitude of courts to the reception of evidence from people with disabilities.[117]

Nonetheless, despite any attitudinal change, the position has not been modified by legislation in Queensland. One of the submissions received by the Commission in response to the Discussion Paper criticised this situation. The Queensland Director

113 Submission 18.

114 Submissions 32, 40.

115 Submission 32.

116 *R v Whitehead* (1866) 10 Cox CC 234.

117 See for example *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414 per Kirby P at 418-420, 423 and per Samuels JA at 425.

of Public Prosecutions commented, with respect to the legislative provisions relating to the evidence of children in Queensland:[118]

> All of these provisions presuppose that the child is able to communicate verbally. Special provision needs to be made to the effect that if a witness (a child or otherwise) has difficulty in verbally communicating his or her evidence by reason of a physical or mental disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible …

The Australian Law Reform Commission expressed the view that no witness should be prevented from giving evidence who is able to communicate with human or mechanical assistance.[119] The *Evidence Act 1995* (Cth), which is based on the recommendations of the Australian Law Reform Commission, provides that a person is competent to give evidence about a fact unless the person is incapable of hearing or understanding, or of communicating a reply to, a question about the fact and that incapacity cannot be overcome.[120]

There is also legislation in England and in Canada providing for the reception of evidence from witnesses who have difficulty communicating in a conventional manner.

Section 6 of the *Canada Evidence Act* provides that:

> (1) If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.
>
> (2) If a witness with a mental disability is determined … to have the capacity to give evidence and has difficulty communicating by reason of a disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible.
>
> (3) The court may conduct an inquiry to determine if the means by which a witness may be permitted to give evidence under subsection (1) or (2) is necessary and reliable.

In England, section 30 of the *Youth Justice and Criminal Evidence Act 1999*, when it comes into force, will allow a witness to whom the Act applies to be provided with "such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from".[121]

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118 Submission 32.

119 Australian Law Reform Commission, Interim Report, *Evidence* (ALRC 26, 1985) Vol 1 at 130.

120 *Evidence Act 1995* (Cth) s 13(4). See also *Evidence Act 1995* (NSW) s 13(4).

121 As at 14 June 2000, this provision had not commenced.

6. THE COMMISSION'S VIEW

(a) Retention of the distinction between sworn and unsworn evidence

This Commission agrees with the Australian Law Reform Commission, the Human Rights and Equal Opportunity Commission and the Law Reform Commission of Western Australia that the distinction between sworn and unsworn evidence should be retained for child witnesses and that, where appropriate, children should be able to give evidence on oath.[122]

In the view of the Commission, the solemnity of legal proceedings is emphasised by the giving of sworn evidence. This helps to reinforce the importance of the obligations which the witness is undertaking. As a result, if children are unable to give sworn evidence, their testimony may be discounted in relation to that of adults who give evidence on oath.

The Commission is therefore of the view that all children who are competent to give evidence on oath should be able to do so, regardless of their age.

(b) The oath competency test

The Commission agrees with many of the criticisms outlined above of the traditional oath competency test.[123] In the view of the Commission, it is no longer appropriate that the competency of a child witness should depend on the child's religious knowledge and belief. The present test requires the child to demonstrate an understanding of matters which many adults who are called as witnesses would regard as irrelevant while, at the same time, failing to take into consideration factors which have an important bearing on the child's ability to give reliable evidence.

The Commission considers that the essential criteria for determining whether a child witness is competent to give evidence on oath are that the child appreciates the solemnity of the occasion and the consequential obligation to give truthful evidence, and that he or she is capable of understanding and responding to questions which are put to him or her as a witness. The Commission does not agree with the suggestion that factors such as suggestibility and memory fade should be included in the test, as these are matters which affect the weight which should be given to the evidence, rather than the child's competence to testify.

The Commission is therefore of the view that the test of competency for a child witness to give evidence on oath should be whether the child understands that the giving of evidence is a serious matter, that he or she is under an obligation to give

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122 See p 15 of this Report.

123 See pp 15-18 of this Report.

truthful evidence that is over and above the ordinary duty to tell the truth, and that he or she is capable of giving a rational answer to a question about a fact in issue.

(c) Competency to give unsworn evidence

The Commission is of the view that a test of competency for a child witness to give unsworn evidence should be retained. However, the Commission does not consider that either of the existing tests under which the unsworn evidence of a child may be admitted in Queensland is appropriate.

The Commission believes that the test imposed by section 37 of the *Oaths Act 1867* (Qld),[124] which requires a witness to demonstrate an understanding of the difference between the truth and a lie, of the duty to tell the truth and of the concept of perjury, would exclude many potential child witnesses who may be able to provide relevant information to the court. The test imposed by section 9 of the *Evidence Act 1977* (Qld),[125] while not requiring a child to understand the importance of telling the truth, focuses on the child's level of intelligence as a determinant of the reliability of the child's evidence. In the view of the Commission, a child's intelligence level is not a satisfactory indicator of the reliability of the child's evidence. In any event, the Commission is of the view that the reliability of a child's evidence should be a matter to be determined by the trier of fact in assessing the weight to be given to the evidence, rather than a factor to be considered by the court in deciding whether the child is competent to give the evidence.

The Commission considered whether an understanding of the importance of telling the truth should be a component of the test of competence to give unsworn evidence. It is not an element of the existing test under section 9 of the *Evidence Act 1977* (Qld). The Commission believes that, particularly for younger children, there are significant difficulties associated with demonstrating an appreciation of such abstract concepts as truth and lies, and of the consequences of failing to speak truthfully while giving evidence. It is concerned that, if the child's understanding of the obligation to tell the truth must be tested before the child is allowed to testify, the evidence of many potential young witnesses may be excluded, even though they are capable of giving a rational and coherent account of what they have seen or experienced. The Commission is therefore of the view that an understanding of the obligation to tell the truth should not be an element of the test of competence to give unsworn evidence.

The Commission agrees with the Irish Law Reform Commission and the Law Reform Commission of Western Australia that the crucial factor in deciding whether a child is competent to give unsworn evidence should be the child's ability to communicate his or her account of relevant events to the court. In the view of the Commission, the competency test for a child to give unsworn evidence should be that the child is able

124 See p 12 of this Report.

125 See pp 12-13 of this Report.

to give an intelligible account of events which he or she has observed or experienced.

(d) Impaired ability to communicate

The Commission is not aware of any recent problems in Queensland with witnesses having been found to be incompetent to give evidence because of impaired ability to hear or to speak.

However, the Commission believes that, to ensure that problems do not arise in the future, the matter should be put beyond doubt. The Commission is therefore of the view that the *Evidence Act 1977* (Qld) should be amended to provide 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.[126]

7. RECOMMENDATIONS

The Commission recommends that:

1. The distinction between sworn and unsworn evidence should be retained for child witnesses.

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.

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.

126 The Commission is aware that many adults may also have disabilities which affect their ability to give evidence. However, the Commission's reference is confined to factors affecting the ability of courts to receive the evidence of children.

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 3

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:[127]

> 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 version of events than counsel.

For any witness, cross-examination has the potential to be an unpleasant experience. For a child witness, confrontation with the accused is often cited as one of the most difficult aspects of giving evidence.[128] It may therefore be even more traumatic for a child witness to be cross-examined by an unrepresented accused, particularly if the child is a complainant in an abuse case. As the New Zealand Law Commission explained:[129]

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127 *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.

128 See for example Flin RH, Davies G and Tarrant A, *The child witness* (1988) and Goodman GS et al, *Testifying in criminal court: Emotional effects on child sexual assault victims* (1992) both cited by Tobey AE et al, "Balancing the Rights of Children and Defendants" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness, Applied Psychology: Individual, Social and Community Issues* Vol 1 (1995) at 217.

129 Law Commission (NZ), Discussion Paper, *The Evidence of Children and Other Vulnerable Witnesses* (NZLC PP26, 1996) at 46.

> ... 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]

2. 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 in person, while at the same time seeking to maintain fairness to the accused by adopting a method of substituted 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.[130] An attempt was made in England to implement the Pigot Committee's recommendation by virtue of section 34A of the *Criminal Justice Act 1988*.[131] However, that provision, which has been criticised by commentators,[132] is to be repealed and replaced by Chapter II of Part II of the *Youth Justice and Criminal Evidence Act 1999*.[133]

The *Youth Justice and Criminal Evidence Act 1999* prohibits a person charged with a sexual offence from cross-examining the complainant in person in connection with that offence or any other offence with which the person is charged in the proceedings.[134] There is a further prohibition against direct cross-examination by a person who is accused of certain specified offences.[135] This prohibition applies to cross-examination of the complainant, a witness who is a child or a witness who becomes subject to cross-examination after giving evidence-in-chief by means of a video recording made when the witness was a child. A child, for the purposes of this provision, is a person under the age of 17 years or under the age of 14 years, depending on the offence with which the accused is charged.[136] The prohibition in these situations is mandatory and the court has no discretion in relation to it.

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130 Home Office (UK), *Report of the Advisory Group on Video Evidence* (The Pigot Committee, 1989) at para 2.30.

131 This section was inserted by the *Criminal Justice Act 1991* s 55(7).

132 See for example Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed 1993) at 95-96.

133 As at 14 June 2000, the provisions in this Chapter of the *Youth Justice and Criminal Evidence Act 1999* had not commenced.

134 *Youth Justice and Criminal Evidence Act 1999* s 34.

135 The specified offences include various sexual offences against children, as well as some other offences against children, such as kidnapping.

136 *Youth Justice and Criminal Evidence Act 1999* s 35.

In a case where neither of the above prohibitions operates, the court may, provided that it would not be contrary to the interests of justice to do so, prevent an accused from cross-examining the witness in person if it appears to the court that the quality of the evidence given by the witness on cross-examination is likely to be diminished if the cross-examination is conducted directly by the accused and would be likely to be improved if such a direction were given.[137] In making such an order, the court must take into account a number of factors including any views expressed by the witness about being cross-examined by the accused in person, the nature of the questions likely to be asked having regard to the issues in the proceedings, and any relationship of whatever nature between the accused and the witness.

When an order is made prohibiting the accused from cross-examining the witness in person, the court must give the accused the opportunity to arrange for a legal representative to cross-examine the witness. The court must also specify a time limit within which the accused must notify the court whether a legal representative is to act on his or her behalf for the purpose of cross-examining the witness. If the accused fails to notify the court within the specified period, or notifies the court that no legal representative is to act for the purpose of cross-examining the witness, the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused. The court must, if it decides that it is necessary for the witness to be cross-examined in this way, choose and appoint a legal representative to act on behalf of the accused for this purpose.[138] The cost of a legal representative appointed by the accused to cross-examine a witness whom the accused has been prevented from cross-examining in person is to be borne by Legal Aid.[139] If a legal representative is appointed by the court, the costs of such representation are to be met out of central funds.[140]

The judge must give the jury such warning as the judge considers necessary to ensure that an accused is not prejudiced by any inferences that might be drawn from the fact that the accused has been prevented from cross-examining the witness in person and that the cross-examination is carried out by a legal representative appointed for that purpose.[141]

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137 *Youth Justice and Criminal Evidence Act 1999* s 36.

138 *Youth Justice and Criminal Evidence Act 1999* s 38. As at 14 June 2000, this section had not commenced.

139 *Legal Aid Act 1988* s 21(3)(e), inserted by the *Youth Justice and Criminal Evidence Act 1999* s 40(2). As at 14 June 2000, this section had not commenced.

140 *Prosecution of Offences Act 1985* s 19(3)(e), inserted by the *Youth Justice and Criminal Evidence Act 1999* s 40(1). This provision commenced on 27 July 1999. "Central funds" is defined as "money provided by Parliament": *Interpretation Act 1978* s 5, Sch 1.

141 *Youth Justice and Criminal Evidence Act 1999* s 39. As at 14 June 2000, this section had not commenced.

(b) New Zealand

The *Evidence Act 1908* (NZ) prohibits a defendant in a sexual abuse case from personally cross-examining a child complainant.[142] For the purposes of this provision a "child" is a person who has not attained the age of 17 years at the commencement of the proceeding.[143] The New Zealand legislation 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.[144] The judge has power to disallow any question that the judge considers, having regard to the age of the complainant, to be intimidating or overbearing.[145]

(c) Canada

In Canada, the right of a person who has been charged with a sexual offence, or an offence in which violence against the person is alleged to have been used, attempted or threatened, to directly cross-examine a witness is limited in certain circumstances. A person charged with such an offence may not personally cross-examine a witness who at the time of the proceedings is under the age of 18 years, unless the court is of the opinion that the proper administration of justice requires that the accused conduct the cross-examination in person.[146] "The proper administration of justice" includes ensuring that the interests of witnesses under the age of 18 years are safeguarded.[147] Where the accused is prevented from conducting a direct cross-examination, the court is to appoint counsel for the purpose of cross-examining the witness.[148]

(d) 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.[149] In such cases, it was considered desirable for questions to be put through

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142 *Evidence Act 1908* (NZ) ss 23C(b)(i), 23F(1).

143 *Evidence Act 1908* (NZ) s 23C(b)(i).

144 *Evidence Act 1908* (NZ) s 23F(3).

145 *Evidence Act 1908* (NZ) s 23F(5).

146 *Criminal Code* (Canada) s 486(2.3). Until 1 December 1999, this provision protected only witnesses under the age of 14 years. This protection was extended to witnesses under the age of 18 years by chapter 25 of the Statutes of Canada, 1999, which amended the *Criminal Code*.

147 *Criminal Code* (Canada) s 486(1.1). See note 146 of this Report.

148 *Criminal Code* (Canada) s 486(2.3).

149 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.44.

an intermediary such as a child communicator[150] or other person approved by the court.[151] The Western Australian Commission recommended:[152]

> 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 by the introduction of section 106G of the *Evidence Act 1906* (WA) which provides:

> 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.[153]

(e) 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:[154]

> 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:[155]

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150 The role of child communicators will be discussed in Part 2 of this Report.

151 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.44.

152 Id at para 6.47.

153 *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.

154 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.1.2.

155 Id at 60 (Recommendation 27).

(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:[156]

(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, legislation was introduced to provide the right to alternative arrangements for children giving evidence where the accused is unrepresented.[157] In a criminal proceeding in any court or in a civil proceeding arising from the commission of a personal assault offence, 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.[158] Such a person must ask the child any questions that the accused or, in a civil proceeding, the defendant, requests the person to put to the child.[159] 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.[160] The provision applies whether closed-circuit television or similar technology is used and whether alternative arrangements are otherwise used.[161]

Where such evidence is given in a jury trial under the provision relating to an unrepresented accused, the judge must inform the jury that it is standard procedure for an intermediary to act on behalf of the accused. The judge must also warn the

156 Id at para 8.1.5.

157 *Crimes Act 1900* (NSW) s 405FA, inserted by the *Crimes Amendment (Children's Evidence) Act 1996* (NSW). Section 405FA was subsequently repealed and re-enacted as s 28 of the *Evidence (Children) Act 1997* (NSW).

158 *Evidence (Children) Act 1997* (NSW) s 28(1), (2). A "child" is a person who is under the age of 16 years at the time the evidence is given: *Evidence (Children) Act 1997* (NSW) s 6. The term "personal assault offence" is defined in s 3 of the *Evidence (Children) Act 1997* (NSW).

159 *Evidence (Children) Act 1997* (NSW) s 28(3).

160 *Evidence (Children) Act 1997* (NSW) s 28(4).

161 *Evidence (Children) Act 1997* (NSW) s 28(5).

jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because an intermediary was used.[162]

3. ISSUES FOR CONSIDERATION

The provisions in other jurisdictions which are outlined above raise a number of issues about cross-examination of child witnesses in Queensland proceedings by accused persons who do not have legal representation. These issues include:

- whether there should be a legislative prohibition on direct cross-examination of child witnesses by an accused person;
- the circumstances in which any such prohibition should apply;
- whether there should be a discretion to put aside such a prohibition or to impose a prohibition in any other circumstances;
- whether, if there were a legislative prohibition on direct cross-examination by an accused person, the court should have power to appoint a third person to conduct cross-examination of a child witness on behalf of the accused person and how the costs, if any, of such representation should be borne;
- whether, at the trial of an accused person for an indictable offence, the court should be required to warn the jury that no inference adverse to the accused should be drawn from the legislative prohibition on direct cross-examination; and
- whether the court should have power to limit the cross-examination by a third person on behalf of an accused person.

(a) A legislative prohibition on direct cross-examination by an unrepresented accused

In Queensland, although the court has an express statutory power to disallow questions which are intended only to annoy or insult the witness or which are needlessly offensive,[163] there is no restriction on the right of an accused to personally cross-examine witnesses, including witnesses who are children. The Queensland Director of Public Prosecutions has expressed the view that:[164]

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162 *Evidence (Children) Act 1997* (NSW) s 25(4).

163 *Evidence Act 1977* (Qld) s 21(2). See p 1 of this Report.

164 Submission 32.

> … these provisions do not go far enough. The questions may be disallowed, but the judge's powers do not prevent the asking of the questions in the first place.
>
> … an unrepresented defendant can, if he wishes, bring to nought the protections the law would want to afford to youthful, and indeed even older, victims of sexual abuse.

A number of submissions received by the Commission in response to the Discussion Paper[165] commented on the potential impact of direct cross-examination of a child witness by an unrepresented accused on both the child and the quality of the child's evidence.[166] The Children's Commission observed:[167]

> It is recognised that in most cases of child abuse, coercion or violence is not the usual means of getting children to comply with the offender's wishes. Offenders more frequently rely on psychological manipulation and a prolonged seduction process that is designed to win a child's affection, interest and loyalty. During this process, the offender becomes intimately acquainted with the child's vulnerabilities and skilled in their exploitation. [Offenders] … encourage the child to share confidences of a sensitive nature. Some children develop a sense of loyalty to the perpetrator and others are fearful of retaliation. Many children become responsive to the mannerisms and unspoken cues of the offender.
>
> When child complainants in abuse cases are cross-examined by an unrepresented accused, they have to cope with additional stresses. They must make eye contact with, and respond to questions from the accused when they can still be responsive to the cues the accused employs. They can be frightened and intimidated by prior threats, or retain a sense of loyalty to the accused. Under these conditions, children are unlikely to provide the court with the best evidence of which they are capable and are likely to experience an unacceptable level of stress. [references omitted]

Both the Department of Families, Youth and Community Care and the Bar Association of Queensland were concerned about the effect on the child and on the child's ability to testify effectively of "cues" used by the accused. The Bar Association of Queensland noted:[168]

> … young children who are [cross-examined by an unrepresented accused] may well be additionally traumatised by questions from the accused himself, may well be sensitive to the "Cues" used by the accused and may be overborne by the mere presence of the accused as the questioner, to the point where they do not give their best evidence to the Court.

The Department of Families, Youth and Community Care emphasised the risks posed by the secret nature of an abusive relationship:[169]

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165 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

166 Submissions 20, 31, 33, 34, 42, 49, 53.

167 Submission 31.

168 Submission 53.

169 Submission 49.

> During questioning, the accused may be able to do or say subtle things which would not be noticed by others in the courtroom but which would re-abuse and/or intimidate the child.

According to the Queensland Branch of the Australian Medical Association:[170]

> Under some circumstances a child may be very ambivalent towards the perpetrator and could be unduly influenced by the accused directly questioning them.
>
> … abuse of a child is an abuse of a privilege of power and to allow an unrepresented accused in court to directly submit the child to examination is again an abuse of power and just compounding the problem.

All except one of the submissions which addressed this issue agreed that there should be a prohibition on direct cross-examination of a child witness by an accused.[171] The Taskforce on Women and the Criminal Code also "overwhelmingly" favoured an absolute prohibition on the cross-examination of children by an accused in person.[172]

However, the President of the Children's Court was of the view that:[173]

> The cases in which this would occur are rare; even with the cuts in legal aid. The right of an accused person to represent himself or herself is inviolate. In those circumstances I would not favour the recommendations of the Pigot Committee in the UK which would effectively prohibit a self-represented accused from conducting a cross-examination of a child.

(b) Circumstances in which the prohibition should apply

The provisions outlined above vary considerably in their scope.[174] There are differences in the witnesses who are protected by them, the age of the witnesses to whom they apply, and the kinds of proceedings for which they are available.

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170 Submission 42.

171 Submissions 2, 20, 31, 32, 33, 34, 40, 41, 42, 49, 53.

172 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 327. See also Recommendation 75 at 328.

173 Submission 45.

174 See pp 33-38 of this Report.

(i) Witnesses who should be protected

The New Zealand legislation applies only to child witnesses who are complainants.[175] In New South Wales, the legislation applies to any child witness other than the accused.[176] In Canada[177] and in Western Australia,[178] the prohibition against direct cross-examination by the accused protects any child witness. In the United Kingdom, the protection applies only to the complainant for some offences; to the complainant, a witness who is a child or a witness who becomes subject to cross-examination after giving evidence-in-chief by means of a video recording made when the witness was a child for other offences; or, in other situations, to a witness the quality of whose evidence on cross-examination is likely to be diminished if the cross-examination is conducted directly by the accused and would be likely to be improved if the prohibition is imposed.[179]

The submissions received by the Commission in response to the Discussion Paper[180] generally supported restriction of the right of an accused to personally cross-examine a child witness.[181] However, the Bar Association of Queensland referred more specifically to children who are complainants.[182]

In its Report, the Taskforce on Women and the Criminal Code did not include any restrictions in its recommendation that child witnesses should be protected by a prohibition on cross-examination by an unrepresented accused in person.[183]

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175 See p 35 of this Report.

176 See p 37 of this Report.

177 See p 35 of this Report.

178 See p 36 of this Report.

179 See pp 33-34 of this Report.

180 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

181 Submissions 2, 20, 31, 33, 34, 40, 41, 49.

182 Submission 53.

183 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 75 at 328.

(ii) The age of protected witnesses

In Canada, an accused may not personally cross-examine a witness who, at the time of the proceedings, is under the age of 18 years.[184] In New South Wales[185] and Western Australia,[186] the relevant age is under 16 years at the time of giving evidence. The New Zealand provision applies to a witness who is under the age of 17 years at the commencement of the proceeding.[187] In the United Kingdom, the prohibition against personal cross-examination by an accused applies, in some situations, to a witness under the age of 14 years, in other situations to a witness who is under the age of 17 years and in some situations, there is no age limit specified.[188]

Only one of the submissions received by the Commission referred specifically to the age of a child witness who should be protected by a prohibition against personal cross-examination by an accused. The Bar Association of Queensland expressed the view that the protection should apply in proceedings for certain types of offences allegedly committed upon children under the age of 12 years who, at the time of giving evidence, are still under the age of 15 years.[189]

In its Report, the Taskforce on Women and the Criminal Code did not specify the age of child witnesses to whom the protection against cross-examination by an accused in person should apply.[190]

(iii) Type of proceeding

In New Zealand, the prohibition against cross-examination in person by an accused applies in relation to proceedings for sexual offences and for the offences of being a party to or conspiring to commit a sexual offence.[191] In Canada, it applies to proceedings for a sexual offence, or an offence in which violence against the person is alleged to have been used, attempted or threatened.[192] In the United Kingdom, the legislative prohibition applies in proceedings for sexual offences, offences of violence, kidnapping, false

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184 See p 35 of this Report. See also note 146 of this Report.

185 See p 37 of this Report.

186 See p 36 of this Report.

187 See p 35 of this Report.

188 See p 33 of this Report.

189 Submission 53.

190 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 75 at 328.

191 *Evidence Act 1908* (NZ) ss 23C, 23F(1).

192 See p 35 of this Report.

imprisonment and certain offences under child protection legislation. However, in certain circumstances, the court may prohibit an accused from cross-examining a witness in person in any other case.[193] The Western Australian provision applies in proceedings for any offence.[194] In New South Wales, the prohibition is against cross-examination by the accused in a criminal proceeding in any court and also in a civil proceeding arising from the commission of a personal assault offence.[195]

Four submissions received in response to the Discussion Paper[196] addressed this issue. A PACT volunteer submitted that the prohibition should apply to all offences.[197] The Department of Families, Youth and Community Care also thought that it should apply to all offences, but expressed a fall back position of sexual and violent offences.[198] The Queensland Director of Public Prosecutions was in favour of the Canadian model, which applies to sexual offences and offences in which violence is not only committed but attempted or threatened.[199] The Bar Association of Queensland was of the view that a person accused of an offence of a sexual or violent nature, deprivation of liberty or cruelty should not be allowed to conduct the cross-examination of a child witness in person.[200]

In its Report, the Taskforce on Women and the Criminal Code did not limit to any particular kind of proceedings its recommendation that child witnesses should be protected from cross-examination by an unrepresented accused in person.[201]

193 See pp 33-34 of this Report.

194 See p 36 of this Report.

195 See p 37 of this Report. "Personal assault offence" is defined in s 3 of the *Evidence (Children) Act 1997* (NSW) and includes offences against the person, child abuse, stalking, and contravention of an apprehended violence order.

196 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

197 Submission 20.

198 Submission 49.

199 Submission 32.

200 Submission 53.

201 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 75 at 328.

(c) Cross-examination of a child witness on behalf of an unrepresented accused

In all jurisdictions where there is a prohibition on direct cross-examination of a child witness by an unrepresented party to the litigation, the legislation provides an alternative means of conducting the cross-examination. However, there are significant differences in the detail of the legislation in the various jurisdictions.

(i) Who should conduct the cross-examination

The legislation in New South Wales, Western Australia and New Zealand provides for an intermediary to question a child witness on behalf of an accused who is prohibited from questioning the witness personally.

In New South Wales, the court may appoint a person to question a child witness on behalf of an unrepresented accused or, in certain civil cases, an unrepresented defendant. The person so appointed must ask the child any questions which the accused or defendant requests the person to put to the child.[202]

The Western Australian legislation also provides an alternative means of cross-examination for an unrepresented accused. The accused must put the question to the judge or other person approved by the court, who must accurately put the question to the child. The guidelines approved by the judges of the Supreme Court of Western Australia recommend that the judge's associate should be the intermediary.[203] However, one judge of the District Court of Western Australia has informed the Commission that, despite this recommendation, on the only occasion when he had an unrepresented accused seek to cross-examine a child witness, he chose to act as the intermediary himself, rather than ask the associate to do so.[204]

In Canada and the United Kingdom, unlike in the other jurisdictions outlined above, the legislation stipulates that professional legal representation must be made available to the accused for the purpose of cross-examining a child witness. The United Kingdom legislation provides a detailed scheme of representation for the purpose of cross-examination of a child witness on behalf of an unrepresented accused. An accused who has been prohibited from cross-examining a witness in person must be given an opportunity to arrange for a legal representative to conduct the cross-examination on his or her behalf and must, within a specified time limit, notify the court whether such an arrangement has been made. In the absence of notification that the accused has arranged for legal representation, the court may appoint a legal

202 See p 37 of this Report.

203 See p 36 of this Report.

204 Submission 54.

representative to act for the accused for the purpose of cross-examining the witness.[205] The Canadian legislation is simpler, and merely requires the court, where the accused does not conduct the cross-examination in person, to appoint counsel for the purpose of cross-examining the child.[206]

A number of the submissions received by the Commission in response to the Discussion Paper[207] addressed the issue of who should conduct the cross-examination on behalf of an unrepresented accused.[208] All of these submissions were generally in favour of questions on behalf of an unrepresented accused being directed through an intermediary.

There was little support for the proposal that the judge should act as intermediary, although one respondent submitted that, where the accused's questions are directed through a third party, it should be "incumbent upon the Judge to try to find out the truth by independently formulating and asking pertinent questions" if it appears to the judge that "the right questions are not being asked".[209]

The majority of the submissions did not address the issue of who should act as intermediary on behalf of the unrepresented accused. One respondent considered that the nature of the intermediary should be specified in the legislation,[210] another that the intermediary should be independent,[211] and a third that the identity of the intermediary should be accepted and approved by the court.[212] Three respondents, including the Queensland Director of Public Prosecutions and the Queensland Council for Civil Liberties, were of the view that the court should have the power to appoint a legal representative to act on behalf of an unrepresented accused for the purpose of cross-examining a child witness.[213] The Queensland Director of Public Prosecutions added that such an appointment should be made, even against the wishes of the accused.[214]

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205 See p 34 of this Report.

206 See p 35 of this Report.

207 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

208 Submissions 2, 20, 31, 32, 33, 34, 40, 41, 49, 53, 54.

209 Submission 38.

210 Submission 2.

211 Submission 34.

212 Submission 41.

213 Submissions 20, 32, 40.

214 Submission 32.

The Taskforce on Women and the Criminal Code did not make any recommendation on this issue.

(ii) Costs of professional representation

In the United Kingdom, the legislation provides that the costs of legal representation for the purpose of cross-examining a witness on behalf of an accused who is otherwise unrepresented are to be borne by Legal Aid if the representation is arranged by the accused, or out of central funds if the legal representative is appointed by the court.[215] The Canadian legislation is silent on the question of the costs of a legal representative appointed by the court.

The Queensland Council for Civil Liberties addressed the issue of the cost of such representation, submitting that legal aid should be granted to an unrepresented accused, if necessary by order of a court, at least for the purpose of cross-examining a child complainant.[216]

(iii) Immunity of court-appointed legal representative

At common law, barristers and solicitors acting as advocates in court are immune from liability in negligence for work done in court and for work done out of court leading up to a decision affecting the outcome of the case.[217]

The High Court of Australia has described the common law immunity as based on considerations of public policy, in particular:[218]

- the public interest in the advocate's overriding duty to the court to exercise his or her independent discretion or judgment in the conduct of a case, as a result of which the advocate's role could therefore be seen to transcend the role of a mere agent for a client; and

- the undesirability of exposing court decisions to collateral attack by negligence actions against advocates, which would prejudice finality of litigation and diminish public confidence in the administration of justice, especially criminal justice.

If a legal representative has been appointed by the court for the purpose of cross-examining a child witness on behalf of a person who is otherwise unrepresented in the proceeding, there may be thought to be some

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215 See p 34 of this Report.

216 Submission 40.

217 *Giannarelli v Wraith* (1988) 165 CLR 543. See also *Rondel v Worsley* [1969] 1 AC 191 and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.

218 G*iannarelli v Wraith* (1988) 165 CLR 543 per Mason CJ at 555-559, per Wilson J at 572-578, per Brennan J at 579-580 and per Dawson J at 593-595.

uncertainty as to whether the common law immunity described above would apply in such circumstances. The question may arise as to the liability, if any, that the legal representative may incur to the person for the way in which the cross-examination is conducted. In the United Kingdom, legislation has been enacted to protect the immunity of such court-appointed legal representatives. Section 38(5) of the *Youth Justice and Criminal Evidence Act 1999* provides:[219]

> A person so appointed shall not be responsible to the accused.

(d) Power of court to restrict cross-examination

The New Zealand legislation gives the court specific power to disallow any question put to a complainant by an intermediary on behalf of an unrepresented accused that the court considers, having regard to the age of the complainant, intimidating or overbearing.[220] There is no equivalent provision in other jurisdictions.

The Queensland Director of Public Prosecutions expressed the view that the existing legislation in New South Wales[221] and in Western Australia[222] is inadequate because "all it prevents is direct questioning by the defendant" and does not impose any restrictions on the questions that may be asked by the intermediary. The Western Australian legislation requires the intermediary to put the accused's questions "accurately" to the witness, while in New South Wales the intermediary must "ask the child any questions that the accused or the defendant requests the person to put to the child". The Department of Families, Youth and Community Care also agreed that that the court should have power to limit questioning by the accused through the intermediary.[223] On the other hand, however, the Bar Association of Queensland considered that the general discretion conferred on the court by section 21 of the *Evidence Act 1977* (Qld)[224] should be sufficient to protect the interests of a child witness without the need for a specific provision directed at cross-examination by an intermediary on behalf of an unrepresented accused.[225]

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219 As at 14 June 2000, this provision had not commenced.

220 See p 35 of this Report.

221 See pp 37-38 of this Report.

222 See p 36 of this Report.

223 Submission 49.

224 See p 1 of this Report.

225 Submission 53.

(e) Exceptions to prohibition on cross-examination by the accused

In Canada, the prohibition against cross-examination of a child witness by an accused may be displaced if the court is of the opinion that it would be in the interests of the proper administration of justice for the accused to conduct the cross-examination in person.[226] Similarly, in New South Wales, the court may choose not to appoint another person to ask questions on behalf of the accused if it considers that it would not be in the interests of justice to do so.[227] In the United Kingdom, the prohibition against personal cross-examination by an accused is mandatory in relation to certain specified offences but, in relation to other offences, the court has a discretion to impose a prohibition if the making of such an order would not be contrary to the interests of justice.[228] The legislation in New Zealand[229] and in Western Australia[230] does not provide any exceptions to the prohibition against cross-examination of a child witness by the accused.

Only two of the submissions received by the Commission in response to the Discussion Paper referred to this issue. Both the Women's Legal Service[231] and the Bar Association of Queensland[232] were in favour of a court discretion not to impose the prohibition "in the interests of justice".

(f) Judicial warning about cross-examination by an intermediary

The legislation in New South Wales requires the court, if arrangements have been made for the cross-examination of a child witness by an intermediary on behalf of an unrepresented accused, to warn the jury that no inference adverse to the accused should be drawn from the use of such arrangements and that the jury should accord the evidence given as a result of such arrangements no greater or lesser weight because an intermediary has been used.[233]

There is also provision for a judicial warning in the legislation in the United Kingdom. However, the warning is discretionary, with the judge required to give the jury such warning as the judge considers necessary to ensure that an unrepresented accused

226 See p 35 of this Report.

227 See p 37 of this Report.

228 See pp 33-34 of this Report.

229 See p 35 of this Report.

230 See p 36 of this Report.

231 Submission 41.

232 Submission 53.

233 See pp 37-38 of this Report.

is not prejudiced by the use of alternative arrangements for the cross-examination of a child witness.[234]

Four of the submissions received by the Commission in response to the Discussion Paper[235] considered the issue of a judicial warning about the use of an intermediary to cross-examine a child witness on behalf of an unrepresented accused.[236] All agreed that the legislation should require such a warning to be given.

4. THE COMMISSION'S VIEW

(a) A legislative prohibition on direct cross-examination by an unrepresented accused

The Commission considers it highly undesirable, in certain situations, for an accused person who does not have legal representation to be able to personally cross-examine a child witness. It is of the view that, for some witnesses, the prospect of having to not only confront the accused person but also respond to the accused's questions is likely to cause significant distress, which may be sufficient to prevent those witnesses from giving their evidence as effectively as they may otherwise be able to do. Accordingly, the Commission favours a legislative prohibition on the direct cross-examination of a child witness by an accused person in the circumstances and on the conditions discussed below.

The Commission recognises that the introduction of such a prohibition would be a significant change from the present position. The accused's lack of legal representation may be a matter of conscious choice rather than economic necessity and, in such a situation, the prohibition would infringe the accused's existing common law right to self-representation. However, the Commission believes that, if the prohibition is accompanied by the introduction of a means of substituted cross-examination on behalf of the accused, any potentially detrimental effect on the interests of the accused can be minimised. In any event, it is of the view that any potential disadvantage to the accused is outweighed by the need to protect vulnerable witnesses from an unacceptable level of distress and to ensure that they are not so adversely affected that they are unable to give their evidence in any coherent way.

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234 See p 34 of this Report.

235 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

236 Submissions 31, 32, 49, 53.

(b) Circumstances in which the prohibition should apply

(i) Witnesses who should be protected

The Commission notes that, in some of the jurisdictions where a prohibition of the kind presently under consideration has been introduced, its application is limited to witnesses who are complainants, at least in relation to certain offences.[237] The Commission is not in favour of such a limitation. In the view of the Commission, there are likely to be situations in which a child witness may find it so distressing to have to respond to an interrogation by the accused that the child's ability to give effective testimony is compromised, even though the child was not the victim of the alleged offence.

The Commission is therefore of the view that, in relation to certain proceedings specified below, the prohibition should extend to the cross-examination of a child witness whether or not the witness is the complainant.

(ii) The age of protected witnesses

The Commission is of the view that the prohibition against cross-examination of a child witness by an accused in person should not be limited to children of any particular age group, but should apply to all child witnesses under the age of 18 years.

(iii) Type of proceeding

The existing legislation in Western Australia and New South Wales prohibiting an accused from personally cross-examining a child witness is not limited in its application to any particular offences. In New South Wales the prohibition also extends to civil proceedings arising out of the commission of some offences. However, in New Zealand, Canada and the United Kingdom the legislation applies only to certain offences of a violent or sexual nature or, in the United Kingdom, under child protection legislation.[238]

Because a prohibition of the kind under discussion impinges on the right of an accused person to self-representation in legal proceedings, the Commission is concerned that the extent of the prohibition should not be any broader than necessary to achieve its intended objective of protecting vulnerable witnesses from a situation where they may experience an unacceptable degree of distress, and may be so affected as to be unable to give evidence. In the view of the Commission, a child witness is most likely to need to be protected from direct cross-examination by an accused person of whom the child is afraid or who, because of the nature of the alleged offence, may be able to

237 See p 41 of this Report.

238 See pp 42-43 of this Report.

manipulate the child's emotions and loyalties by the use of cues that would remain undetected by other people.

Accordingly, the Commission is of the view that the legislative prohibition against direct cross-examination by an accused person in criminal proceedings should apply only to offences involving violence or sexual assault. However, the Commission considers that the same arguments against cross-examination by an unrepresented accused might be of equal relevance in some civil proceedings. The Commission is therefore of the view that the prohibition should also apply in civil proceedings arising from the commission of an offence of a violent or sexual nature or in proceedings for domestic violence orders.

The Commission has also given consideration to whether, in addition to imposing a prohibition on cross-examination of a child witness in person by an unrepresented accused or defendant in the situations outlined above, the legislation should also confer a discretion on the court to refuse to allow such a cross-examination in any other circumstances.

There may be other offences - for example, stalking or certain drug offences - which, while not involving violence or sexual assault, may create sufficient fear in the mind of a child witness faced with the prospect of being directly cross-examined by the accused to impact on the child's ability to testify effectively. There may also be other circumstances where a child's ability to give evidence may be affected if the child is cross-examined by the accused in person. If there is a relationship of any kind between the child and the accused, the child may feel inhibited by the relationship, or the conduct of the accused during the proceedings may have been such as to intimidate the child to such an extent that the quality of the child's evidence is diminished.

Further, there may be some civil cases where it would be undesirable for an unrepresented party to be allowed to personally cross-examine a child witness. For example, a child witness may find it so distressing to be cross-examined by the former de facto partner of a parent in a dispute about division of property on the breakdown of the de facto relationship, or by a family member in the course of a family provision application brought to challenge the distribution of the estate of a deceased person, that the child would be unable to give evidence effectively.

In the view of the Commission, the most important consideration is the potential effect of the cross-examination on the child and the resulting impact on the child's ability to give evidence, rather than the nature of the proceedings. The Commission considers that, where there is a likelihood that the quality of a child's evidence will be diminished if the child is cross-examined in person by an unrepresented party to the proceedings, it would be illogical to make a distinction based on whether the proceedings were civil or criminal in nature.

The Commission is therefore of the view that courts should have a discretion in any proceeding, whether criminal or civil, to prevent an unrepresented party from cross-examining a child witness in person if, in the opinion of the court, cross-examination of the child witness by the unrepresented party in person would be likely to adversely affect the child's ability to give evidence.

(c) Cross-examination of a child witness on behalf of an unrepresented person

(i) Who should conduct the cross-examination

In each of the jurisdictions discussed in this chapter, the legislation provides an alternative method of cross-examining a child witness on behalf of a person who is prohibited by the legislation from conducting the cross-examination in person. In New South Wales and New Zealand, the accused's questions are to be put to the witness by any person approved by the judge, in Western Australia by the judge or a person approved by the court, while in England and Canada the cross-examination must be conducted by a lawyer.[239]

In the view of the Commission, it is not appropriate, within the context of the adversarial system, for the judge or the judge's associate to be directly involved in putting to the witness the questions that the unrepresented person wishes to ask in cross-examination.

The Commission also has serious reservations about the efficacy of cross-examination conducted by an intermediary who puts to a witness questions on a list provided by the unrepresented party. Effective cross-examination almost invariably requires that the cross-examiner, in pursuing a line of questioning, mould the questions asked by reference to answers to previous questions and according to the way in which answers were given. For example, a question may have been answered confidently and by reference to some substantiating or corroborating detail or, conversely, an answer may have been given hesitantly so as to suggest a lack of confidence in the answer or speculation on the part of the witness. A cross-examiner must be alert to nuances and be able to show flexibility in detecting and following up discrepancies, inconsistencies and lines of inquiry that have the potential to detract from the witness's evidence or otherwise assist the case the cross-examiner seeks to advance. Often questions which give rise to answers helpful to the case of the cross-examiner's client occur to the cross-examiner as a result of things said or left unsaid by the witness in the course of cross-examination. A right to "cross-examine" in a way which does not enable the cross-examiner to have the benefit of considerations such as these is likely to

239 See pp 35, 44-45 of this Report.

prove illusory and thus be an effective denial of the right of an unrepresented party to confront witnesses for an opposing party.

The Commission favours the approach adopted in England and in Canada, where legal representation must be arranged for an unrepresented person for the purpose of cross-examining a child witness. The Commission considers the provision of a qualified legal representative would promote the overall interests of justice by ensuring that a vulnerable witness is protected while, at the same time, safeguarding the rights of the unrepresented person to a greater extent than is likely to be the case if cross-examination is carried out on behalf of that person by a lay intermediary.

The Commission is further of the view that the person should first be given the opportunity to engage a lawyer of his or her choosing and to notify the court, within a specified period, that this has been done. However, if the person is unable to or fails to arrange representation, or does not comply with the notification requirement, the court should have power to appoint a legal representative to conduct the cross-examination on behalf of the person.

(ii) Costs of professional representation

A party to a legal proceeding may be without legal representation because of financial inability to afford to engage a lawyer, or as a result of a conscious decision not to do so. In any event, the Commission does not consider it reasonable that an unrepresented party who is prevented by public policy considerations from cross-examining a witness in person should have to bear the cost of paying for the lawyer who undertakes the cross-examination on his or her behalf.

The Commission notes that the provisions of the *Youth Justice and Criminal Evidence Act 1999* in England require the cost of legal representation for the purpose of cross-examining a witness whom a person is prohibited from questioning directly to be borne by Legal Aid or met out of central funds.[240] It agrees that, where legislation prevents a person who would otherwise be unrepresented from cross-examining a witness in person and requires that person to use the services of a lawyer to undertake the cross-examination on his or her behalf, such representation should be provided at public expense. The Commission does not believe that the extent of the costs involved would impose a significant burden on the public purse.[241]

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240 See p 34 of this Report.

241 The situation of an unrepresented party wishing to cross-examine a child witness in person is not likely to be a frequent occurrence. The Queensland Director of Public Prosecutions informed the Commission that he was not aware of any instances of an unrepresented accused personally conducting the cross-examination of a child witness (Submission 32), and the Bar Association of Queensland referred to one case which took place in 1983 (Submission 53). See also Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 324.

The Commission considers the provision of adequate public funding to meet the costs of legal representation for unrepresented parties for the purpose of cross-examination of child witnesses as an integral component of its proposed scheme. The prevention of personal cross-examination of a child witness by an unrepresented party is intended to assist in ensuring that child witnesses are able to give their evidence effectively. However, the ability to cross-examine the witnesses of an opposing party is essential to the fairness of any proceeding. An unrepresented party who is obliged to have legal representation in order to be able to cross-examine a child witness should not have to bear the cost of that representation. In the view of the Commission, the issue of public funding is inextricably linked to the restriction of cross-examination in person by an unrepresented party. If funding is not made available for a legal representative to cross-examine a child witness on behalf of an unrepresented party, there should be no restriction of the unrepresented party's right to conduct the cross-examination in person.

(iii) Immunity of court-appointed legal representative

In the view of the Commission, the public interest considerations referred to by the High Court of Australia as the basis for the common law immunity of advocates for work done in court[242] would apply regardless of whether the advocate was appointed by the unrepresented party or by the court to act on the unrepresented party's behalf. The Commission therefore considers it likely that a court-appointed legal representative would have the same immunity at common law as a legal representative engaged in the usual way.

However, to remove any potential uncertainty as to whether the immunity would apply, the Commission favours the enactment of legislative protection for a legal representative appointed by the court to cross-examine a child witness on behalf of an unrepresented party.

The Commission is not in favour of adopting the English legislation as a model. Section 38(5) of the *Youth Justice and Criminal Evidence Act 1999* provides that a court-appointed legal representative "shall not be responsible" to the party on behalf of whom the cross-examination is conducted. The Commission is concerned that the protection given by the wording of this section may be wider than that which is intended. Lawyers who represent their clients in court, while immune from liability in negligence for work done in court, are nonetheless subject to various other legal, professional and ethical obligations in their dealings with the clients on whose behalf they appear.[243] In the view of the Commission, court-appointed legal representatives should also be subject to those obligations when they undertake a cross-examination of a child witness for an unrepresented party.

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242 *Giannarelli v Wraith* (1988) 165 CLR 543. See p 46 of this Report.

243 For example, a lawyer owes a duty of confidence to his or her client.

The Commission is therefore of the view that the legislation should provide that a legal representative who is appointed by the court to cross-examine a child witness on behalf of an unrepresented party has the same immunity as the legal representative would have had if he or she had been engaged by that party.

(d) Power of court to restrict cross-examination

New Zealand is currently the only one of the jurisdictions considered above where the legislation specifically provides that the court may intervene to restrict the cross-examination undertaken by an intermediary on behalf of an unrepresented party to the proceeding by disallowing certain questions asked by the intermediary. The Queensland Director of Public Prosecutions criticised the existing legislation in New South Wales and Western Australia for not containing a similar power.[244]

The Commission notes that the legislation in these three jurisdictions does not impose any limitations on whom the court may appoint as an intermediary to conduct the cross-examination.

It is the Commission's view, however, that the cross-examination on behalf of an unrepresented party should be carried out only by a legal representative appointed for that limited purpose.[245] The Commission sees no need for the inclusion of a specific provision enabling the court to limit the cross-examination where the cross-examination is conducted by a legal representative. The legal representative would be aware of and bound by the rules of evidence and by professional ethical standards, so that the situation would be no different from that which would have existed if the person had had his or her own legal representation. The *Evidence Act 1977* (Qld) already contains a provision giving the court power to disallow a question asked in cross-examination,[246] and the Commission has recommended in this Report that the grounds set out in this section for disallowing questions in cross-examination should be extended.[247]

(e) Exceptions to prohibition on cross-examination by the accused

The Commission notes the provisions which exist in a number of other jurisdictions conferring on the court a power to override the prohibition on cross-examination of a child witness by an accused person in certain circumstances. In those jurisdictions, the exception is generally based on the interests of justice in the circumstances of a particular case.

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244 Submission 32. See p 47 of this Report.

245 See pp 52-53 of this Report.

246 *Evidence Act 1977* (Qld) s 21. See p 1 of this Report.

247 See p 8 of this Report.

However, in this Report, the Commission recommends that the cross-examination of a child witness should be undertaken by a legal representative on behalf of the accused person, and that the legal representation should be provided at no cost to the accused. The Commission considers that the public interest in ensuring that the accused has a fair trial is adequately protected, and that there is therefore no need to provide an exception to the legislative prohibition.

Further, the Commission believes that it is in the interests of certainty and consistency not to include any exceptions to the prohibition. A potential witness is likely to feel less anxious about giving evidence if the witness knows that the accused will not be able to directly cross-examine him or her. Moreover, from the point of view of the accused, there is less likely to be an unfavourable impact on a jury as a result of the prohibition if the jury can be assured that it is routine for the prohibition to apply in certain circumstances.

(f) Judicial warning about cross-examination by an intermediary

The Commission is of the view that, in the interests of fairness to a person who is prohibited from personally cross-examining a child witness in a trial by jury, the jury should be warned that no inference adverse to the person should be drawn and that the evidence given as a result of those arrangements should be given no greater or lesser weight because the arrangements have been used. The Commission is further of the view that, where the prohibition applies, the use of the warning should be mandatory and not left as a matter for judicial discretion.

5. RECOMMENDATIONS

The Commission recommends that:

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.**

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.**

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.

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.

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.

6. The *Evidence Act 1977* (Qld) should be amended to provide that the legal representation referred to in recommendations 4 and 5 should be provided at public expense.

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.

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 4

ALLEGATIONS OF PERSISTENT SEXUAL ABUSE

1. INTRODUCTION

In the Discussion Paper,[248] the Commission addressed several issues that may arise when allegations are made that a person has, on a number of occasions, committed a sexual offence in relation to a child.[249] In particular, the Commission considered the offence of "maintaining a sexual relationship with a child", which is created by section 229B of the *Criminal Code* (Qld).[250]

The Commission's consideration of this provision was in response to several preliminary submissions[251] received by the Commission following the publication of a call for submissions in April 1997.[252]

The Report of the Taskforce on Women and the Criminal Code included a recommendation, by a majority of the Taskforce, that certain amendments should be made to section 229B of the *Criminal Code* (Qld). The Report noted that those members of the Taskforce who did not support that recommendation preferred to await the recommendations of this Commission on that issue.[253]

2. THE GENERAL REQUIREMENT FOR AN INDIVIDUAL OFFENCE TO BE IDENTIFIED WITH REASONABLE PARTICULARITY

(a) The general law

When allegations of a number of incidents of sexual abuse are made by a complainant, the particulars given of the various incidents charged in the

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248 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

249 Id at Chapter 19 (Similar Fact Evidence, Separate Trials and Multiple Offences).

250 Id at 258-267.

251 Preliminary submissions 15, 22, 44.

252 See the Foreword to this Report in relation to the Commission's call for preliminary submissions.

253 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 244.

indictment[254] and the extent to which the complainant's evidence relates to each individual offence assume a particular importance in ensuring a fair trial for the accused.

Ordinarily, an indictment must contain the following particulars of the offences with which the accused is charged:[255]

> An indictment … must … set forth the offence with which the accused person is charged in such a manner, and with such particulars as to the alleged time and place of committing the offence, and as to the person (if any) alleged to be aggrieved … as may be necessary to inform the accused person of the nature of the charge.

The minimum requirement of particularity required in relation to an offence charged has been described in the following terms:[256]

> 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 of an offence that is charged. It may be possible for an individual occasion to be identified by reference to some feature:[257]

> 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.

Sometimes, however, a child complainant will make an allegation of a generalised nature against an accused - for example, that certain conduct occurred "every couple of months for a year",[258] "every time my mum and dad went out",[259] or "whatever

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254 An indictment is a document that contains details of the charges made against the accused: see s 1 of the *Criminal Code* (Qld). Under the *Criminal Code* (Qld), it is possible, in certain circumstances, for more than one indictable offence to be charged 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.

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).

255 *Criminal Code* (Qld) s 564(1).

256 *The Queen v Rogers* (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) per Dowsett J at 24.

257 Ibid.

258 See *S v The Queen* (1989) 168 CLR 266 at 268.

259 See *The Queen v Rogers* (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) per Dowsett J at 3.

nights my mum worked".[260] Allegations in this form raise difficulties for both the prosecution and for the accused.

The prosecution may have difficulty in framing the indictment so that adequate particulars are given of the occasion on which the offence is alleged to have occurred and of the circumstances alleged to give rise to the offence. Problems may also arise if the complainant gives evidence of several incidents, any of which could constitute the offence charged in the indictment.

(b) The prejudice arising from the admission of generalised evidence

An insufficiency of particularity in the charges made against an accused, or the admission of evidence that discloses more than one incident that fits the description of an offence with which an accused is charged, may lead to a miscarriage of justice that is sufficient for a conviction to be quashed.

In *S v The Queen*,[261] the High Court considered 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 incident 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 a "latent ambiguity" that required correction if the accused was to have a fair trial.[262] His Honour explained the way in which that type of ambiguity might generally be corrected:[263]

> … the prosecution ought to have been required as soon as the defect became apparent to elect by indicating which of the offences revealed by the evidence were the offences charged. In some cases (although not, it would seem, the present one) the ambiguity may be removed by an amendment of the indictment splitting a count into several counts or by adding further counts so as to distinguish the separate occasions alleged. Such an amendment may only be allowed if it does not cause injustice or prejudice to the accused and that generally means that it cannot be made during the course of a trial. [note omitted]

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260 See *The Queen v W* (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.

261 (1989) 168 CLR 266.

262 Id at 274.

263 Ibid.

The prejudice to the accused in "having to defend himself in relation to an indeterminate number of occasions, unspecified in all but two instances, any one of which might, if it occurred in one of the relevant years, constitute one of the offences charged"[264] was explained in the following way:[265]

> The occasions upon which the offences alleged took place were unidentified and the applicant was, in effect, reduced to a general denial in pleading his defence. He was precluded from raising more specific and, therefore, more effective defences, such as the defence of alibi. Because the occasions on which he was alleged to have committed the offences were unspecified, he was unable to know how he might have answered them had they been specified. It is not to the point that the prosecution may have found it difficult or even impossible to make an election because of the generally unsatisfactory evidence of the complainant. An accused is not to be prejudiced in his defence by the inability of the prosecution to observe the rules of procedural fairness.

Gaudron and McHugh JJ elaborated on the question of prejudice to the accused that may result from admitting this type of generalised evidence:[266]

> The question of prejudice goes somewhat deeper than the question whether there was an effective denial of an opportunity to call alibi evidence. … Effectively, the applicant was required to defend himself in respect of each occasion when an offence *might* have been committed. [original emphasis]

Gaudron and McHugh JJ also referred to the fact that, because the offences were not identified with any particularity, "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".[267]

Another reason given for requiring certainty in relation to the particular offence charged was that, if charged with the same offence a second time, the accused must be able to plead in defence that he or she has previously been either acquitted or convicted of the same offence.[268]

Toohey J referred to the real possibility that, given the generalised nature of the evidence, the jury would convict without being satisfied that a particular occasion, referable to one of the counts in the indictment, had in fact occurred:[269]

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264 Ibid.

265 Id per Dawson J at 275.

266 Id at 286.

267 Ibid.

268 Id per Dawson J at 276 and per Gaudron and McHugh JJ at 284. See the discussion of s 17 of the *Criminal Code* (Qld) at pp 92-96 of this Report.

269 Id at 283.

> This 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 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.

In *Podirsky v The Queen*[270] - which was decided before Western Australia enacted a provision similar to section 229B of the *Criminal Code* (Qld)[271] - the Full Court of the Supreme Court of Western Australia discussed the difficulties of these types of cases. In that case, the applicant was charged with, and convicted of, two counts of rape. The first count was alleged to have occurred between 1 January 1975 and 31 December 1975. The second count was alleged to have occurred "in or about the year 1977".[272] The applicant appealed against his conviction on the second count. The complainant testified that "following on the initial act of penetration by the accused, during the year 1975, when she was aged 14, there were frequent acts of intercourse until she was aged 17".[273] She also testified that she had not consented to any of the acts of intercourse with the accused. The complainant became pregnant in 1977 and gave birth in May 1978. The medical evidence estimated the time of conception as being August 1977, but did not exclude a pregnancy commencing in July or September.[274]

The Court held that "the evidence revealed a multiplicity of offences with nothing to identify any one of them as the offence with which the applicant was charged in any particular count".[275] Accordingly, following the decision in *S v The Queen*,[276] the Court quashed the conviction in relation to the second count:[277]

> It follows from the reasons in *S v The Queen* that the trial judge erred in allowing the trial to proceed without confining each count to a single act of intercourse by requiring either particulars or by requiring the Crown to elect which of the acts upon which it relied as constituting the offence charged.

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270 (1990) 3 WAR 128.

271 Section 321A (Child under 16: Sexual relationship with) was inserted into the *Criminal Code* (WA) by s 6 of the *Acts Amendment (Sexual Offences) Act 1992* (WA).

272 *Podirsky v The Queen* (1990) 3 WAR 128 at 130.

273 Id at 131.

274 Ibid.

275 Id at 136.

276 (1989) 168 CLR 266.

277 *Podirsky v The Queen* (1990) 3 WAR 128 at 136-137.

The Court outlined the difficulties faced by an accused against whom allegations of repeated abuse are made:[278]

> There is no doubt that, in cases such as *S v The Queen* and the present case, allegations of repeated acts of intercourse over an extended period, without sufficient particularity as to time, place or occasion so as to identify any particular act relied upon to constitute the offence charged, makes it extremely difficult for an accused to mount a proper defence. While the indictment may be regularly framed to allege a particular act of intercourse without specification of time and place, evidence of a series of acts, any one of which could constitute the offence on the basis that the evidence of the other acts was admissible as similar fact evidence or evidence of the relationship between the accused and complainant, creates a significant problem. The act relied upon to constitute the offence cannot be identified. Consequently, with respect to any particular act it cannot be said whether it constituted the offence, or was part of the similar fact evidence or was otherwise relevant and admissible in relation to the offence charged.

Although the Court recognised the importance for the accused in receiving proper particulars of the offences alleged, it also recognised the difficulties in prosecuting cases involving a number of sexual offences in relation to the one child where, because of the frequency of the abuse, the complainant is not capable of giving evidence that sufficiently distinguishes between different incidents so as to found a number of distinct counts against an accused. The Court acknowledged the injustice to the complainant that could result, especially where the nature of the offences and the length of time over which they are carried out is such that the complainant is not capable of differentiating between a number of incidents:[279]

> It [the situation] also carries with it a potential for injustice to the complainant and generally because one effect of the decision in *S v The Queen* is that notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse in the relevant period, any one of which could have caused conception, the Crown have found it impossible to identify any particular act with sufficient precision to enable any one offence to be charged. This means that unless the law is changed there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.

(c) The Sturgess Report

In his report on sexual offences involving children, Mr Sturgess QC, the then Queensland Director of Prosecutions, 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.[280] He suggested that the younger a child was when the abuse began

278 Id at 136.

279 Ibid.

280 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at paras 7.3-7.9.

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.[281] 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.[282] Because of this, prosecutors were more likely to concentrate on the most recent acts.[283] 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.[284]

Sturgess recommended that a provision be inserted into the *Criminal Code* (Qld) to create an offence when an "adult enters into and maintains a relationship with a child of such a nature that he commits a series of sexual offences" with that child.[285] 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".[286]

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281 Id at para 7.6.

282 Ibid.

283 Ibid.

284 See for example *R v D* [1996] 1 Qd R 363 and *R v Wackerow* [1998] 1 Qd R 197.

285 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at para 7.9. Sturgess recommended a provision in the following terms:

> **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.

286 Sturgess DG, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (Qld, 1985) at para 7.9.

3. SECTION 229B OF THE *CRIMINAL CODE* (QLD): THE OFFENCE OF "MAINTAINING A SEXUAL RELATIONSHIP WITH A CHILD"

(a) Introduction

In 1989, the *Criminal Code* (Qld) was amended to implement a number of recommendations made in the Sturgess Report, including the recommendation that the Code should be amended to create the offence of maintaining an unlawful sexual relationship with a child.[287] In the second reading speech for *The Criminal Code, Evidence Act and Other Acts Amendment Bill 1988* (Qld), the Hon B D Austin explained the reason for the creation of the new offence:[288]

> Despite some submissions to the contrary, it is proposed to leave the new offence of maintaining a sexual relationship with a child under 16 in the Bill for a number of reasons.
>
> Some concern has been expressed as to the broadness of the provision and the lack of definition and it has been suggested that the offence is a simple means of avoiding the strict proof of specific charges which rests on the Crown in the criminal trial.
>
> The provision has been specifically drafted in response to a general recommendation made by Mr. D.G. Sturgess, Q.C. in his report in recognition of the limited recall which many children, particularly those of tender years, have in respect of specific details such as time and dates of the offences and other surrounding circumstances.

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),[289] 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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287 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). The section, including the heading of the section, was amended by s 33 of the *Criminal Law Amendment Act 1997* (Qld).

288 Legislative Assembly (Qld), *Parliamentary Debates* (24 November 1988) at 3256.

289 The offences established by s 210(1)(e) and (f) of the *Criminal Code* (Qld) relate, respectively, to wilfully exposing a child under the age of 16 years to any indecent object or any indecent film, videotape, audiotape, picture, photograph or printed or written matter (s 210(1)(e)) and to taking any indecent photograph or recording, by means of any device, any indecent visual image of a child under the age of 16 years (s 210(1)(f)).

(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;[290]

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.[291]

(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[292] - 18 years; or

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290 These sections relate to the offences of "unlawful sodomy" (s 208) and "attempted sodomy" (s 209).

291 The term "Crown Law Officer" is defined in s 1 of the *Criminal Code* (Qld) to mean the Attorney-General or Director of Prosecutions.

292 See note 290 of this Report.

> (b) to the extent that the relationship involves any other act defined to constitute an offence of a sexual nature - 16 years. [notes added; emphasis added]

The purpose of section 229B has been described in the following terms:[293]

> Section 229B … recognises that where repetitive acts of a sexual nature are committed upon children, it will often be difficult to give the degree of particularity usually demanded when a charge is brought. Section 229B has as one of its purposes attempting to ensure that, in an area where repetitive conduct of a similar kind is not infrequent in respect of a vulnerable segment of society and where, because of the repetitive and secretive nature of the conduct, precise particularity of the occasion is often lacking, offenders do not escape punishment merely because the degree of particularity that would ordinarily be required cannot be given. Section 229B is an attempt to create a legislative compromise which strikes at the element of repetitious conduct (by employing the concept of maintaining a sexual relationship) while requiring the jury to be unanimously satisfied beyond reasonable doubt that three or more acts of a sexual nature occurred in the period alleged.

Kirby J, in the High Court case of *KBT v The Queen*,[294] made a similar observation, suggesting 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".[295]

Because of the repetitious nature of the conduct giving rise to the offence, the offence is regarded as a particularly serious one:[296]

> Section 229B was enacted in 1989 with the obvious intention of providing for a heavier penalty where the offender was an adult and the sexual relationship was maintained over a period involving at least three separate acts. The offence is obviously more serious than that of unlawful carnal knowledge simpliciter and that must be reflected in the sentence imposed.

(b) The elements of the offence

Section 229B(2) provides that, to be convicted under the section, a person must have committed certain offences of a sexual nature in relation to a child on three or more occasions.[297] In this respect, the section differs from the provision recommended in the Sturgess Report. The substance of the provision

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293 *R v Kemp (No 2)* [1998] 2 Qd R 510 per Mackenzie J at 517-518.

294 (1997) 191 CLR 417.

295 Id per Kirby J at 428.

296 *R v Jones* (Unreported, CA, Sup Ct of Qld, McPherson JA, Williams and Derrington JJ, CA No 264 of 1992, 4 December 1992) at 4.

297 In 1997, s 229B(1A) was renumbered as s 229B(2). See note 306 of this Report.

recommended in that Report was that a person entered into and maintained a relationship with a child "of such a nature he commits a series of offences of a sexual nature".[298] In the second reading speech for *The Criminal Code, Evidence Act and Other Acts Amendment Bill 1988* (Qld), the Hon B D Austin, after noting that the new offence created by section 229B was introduced in response to a recommendation made in the Sturgess Report,[299] explained the purpose of the requirement that three or more acts of a sexual nature must be proved:[300]

> The drafting of this provision has … been tightened and it will now be a requirement that the prosecution establish the sexual relationship by proving no fewer than 3 specific acts which constitute offences of a sexual nature.

The High Court has held that, for a person to be convicted under section 229B, the jury must be agreed as to the commission of the same three or more illegal acts. In *KBT v The Queen*,[301] the accused 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. Rather, the complainant gave evidence of a general course of sexual misconduct by the accused, although the allegations did fall into six broad categories - namely, acts that occurred while riding the farm motorcycle with the appellant; during afternoon rests on a bean bag; during fruit picking; during morning tea breaks; in the morning before the complainant had risen; and while watching television in the evening.[302] Within those categories, however, her evidence did not identify specific incidents:[303]

> She gave evidence that the motorcycle incidents occurred "on and off on a … regular basis, whenever we'd go [fruit]picking" - "[n]ot every time, but some times". The morning tea incidents were said to involve "most of the morning teas" but "not all of them", while the television incidents were said to have occurred a minimum of two times per week, perhaps "five times one week and twice the next week". There was no evidence as to the frequency of the other incidents of which she complained.

The accused was convicted under section 229B of the *Criminal Code* (Qld) 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

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298 The recommended provision is set out in full at note 285 of this Report.

299 See p 66 of this Report.

300 Legislative Assembly (Qld), *Parliamentary Debates* (24 November 1988) at 3256.

301 (1997) 191 CLR 417. This decision concerned s 229B prior to its amendment in 1997 by s 33 of the *Criminal Law Amendment Act 1997* (Qld). The current provision does not differ in terms of those matters that concerned the High Court in *KBT v The Queen*.

302 (1997) 191 CLR 417 per Brennan CJ, Toohey, Gaudron and Gummow JJ at 421.

303 Id at 422.

sexual nature had been established and to reach unanimous verdicts upon the same three offences.[304]

In a joint judgment, Brennan CJ, Toohey, Gaudron and Gummow JJ held that, for a person to be convicted under section 229B, it was necessary for the jury to be agreed as to the commission of the same three illegal acts. This followed from the fact that it was the commission of the three offences of a sexual nature that constituted the offence:[305]

> The offence created by s 229B(1) is described in that sub-section in terms of a course of conduct and, to that extent, may be compared with offences like trafficking in drugs or keeping a disorderly house. In the case of each of those latter offences, the actus reus is the course of conduct which the offence describes. However, an examination of sub-s (1A)[306] makes it plain that that is not the case with the offence created by s 229B(1). Rather, it is clear from the terms of sub-s (1A) that the actus reus of that offence is the doing, as an adult, of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions. Once it is appreciated that the actus reus of the offence is as specified in sub-s (1A) rather than maintaining an unlawful sexual relationship, it follows, as was held by the Court of Appeal,[307] that a person cannot be convicted under s 229B(1) unless the jury is agreed as to the commission of the same three or more illegal acts. [notes added]

Brennan CJ, Toohey, Gaudron and Gummow JJ then considered the nature of the evidence that had been given by the complainant and found that, in the light of that evidence, it was "impossible to say that the jurors must have been agreed as to the appellant having committed the same three acts".[308]

> 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. [note omitted]

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304 Id per Kirby J at 430.

305 Id per Brennan CJ, Toohey, Gaudron and Gummow JJ at 422.

306 Section 229B of the *Criminal Code* (Qld) was amended by s 33 of the *Criminal Law Amendment Act 1997* (Qld), which came into force on 1 July 1997 (see SL No 152 of 1997). As part of those amendments, s 229B(1A) was renumbered as s 229B(2).

307 See (1996) 90 A Crim R 416.

308 (1997) 191 CLR 417 at 424. See also *R v Hubbuck* [1999] 1 Qd R 314, which concerned an appeal against a conviction for unlawful stalking, an offence created by s 359A of the *Criminal Code* (Qld). An element of the offence was, at that time, that the person engaged in conduct involving "a concerning act on at least 2 separate occasions". The Court of Appeal held (at 315) that that case was indistinguishable from the decision in *KBT v The Queen*. 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. In 1999, the *Criminal Code* (Qld) was amended by the *Criminal Code (Stalking) Amendment Act 1999* (Qld), which repealed s 359A and inserted a new Chapter 33A (Unlawful Stalking). Under the new Chapter, "unlawful stalking" is now defined in s 359B as, inter alia, conduct consisting of one or more specified acts that is "engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion".

It followed that the accused had been deprived of "a chance of acquittal that was fairly open".[309]

Kirby J, in a separate judgment, also agreed that the jury must unanimously agree as to the commission of the same three offences of a sexual nature.[310]

(c) The required degree of particularity

Section 229B(2) provides that, in relation to proof of the commission of the three offences:

> … 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. [emphasis added]

The section does not, however, obviate the need for any particulars. In their joint judgment in *KBT v The Queen*, Brennan CJ, Toohey, Gaudron and Gummow JJ considered the effect of this provision on the requirement for proving the necessary three offences:[311]

> The sub-section's dispensation with respect to proof applies only to the dates and circumstances relating to the occasions on which the acts were committed. It does not detract from the need to prove the actual commission of acts which constitute offences of a sexual nature.
>
> It should be noted that, quite apart from fairness to the accused, evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour is not necessarily evidence of the doing of "an act defined to constitute an offence of a sexual nature … on 3 or more occasions" for the purposes of s 229B(1A).[312] Moreover, if the prosecution evidence in support of a charge under s 229B(1) is simply evidence of a general course of sexual misconduct or of a general pattern of sexual misbehaviour, it is difficult to see that a jury could ever be satisfied as to the commission of the same three sexual acts as required by s 229B(1A). [note added]

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309 (1997) 191 CLR 417 per Brennan CJ, Toohey, Gaudron and Gummow JJ at 424.

310 Id at 431 and 433. However, whereas the joint judgment of Brennan CJ, Toohey, Gaudron and Gummow JJ found (at 422) that the "actus reus" of the offence was "the doing … of an act which constitutes an offence of a sexual nature in relation to the child concerned on three or more occasions", Kirby J seemed to suggest that the proof of the three acts was a necessary, but not a sufficient, condition of proof of the offence, describing that requirement variously as "an ingredient of the offence" (at 431), a "statutory prerequisite" (at 432) and as one of "the preconditions for a conviction" (at 435). In particular, Kirby J made the following statement as to the requirements for a conviction under the section (at 433):

> The jury may find offences of a sexual nature in relation to the child on more than three occasions. But to warrant a verdict of guilty of an offence against the section, the jurors must identify to themselves at least three occasions, reach unanimous agreement that the offences on those occasions are of a sexual nature, that they relate to the child and are such as to show the maintenance of the relationship charged and have been proved beyond reasonable doubt. All of these elements must be made out. [emphasis added]

311 (1997) 191 CLR 417 at 423.

312 See note 306 of this Report.

Consequently, even though no specificity as to dates or circumstances is required by section 229B, three separate "occasions" must still be identified and the jury must be agreed as to those three occasions. It is therefore unlikely that a disclosure of certain conduct on "multiple occasions" would be sufficient to procure a conviction under the section.

(d) Cases in which *KBT v The Queen* has been distinguished

Although the High Court in *KBT v The Queen* held that the jurors must be able to identify three offences and be agreed as to the commission of the same three offences,[313] evidence of a general pattern of unlawful sexual conduct has been held in two recent decisions to found a conviction under section 229B of the *Criminal Code* (Qld) and under the equivalent provision in Victoria.[314]

In *R v S,*[315] the complainant gave evidence that the appellant had engaged in certain conduct every night for a period of some five 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.[316]

The Court of Appeal of the Supreme Court of Queensland distinguished *KBT v The Queen*, 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:[317]

> 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).[318] [note added]

313 (1997) 191 CLR 417 per Brennan CJ, Toohey, Gaudron and Gummow JJ at 423 and per Kirby J at 433.

314 See note 335 of this Report.

315 [1999] 2 Qd R 89.

316 Id at 91.

317 Id at 93.

318 See note 306 of this Report.

The Court of Appeal of the Supreme Court of Victoria has also distinguished the decision in *KBT v The Queen*. In *KRM v The Queen*,[319] the applicant was charged with, and convicted of, eighteen counts of various sexual offences, including one of maintaining a sexual relationship with a child under the age of 16 years.[320] In relation to that count, the complainant gave evidence of frequent acts of intercourse with the applicant:[321]

> There's no specifics that I can remember. Everything - a lot of them were - I cannot remember anything that separates a lot of them from the rest because it was very repetitious. … It was very routine and very frequent.

The complainant concluded her evidence in chief by confirming that her reference to "numerous occasions" meant that the acts referred to had occurred on more than three occasions during the relevant period.[322]

The applicant appealed against the conviction for maintaining a sexual relationship with a child under the age of 16 years on the basis that the trial judge had erred in failing to direct the jury that they must agree on the same three acts of sexual penetration. The Court rejected the appeal, holding that, in the circumstances of the case, the judge was not required to direct the jury as to the commission of the same three acts.[323] As in *R v S*,[324] the Court distinguished the decision in *KBT v The Queen*[325] on the basis of the identical nature of the acts alleged by the complainant. After discussing the decision in *KBT v The Queen*, the Court referred to the evidence given by the complainant in the case before it:[326]

> The present case is altogether different. The evidence is not "simply" evidence of some general course of sexual misconduct or general pattern of sexual misbehaviour. In concluding her examination-in-chief, the complainant confirmed expressly that the sexual intercourse of which she had earlier spoken consisted of penile penetration and occurred "on more than three occasions". The jury either accepted this or rejected it. There was no specification of dates or other attendant circumstances and the acts of penile penetration, being acts of sexual intercourse, were not distinguished one from the other. The jury could make no choice between one act and another, for their quality was identical. If the jury accepted the complainant's evidence, they must have been satisfied that there were at least three acts of sexual intercourse and that they were all of the same kind because there were no different categories of conduct or groups of surrounding circumstances.

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319 (1999) 105 A Crim R 437 at 438.

320 See the *Crimes Act 1958* (Vic) s 47A.

321 *KRM v The Queen* (1999) 105 A Crim R 437 at 439.

322 Ibid.

323 Id per Buchanan JA (with whom Phillips CJ and Batt JA agreed at 438) at 441.

324 [1999] 2 Qd R 89. See the discussion of this decision at p 72 of this Report.

325 (1997) 191 CLR 417. See the discussion of this decision at pp 69-71 of this Report.

326 *KRM v The Queen* (1999) 105 A Crim R 437 per Buchanan JA at 440.

(e) Criticism of section 229B

The operation of section 229B (or its equivalent in other jurisdictions) has been criticised in several recent decisions.

In *R v S*,[327] the Court of Appeal of the Supreme Court of Queensland expressed doubts about the effectiveness of section 229B, notwithstanding that, on the facts of that case, the Court was able to distinguish *KBT v The Queen*:[328]

> 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 W*,[329] the accused was charged with eight offences of a sexual nature, but not with an offence under section 229B.[330] Pincus JA made the following comment about the present utility of the section:[331]

> 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.

In *R v GB*,[332] a decision concerning the equivalent provision in the Australian Capital Territory, Crispin J observed:[333]

> As the High Court has pointed out in the more recent decision of *KBT v The Queen* it is still necessary for the Crown to identify each of the precise acts relied upon and for each member of the jury to be satisfied beyond reasonable doubt as to the commission of each of those precise acts. … *S v The Queen* did not establish any proposition that the date upon which a sexual act occurred had to be identified or that the circumstances in which the act occurred had to be established with any precision. Accordingly, it would appear that s 92EA does not overcome the problems referred to by the High Court in *S v The Queen*. Indeed, given the range of other offences that may be charged and the severity of penalties available, the utility of the offence provided in this section is by no means clear.

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327 [1999] 2 Qd R 89.

328 Id at 94. See the discussion of *R v S* at p 72 of this Report.

329 Unreported, CA, Sup Ct of Qld, Pincus JA, Thomas and Dowsett JJ, CA No 476 of 1997, 12 May 1998.

330 Id per Thomas J at 2 where the 14 charges are set out.

331 Id per Pincus JA at 9.

332 (1998) 148 FLR 222.

333 Id at 228.

4. THE LAW IN OTHER JURISDICTIONS

All other Australian jurisdictions now have a provision similar to section 229B of the *Criminal Code* (Qld) creating an offence that is proved by the commission of three or more sexual offences in relation to a child. Following the enactment of section 229B of the *Criminal Code* (Qld) in 1989,[334] equivalent provisions were enacted in the Australian Capital Territory and Victoria in 1991,[335] in Western Australia in 1992,[336] in the Northern Territory, South Australia and Tasmania in 1994,[337] and in New South Wales in 1998.[338]

The provisions were generally said to have been enacted as a response to the decision of the High Court in *S v The Queen*.[339] The New South Wales Attorney-General, the Hon J W Shaw, when introducing the *Crimes Legislation Amendment (Child Sexual Offences) Bill 1998* (NSW), explained that a provision of this kind had been recommended by the Wood Royal Commission to overcome the difficulties posed by the High Court's decision in *S v The Queen*.[340] The Report of Justice Wood included the following recommendation:[341]

> In order to overcome the very serious practical difficulties caused by the decision of the High Court in *S v The Queen*, the Commission considers it essential for NSW to introduce an offence of persistent sexual abuse, along the lines of the Model Code. This would allow an accused to be charged where during a nominated period, he or she is shown to have committed sexual offences in relation to the one child on more than three occasions, on separate days, without the necessity of establishing the incidents with the specificity required by *S v The Queen*. [note omitted]

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334 See note 287 of this Report.

335 *Crimes Act 1900* (ACT) s 92EA (Maintaining a sexual relationship with a young person), which was inserted by s 3 of the *Crimes (Amendment) Act (No 3) 1991* (ACT); *Crimes Act 1958* (Vic) s 47A (Sexual relationship with child under the age of 16), which was inserted by s 3 of the *Crimes (Sexual Offences) Act 1991* (Vic).

336 *Criminal Code* (WA) s 321A (Child under 16: Sexual relationship with), which was inserted by s 6 of the *Acts Amendment (Sexual Offences) Act 1992* (WA).

337 *Criminal Code* (NT) s 131A (Unlawful sexual relationship with child), which was inserted by s 7 of the *Criminal Code Amendment Act (No 3) 1994* (NT); *Criminal Law Consolidation Act 1935* (SA) s 74 (Persistent sexual abuse of a child), which was inserted by s 3 of the *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA); and *Criminal Code* (Tas) s 125A (Maintaining sexual relationship with young person), which was inserted by s 4 of the *Criminal Code Amendment (Sexual Offences) Act 1994* (Tas).

338 *Crimes Act 1900* (NSW) s 66EA (Persistent sexual abuse of a child), which was inserted by s 3 and Sch 1[2] of the *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW).

339 (1989) 168 CLR 266. See *R v GB* (1998) 148 FLR 222 per Crispin J at 227 in relation to the Australian Capital Territory provision; Legislative Council (NSW), *Parliamentary Debates* (20 October 1998) at 8541 in relation to the New South Wales provision; House of Assembly (SA), *Parliamentary Debates* (4 May 1994) at 1005, 1159, 1160 in relation to the South Australian provision; and Legislative Assembly (Vic), *Parliamentary Debates* (20 March 1991) per Mrs Wade at 512-513 in relation to the Victorian provision. It was also suggested (at 514) that the Victorian provision was modelled on the Queensland provision.

340 Legislative Council (NSW), *Parliamentary Debates* (20 October 1998) at 8541.

341 Wood, the Hon Justice JRT, *Royal Commission into the New South Wales Police Service - Final Report - Volume V: The Paedophile Inquiry* (August 1997) at para 14.44.

The provisions in all other Australian jurisdictions have broadly the same effect as section 229B of the *Criminal Code* (Qld) in relation to proof of the offence. Although the provisions are intended to achieve the same end, there are, however, some differences between the various provisions. The relevant differences are discussed below.[342]

Section 66EA of the *Crimes Act 1900* (NSW), which is the provision most recently enacted, provides:

> **Persistent sexual abuse of a child**
>
> (1) A person who, on 3 or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a sexual offence is liable to imprisonment for 25 years.
>
> (2) It is immaterial whether or not the conduct is of the same nature, or constitutes the same offence, on each occasion.
>
> (3) It is immaterial that the conduct on any of those occasions occurred outside New South Wales, so long as the conduct on at least one of those occasions occurred in New South Wales.
>
> (4) In proceedings for an offence against this 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.
>
> (5) A charge of an offence against this section:
>
> (a) must specify with reasonable particularity the period during which the offence against this section occurred, and
>
> (b) must describe the nature of the separate offences alleged to have been committed by the accused during that period.
>
> (6) In order for the accused to be convicted of an offence against this section:
>
> (a) the jury must be satisfied beyond reasonable doubt that the evidence establishes at least 3 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 of a nature described in the charge, and
>
> (b) the jury must be so satisfied about the material facts of the 3 such occasions, although the jury need not be so satisfied about the dates or the order of those occasions, and
>
> (c) if more than 3 such occasions are relied on as evidence of the commission of an offence against this section, all the members of the jury must be so satisfied about the same 3 occasions, and
>
> (d) the jury must be satisfied that the 3 such occasions relied on as evidence of the commission of an offence against this section occurred after the commencement of this section.

342 See pp 79-98 of this Report.

(7) In proceedings for an offence against this section, the judge must inform the jury of the requirements of subsection (6).

(8) A person who has been convicted or acquitted of an offence against this 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 this section. This subsection does not prevent an alternative verdict under subsection (10).

(9) A person who has been convicted or acquitted of a sexual offence may not be convicted of an offence against this section in relation to the same child if any of the occasions relied on as evidence of the commission of the offence against this section includes the occasion of that sexual offence.

(10) If on the trial of a person charged with an offence against this 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 this section, committed a sexual offence, the jury may acquit the person of the offence charged and find the person guilty of that sexual offence. The person is liable to punishment accordingly.

(11) Proceedings for an offence against this section may only be instituted by or with the approval of the Director of Public Prosecutions.

(12) In this section:

child means a person under the age of 18 years.

sexual offence means any of the following:

(a) an offence under section 61I, 61J, 61K, 61L, 61M, 61N, 61O, 66A, 66B, 66C, 66D, 66F, 73, 74, 78H, 78I, 78K, 78L, 78N, 78O, 78Q or 80A,

(b) an offence of attempting to commit an offence referred to in paragraph (a),

(c) an offence under the law of a place outside New South Wales that would, if it had been committed in New South Wales, be an offence referred to in paragraph (a) or (b).

5. ISSUES FOR CONSIDERATION

The recent judicial criticism of section 229B of the *Criminal Code* (Qld) and differences between that provision and the equivalent provisions in other jurisdictions raise a number of issues about the prosecution of an offence that is designed to deal with the persistent sexual abuse of children.

The main issue for consideration is whether an offence to the effect of section 229B of the *Criminal Code* (Qld) should be retained (thereby requiring proof of a number of specific sexual offences) or whether the section should be replaced with one that

creates a continuing offence of maintaining a sexual relationship with a child, based on proof of a course of conduct in relation to the child.

If the decision is made to retain a provision to the general effect of section 229B of the *Criminal Code* (Qld), other issues that arise for consideration include:

- whether the provision should continue to stipulate proof of some number of sexual offences in relation to a child;
- whether the jury must be unanimously agreed as to the commission of the same three sexual offences;
- whether the provision should require the relevant offences to have occurred on separate days;
- whether the provision should expressly stipulate that the relevant offences need not be of the same nature;
- whether it should be sufficient to prove the offence if only one of the relevant offences occurs in Queensland;
- the degree of particularity that should be required in relation to the relevant offences;
- whether the offence should make provision for alternative verdicts;
- whether any special directions should be given to the jury;
- whether it should be possible - as it is presently under section 229B(6) of the *Criminal Code* (Qld) - to include in the one indictment a charge under that section and a charge in respect of another offence of a sexual nature that is alleged to have been committed during the period covered by the section 229B charge;
- whether there could be a need for the jury to give a special verdict; and
- what transitional arrangements should apply if a new provision is recommended in the place of the existing section 229B.

Regardless of whether section 229B of the *Criminal Code* (Qld) continues to operate as an offence that is proved by the commission of a specified number of sexual offences or is amended so that the section creates an offence based on proof of a course of conduct, two further issues arise for consideration:

- whether, if a person has been convicted or acquitted of an offence under section 229B, the person should be able to be convicted of a specific sexual offence in relation to the same child if the latter offence (that is, the specific offence) is alleged to have been committed during the period covered by the section 229B charge;

- whether, if a person has been convicted or acquitted of a specific sexual offence in relation to a child, the person should be able to be convicted of a charge under section 229B in relation to the same child if the charge under section 229B relies on evidence of the commission of the same specific offence.

(a) The need to prove three sexual offences in relation to a child

In all jurisdictions, the legislation requires that, to be convicted of the relevant offence, a person must have committed three acts constituting sexual offences in relation to a child.[343]

Further, the legislation in New South Wales and in South Australia expressly provides that, in order to be convicted under the relevant section, the jury must be agreed as to the material facts of the same three acts, although they need not be agreed as to the dates of the three acts or the order in which they occurred.[344] Section 66EA(6) of the *Crimes Act 1900* (NSW) provides:

> In order for the accused to be convicted of an offence against this section:
>
> (a) the jury must be satisfied beyond reasonable doubt that the evidence establishes at least 3 separate occasions … on which the accused engaged in conduct constituting a sexual offence in relation to a particular child of a nature described in the charge, and
>
> (b) the jury must be so satisfied about the material facts of the 3 such occasions, although the jury need not be so satisfied about the dates or the order of those occasions, and
>
> (c) if more than 3 such occasions are relied on as evidence of the commission of an offence against this section, all the members of the jury must be so satisfied about the same 3 occasions, and
>
> (d) the jury must be satisfied that the 3 such occasions relied on as evidence of the commission of an offence against this section occurred after the commencement of this section.

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343 *Crimes Act 1900* (ACT) s 92EA(3); *Crimes Act 1900* (NSW) s 66EA(1); *Criminal Code* (NT) s 131A(3); *Criminal Code* (Qld) s 229B(2); *Criminal Law Consolidation Act 1935* (SA) s 74(2); *Criminal Code* (Tas) s 125A(3)(a); *Crimes Act 1958* (Vic) s 47A(2); *Criminal Code* (WA) s 321A(1).

344 It is interesting to note that, although the New South Wales provision was enacted after the decision in *KBT v The Queen*, the South Australian provision was inserted in 1994, several years before that decision. See notes 337 and 338 of this Report.

Section 74(5) of the *Criminal Law Consolidation Act 1935* (SA) is in similar terms, although it does not expressly address the situation where evidence of more than three occasions is relied on. Section 74(5) provides:

> Before a jury returns a verdict that a defendant is guilty of persistent sexual abuse of a child -
>
> (a) the jury must be satisfied beyond reasonable doubt that the evidence establishes at least three separate incidents … between the time when the course of conduct is alleged to have begun and when it is alleged to have ended in which the defendant committed a sexual offence against the child; and
>
> (b) the jury must be agreed on the material facts of three such incidents in which the defendant committed a sexual offence of a nature described in the charge (although they need not be agreed about the dates of the incidents, or the order in which they occurred).

Earlier this year, the Taskforce on Women and the Criminal Code recommended, by majority, that section 229B of the *Criminal Code* (Qld) should be amended so that the substance of the offence is the relationship with the child, rather than the commission of the three sexual offences.[345] In particular, the Taskforce supported the concept of an offence based on a "course of conduct".[346]

The question then arises as to how the unlawful relationship, continuing as it must over some period of time, should be proved. The concept of a continuing offence - that is, one that is established by a course of conduct over a period of time - is recognised in cases relating to drug trafficking offences, where what is alleged is not a number of individual counts of supplying, but rather the activity of being engaged in trafficking over a period of time. It has been held that, in such a case, the continuous offence cannot be proved by adducing evidence of a number of individual transactions - any of which might be able to sustain an individual count - and asking the jury to decide whether any individual offence was committed during the stated period:[347]

> If the case being advanced is that a business was being carried on, that is that it was a continuing offence, then that is what must be proved to establish the single offence charged in the count. It is not proper to plead a number of individual acts of trafficking (perhaps because it is not possible to match each to a particular date or approximate date) on the basis that the jury can find at least one offence committed during the stated period; still less that different jurors might be satisfied as to different acts of trafficking so long as they were all satisfied as to at least one. If the prosecution were to seek to plead the case in such a manner it should be called upon to elect, … or to amend the presentment so as to confine each illegal act alleged to its own count.

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345 Office of Women's Policy, Department of Equity and Fair Trading (Qld), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 244.

346 Ibid.

347 *Giretti v The Queen* (1986) 24 A Crim R 112 per Crockett J at 117.

Where the allegation is of a continuing offence, the jury is entitled to consider the evidence of specific acts and draw an inference as to whether the offence of engaging in an ongoing activity is made out.[348] As Ormiston J of the Court of Criminal Appeal in Victoria commented in *Giretti v The Queen*:[349]

> A series of individual trafficking transactions does not establish the continuing offence, for it is necessary to characterise the continuing activity in a manner consistent with the proper meaning of the word "trafficking". It is not necessarily difficult to draw the inference that an accused is trafficking from proof of the large number of transactions which can be so described, especially if they are committed over a relatively short period, but it is another matter to leave it open to a jury to find a continuing offence from possibly only two or half a dozen or so transactions over periods which varied from three to sixteen months.

Ormiston J, who dissented in finding that, in light of the trial judge's direction to the jury, there had been a substantial miscarriage of justice, explained the significance between being convicted in respect of individual transactions and being convicted of the continuous offence of trafficking. After expressing the view that it was uncertain from the verdict whether the jury had unanimously agreed that the accused had committed any specific acts or whether the jury had found the accused guilty of a continuous offence, Ormiston J commented:[350]

> Nor is this uncertainty of little consequence, for there must be, and is, a vast difference between a conviction which relates to the carrying on of a trade in drugs for a sixteen months', or even a three months' period and one which relates to a single transaction, or even two or three transactions, of sale, purchase, delivery or receipt of drugs in their transmission from source to consumer.

In the context of a continuous offence of maintaining an unlawful sexual relationship with a child, it would be necessary for the jury to be able to infer from the evidence that the sexual misconduct alleged did not consist of isolated incidents, but occurred over the course of the period during which the relationship was alleged to have been maintained.

The creation of an offence, the substance of which is the maintenance of a sexual relationship with a child, rather than the commission of three distinct sexual offences, was supported by two respondents[351] to the Discussion Paper.[352] One of these respondents, the Queensland Director of Public Prosecutions, suggested that section 229B of the *Criminal Code* (Qld) had "not lived up to its expectations because according to the ruling of the High Court in *KBT v R* the prosecution must satisfy the jury of the commission of the same 3 acts before the foundation is laid for

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348 Id per Crockett J at 119, per Gray J at 121 and per Ormiston J at 127, 130, 134 and 140.

349 Id at 140.

350 Id at 141.

351 Submissions 2, 32.

352 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence in Queensland Courts: The Evidence of Children* (WP 53, December 1998).

a conviction under the section".[353] This is a similar view to that expressed by the Court of Appeal in *R v S*.[354] The Queensland Director of Public Prosecutions suggested a new offence in the following terms:

> A person who as an adult maintains a relationship of a sexual nature with a person under the prescribed age shall be guilty of a crime, but the jury may not convict a person of the offence unless satisfied of the commission of sufficient offences of a sexual nature over a sufficient period of time as to render the offence proven.

On the other hand, two other respondents to the Discussion Paper favoured the retention of the existing provision. The Bar Association of Queensland argued that any attempt to amend section 229B to allow generalised and unparticularised evidence of sexual misconduct in proof of a charge of "maintaining a sexual relationship" would seriously erode the rights of an accused person:[355]

> Any attempt to allow unparticularised and generalised evidence of sexual misconduct to form the subject of a jury's verdict will seriously undermine the principle that an accused person can only be convicted on the unanimous verdict of the jury. It will be theoretically possible for some jurors to consider the accused guilty on the basis of some of the alleged sexual acts, and other jurors to be satisfied of the guilt of the accused on the basis of other quite distinct alleged sexual acts. The verdict might therefore amount merely to a statement by the jury to the effect that: "*We are satisfied unanimously that something happened, we are not unanimous as to what happened, but we find the accused guilty*". To create an offence which would allow for this result is grossly unfair to the accused person. [original emphasis]

The Queensland Council for Civil Liberties also supported the present requirement in section 229B that three distinct offences of a sexual nature must be established.[356]

(b) Issues related to the elements of the offence

Although all Australian jurisdictions require proof of three or more sexual offences in relation to a child to found a conviction under their legislation, the various provisions contain some differences from section 229B of the *Criminal Code* (Qld).

(i) Proof of three or more separate acts committed on separate days

In New South Wales, South Australia and Western Australia, the legislation expressly provides that the three offences must occur on separate days.[357]

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353 Submission 32.

354 [1999] 2 Qd R 89 at 94. See p 74 of this Report.

355 Submission 53A.

356 Submission 40.

357 *Crimes Act 1900* (NSW) s 66EA(1); *Criminal Law Consolidation Act 1935* (SA) s 74(3); *Criminal Code* (WA) s 321A(1).

The other Australian jurisdictions do not have that requirement. However, the Court of Appeal of the Supreme Court of Queensland has suggested that it would be an unusual result if an offence under section 229B of the *Criminal Code* (Qld) could be made out by the commission of three sexual offences within a very short period of time:[358]

> The statement in the joint judgment in *KBT v The Queen* that "the actus reus of the offence is as specified in subs.(1A) rather than maintaining an unlawful sexual relationship" may, with respect, be capable of producing a somewhat surprising result in a case where, for example, the three acts in question all occurred in the course of the same day, or perhaps even within the same hour of that day. It would in those circumstances be difficult to regard the accused as "maintaining a sexual relationship", according to the natural meaning of those words, over so short a period. Fortunately, however, we are not faced here with a state of affairs like that.

(ii) The three acts need not be of the same nature

The legislation in New South Wales, South Australia, Tasmania, Victoria and Western Australia provides that it is immaterial whether the conduct on each of the three occasions is of the same nature or constitutes the same, or a different, offence.[359]

There is no such provision in section 229B of the *Criminal Code* (Qld). Section 229B(2) simply provides that:

> A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the accused person … has … 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 …

It has been held in relation to the Australian Capital Territory provision - which is similar in this respect to section 229B of the *Criminal Code* (Qld) - that the section does not require the commission of the same sexual act on each of the three occasions, as long as each would constitute an offence under the relevant part of the *Crimes Act 1900* (ACT).[360]

It would appear that, although section 229B of the *Criminal Code* (Qld) does not contain an express provision in terms of the provisions referred to above,[361] it is possible under the existing provision for a range of sexual offences of varying gravity to be prosecuted together under the section.[362]

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358 *R v S* [1999] 2 Qd R 89 at 91-92.

359 *Crimes Act 1900* (NSW) s 66EA(2); *Criminal Law Consolidation Act 1935* (SA) s 74(2); *Criminal Code* (Tas) s 125A(4)(b); *Crimes Act 1958* (Vic) s 47A(2A); *Criminal Code* (WA) s 321A(2).

360 *R v GB* (1998) 148 FLR 222 at 224.

361 See note 359 of this Report.

362 See for example *Criminal Code* (Qld) ss 208 (Unlawful sodomy); 210(1)(a) (Unlawfully and indecently dealing with a child under the age of 16 years); 215 (Carnal knowledge of girls under 16); 222 (Incest); and 347 (Rape).

(iii) Jurisdiction

The legislation in New South Wales provides that "[i]t is immaterial that the conduct on any of those occasions occurred outside New South Wales, so long as the conduct on at least one of those occasions occurred in New South Wales".[363]

Such a provision has also been recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General,[364] which gave the following explanation for its recommendation:[365]

> This important extension of the jurisdiction of the criminal courts of each jurisdiction will ensure that accused persons do not escape prosecution for engaging in persistent child sexual abuse, simply because the child complainant is uncertain about the jurisdiction in which each and every one of all of the pre-existing offences occurred. For example, in a situation where a child complainant was certain that one of the pre-existing offences occurred in Albury, but could not be certain if the other pre-existing offences took place in Albury or Wodonga, the accused would be able to be brought to justice in New South Wales with regard to all of the offences.

Because of the extra-territorial operation of the New South Wales provision, the term "sexual offence" has been given an extended meaning, so that it includes certain sexual offences committed outside New South Wales. For the purposes of section 66EA of the *Crimes Act 1900* (NSW), the term is defined to include, in addition to certain specified offences under New South Wales legislation:[366]

> an offence under the law of a place outside New South Wales that would, if it had been committed in New South Wales, be an offence referred to in paragraph (a) or (b).

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363 *Crimes Act 1900* (NSW) s 66EA(3). In *R v S* [1999] 2 Qd R 89, the Court observed (at 94) that the trial judge had been careful to instruct the jury that they must be satisfied that the three instances of indecent dealing had occurred in Queensland during the time frame alleged. Evidence of a sequence of events that had occurred in Victoria was held to be admissible on the basis that it was "relevant to and probative of the fact that there was an element of continuity in what was done in Queensland". That evidence could not, however, be admitted as proof of any of the three sexual offences.

364 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Report, *Model Criminal Code - Chapter 5: Sexual Offences Against the Person* (May 1999) at 138, s 5.2.14(3). This Committee was established by the Standing Committee of Attorneys-General for the purpose of developing a national model criminal code for Australian jurisdictions: see Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Report, *Model Criminal Code - Chapter 5: Sexual Offences Against the Person* (May 1999), Preface at i.

365 Id at 139.

366 *Crimes Act 1900* (NSW) s 66EA(12)(c).

(iv) The required degree of particularity

As noted earlier, section 229B(2) of the *Criminal Code* (Qld) provides that, in relation to proving that an act constituting a sexual offence in relation to a child was done on three or more occasions:

> … 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.

In this respect, the provision addresses one of the difficulties that arose, before the introduction of section 229B, when it was sought to prosecute a number of sexual offences in the one indictment.[367]

Other jurisdictions also require a lesser degree of particularity in relation to the proof of each of the three requisite offences than would be required in relation to a charge of a specific offence.[368] There is some slight variation between the provisions, although they are generally to the same effect. The New South Wales provision is similar to section 229B(2) of the *Criminal Code* (Qld), although, in the context of an offence that consists of the commission of three or more separate acts, rather than the maintenance of a relationship, the New South Wales provision is arguably expressed in more appropriate language. Section 66EA(4) of the *Crimes Act 1900* (NSW) provides:

> In proceedings for an offence against this 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.

Some jurisdictions also specify in their relevant provisions the degree of particularity that must be contained in the indictment charging the relevant offence. Section 229B of the *Criminal Code* (Qld) does not contain such a provision.

In New South Wales, section 66EA(5) of the *Crimes Act 1900* (NSW) provides that a charge of an offence against the relevant section:

> (a) must specify with reasonable particularity the period during which the offence against this section occurred, and
>
> (b) must describe the nature of the separate offences alleged to have been committed by the accused during that period.

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367 See the discussion of *S v The Queen* (1989) 168 CLR 266 at pp 61-63 of this Report.

368 *Crimes Act 1900* (ACT) s 92EA(4); *Crimes Act 1900* (NSW) s 66EA(4); *Criminal Code* (NT) s 131A(3); *Criminal Law Consolidation Act 1935* (SA) s 74(4); *Criminal Code* (Tas) s 125A(4)(a); *Crimes Act 1958* (Vic) s 47A(3); *Criminal Code* (WA) s 321A(5).

The South Australian provision is in similar terms to the New South Wales provision. Section 74(4) of the *Criminal Law Consolidation Act 1935* (SA) provides:

> A charge of persistent sexual abuse of a child -
>
> (a) must specify with reasonable particularity when the course of conduct alleged against the defendant began and when it ended; and
>
> (b) must describe the general nature of the conduct alleged against the defendant and the nature of the sexual offences alleged to have been committed in the course of that conduct,
>
> but the charge need not state the dates on which the sexual offences were committed, the order in which the offences were committed, or differentiate the circumstances of commission of each offence. [emphasis added]

The Western Australian provision requires the least degree of particularity. Section 321A of the *Criminal Code* (WA) provides, in part:

> (4) An indictment under subsection (3) shall specify the period during which it is alleged that the sexual relationship occurred … .
>
> (5) In proceedings on an indictment charging an offence under subsection (3) it is not necessary to specify the dates, or in any other way to particularize the circumstances, of the alleged acts. [emphasis added]

(c) Alternative verdicts

It is possible that a jury might be satisfied that the accused had committed only one, or perhaps two, of the three or more offences alleged. That would not be sufficient to found a conviction under section 229B of the *Criminal Code* (Qld).

In New South Wales, Victoria and Western Australia, a jury that acquits an accused in respect of a charge under the equivalent of section 229B of the *Criminal Code* (Qld) may bring in an alternative verdict if it is satisfied as to the commission of any sexual offence relied on.[369] For example, section 66EA(10) of the *Crimes Act 1900* (NSW) provides:

> If on the trial of a person charged with an offence against this 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 this section, committed a sexual offence, the jury may acquit the person of the offence charged and find the person guilty of that sexual offence. The person is liable to punishment accordingly.

369 *Crimes Act 1900* (NSW) s 66EA(10); *Crimes Act 1958* (Vic) s 47A(5); *Criminal Code* (WA) s 321A(9).

(d) Directions to the jury

Legislation in New South Wales and in South Australia provides that the judge must inform the jury of the matters of which it must be satisfied to convict a person under the relevant section.[370]

(e) The charging in the one indictment of an offence under section 229B and of a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge

In Queensland, the Australian Capital Territory and the Northern Territory, the legislation expressly provides that the one indictment may include a charge under section 229B of the *Criminal Code* (Qld) (or its equivalent in the latter two jurisdictions) and a charge of any other sexual offence alleged to have been committed during the period covered by the charge under section 229B (or its equivalent).[371] Section 229B(6) of the *Criminal Code* (Qld) provides:

> 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.

In all three jurisdictions, the legislation imposes a restriction on the sentence that may be imposed if the accused is convicted of both the offence under section 229B (or equivalent provision in the Territories) and a specific sexual offence that is committed during the period covered by the section 229B (or equivalent) charge.[372] In effect, the restriction prevents the imposition of cumulative custodial sentences.

In Queensland, it would appear that the charge of a specific sexual offence could relate to an offence that is relied on as one of the three or more sexual offences for the purposes of the charge under section 229B. For example, in *R v LSS*,[373] the accused was charged with eleven offences of a sexual nature. The final count was a charge under section 229B, "the particulars of which included the details of the preceding counts 2 to 10".[374]

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370 *Crimes Act 1900* (NSW) s 66EA(7); *Criminal Law Consolidation Act 1935* (SA) s 74(6). The matters of which the jury must be satisfied are set out at pp 79-80 of this Report.

371 *Criminal Code* (Qld) s 229B(6); *Crimes Act 1900* (ACT) s 92EA(7); *Criminal Code* (NT) s 131A(7).

372 This limitation is discussed at pp 92-93 of this Report.

373 [2000] 1 Qd R 546.

374 Id per Thomas J at 547.

Similarly, in *R v Kemp (No 2)*,[375] the accused was charged in the one indictment with an offence under section 229B and with six further charges alleging the commission of specific sexual offences during the period covered by the section 229B charge. The accused was convicted of the offence under section 229B and of five of the six specific offences. The Court of Appeal seemed to accept that the same acts could be relied on both as proof of the charge under section 229B and as proof of the specific offences. After setting out the various offences of which the accused had been convicted, Mackenzie J, commented:[376]

> The specific offences were therefore committed within the period during which the maintenance of the unlawful sexual relationship was alleged, satisfying the requirement that three or more acts defined to constitute an offence of a sexual nature were done in relation to the child during the period alleged.

Alternatively, the specific charge could relate to an incident that is unrelated to the acts relied on for the purposes of the section 229B charge. For example, the prosecution might rely on evidence of three indecent dealings for the purposes of the section 229B charge and bring a separate charge of rape in the same indictment.

A reason for including in the indictment a specific charge or specific charges, in addition to the charge under section 229B, is that section 229B makes no provision for an alternative verdict.[377] If the members of the jury were unanimously agreed about the commission of only one or two of the three occasions that must be proved under section 229B, they would have to acquit the accused of the charge under section 229B. If the indictment did not also contain specific charges in relation to the offences on which they were unanimously agreed, there would be no possibility of convicting the accused of those offences.

The Supreme Court of the Australian Capital Territory has considered, in relation to the comparable provision in that jurisdiction - section 92EA of the *Crimes Act 1900* (ACT) - whether "a person might be convicted in relation to an offence under s 92EA and in addition convicted of separate offences constituted by the commission of each of the sexual acts relied on by the Crown to establish the maintenance of the sexual relationship".[378]

The Court noted that, at face value, section 92EA(7) - which is expressed in similar terms to section 229B(6) of the *Criminal Code* (Qld) - appeared to authorise such a course.[379] However, the Court rejected the argument that a person could be

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375 [1998] 2 Qd R 510.

376 Id at 514.

377 Similarly, in the Australian Capital Territory and the Northern Territory, there is no provision for alternative verdicts. See the Commission's view in relation to the issue of alternative verdicts and its recommendation at pp 105-106 and 114 (Recommendation 2(k)) of this Report.

378 *R v GB* (1998) 148 FLR 222 at 224. Section 92EA of the *Crimes Act 1900* (ACT) is very similar in terms to s 229B of the *Criminal Code* (Qld).

379 *R v GB* (1998) 148 FLR 222 at 224.

convicted both of an offence under section 92EA and of the constituent sexual offences. One of the reasons given was that such a course was "contrary to longstanding principle to punish someone twice for what is effectively the same offence".[380]

> In the present case it may be possible to distinguish between the maintenance of a sexual relationship and individual acts committed during the course of that relationship. However, in *KBT v The Queen* … , Brennan CJ, Toohey, Gaudron and Gummow JJ held … that the actus reus of the offence under the comparable Queensland provision was the doing, as an adult, of an act which constituted an offence of a sexual nature in relation to the young person in question on three or more occasions. Subsection (1) requires that each such act constitute an offence under Pt IIIA of the *Crimes Act* and if subs (7) [s 229B(6)] were to be construed as the Crown suggests it would involve the consequence that whenever a person was convicted of three such offences a fourth conviction for an offence under s 92EA [s 229B] could be added without proof of any additional element such as the nature or duration of the relationship. [note omitted; words in square brackets added]

In South Australia, Tasmania and Western Australia, quite a different regime applies in relation to the charging of specific sexual offences.

Legislation in Tasmania and in Western Australia provides that an indictment charging a person with having committed an offence under the equivalent of section 229B of the *Criminal Code* (Qld) must not contain a separate charge that the accused committed an unlawful sexual act in relation to the young person during the period covered by the former charge.[381] This prohibition applies regardless of whether the specific offence relates to a constituent sexual offence of the charge under the equivalent of section 229B or to a sexual offence that is unrelated to the evidence relied on for the purposes of that charge.

In South Australia, the legislation is even broader in its application. Section 74(8) of the *Criminal Law Consolidation Act 1935* (SA) prohibits the bringing of simultaneous charges of an offence of persistent sexual abuse and of a specific sexual offence that is alleged to have been committed during the period covered by the former

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380 Id at 225-226. The other reason for rejecting the argument that the constituent sexual offences could be individually charged in addition to the offence under s 92EA would not, because of a slight difference between the Queensland and Australian Capital Territory provisions, be applicable to the Queensland provision. The general maximum term of imprisonment for an offence under s 92EA of the *Crimes Act 1900* (ACT) is seven years: *Crimes Act 1900* (ACT) s 92EA(5). However, s 92EA(6) of that Act provides:

> If a person convicted under subsection (2) is found, during the course of the relationship, to have committed another offence under this Part in relation to the young person (whether or not the person has been convicted of that offence), the offence under subsection (2) is punishable by imprisonment -
>
> (a) if the other offence is punishable by imprisonment for less than 14 years - for 14 years; or
>
> (b) if the other offence is punishable by imprisonment for a period of 14 years or more - for life.

The Court held (at 225) that, if the reference to "another offence under this Part" included one of the "constituent sexual acts", it would have the result that "the increased penalties provided by subs (6) would always be applicable. In that event, of course, the maximum penalty provided by subs (5) could never apply".

381 *Criminal Code* (Tas) s 125A(6)(b); *Criminal Code* (WA) s 321A(4). In Western Australia, the legislation makes provision for an alternative verdict: *Criminal Code* (WA) s 321A(9). There is, however, no provision for an alternative verdict in s 125A of the *Criminal Code* (Tas).

charge, regardless of whether the charges are brought in the same indictment or in separate indictments:[382]

> A charge of persistent sexual abuse of a child subsumes all sexual offences committed by the same person against the same child during the period of the alleged sexual abuse, and hence a person cannot be simultaneously charged (either in the same or in different instruments of charge) with persistent sexual abuse of a child and a sexual offence alleged to have been committed against the same child during the period of the alleged persistent sexual abuse.

Although the New South Wales legislation is silent on the issue of whether it is possible to bring, in the one indictment, a charge of persistent sexual abuse under section 66EA of the *Crimes Act 1900* (NSW) and a charge of a specific sexual offence that relates to the period covered by the former charge, such a course would not seem to be open under the legislation.

Section 66EA of the *Crimes Act 1900* (NSW) contains specific provisions dealing with the rule against "double jeopardy".[383] The effect of those provisions would make it pointless to bring a charge of persistent sexual abuse under section 66EA and a separate charge of a specific offence that is alleged to have been committed during the period covered by the charge under section 66EA, as there could never be a conviction in respect of both charges. In particular, the legislation provides that, if the accused has been convicted or acquitted of the offence under section 66EA, he or she may not be convicted of a sexual offence in relation to the same child that is alleged to have been committed during the period covered by the charge under section 66EA.[384] Alternatively, if the accused has been convicted or acquitted of a specific sexual offence, he or she may not be convicted of the offence under section 66EA in relation to the same child if evidence in relation to the former offence is relied on as evidence of the commission of the offence under section 66EA.[385]

Further, as noted above,[386] section 66EA(10) of the *Crimes Act 1900* (NSW) enables a jury to return an alternative verdict where the jury is satisfied that the accused has committed a specific sexual offence, but is not satisfied of the matters necessary to found a conviction under section 66EA. The jury may convict the accused of an offence that they are satisfied has been committed, notwithstanding that the accused is acquitted of the charge under section 66EA. Consequently, there is no reason under the New South Wales provision to bring, in addition to a charge under section

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382 *Criminal Law Consolidation Act 1935* (SA) s 74(8). Quite apart from this provision, s 74(9) of the *Criminal Law Consolidation Act 1935* (SA) provides that a person who has been tried and convicted or acquitted on a charge of persistent sexual abuse may not be charged with a sexual offence against the same child where the specific offence is alleged to have been committed during the period over which the person was alleged to have committed the offence of persistent sexual abuse. See the discussion of this provision and other similar provisions at pp 92-96 of this Report.

383 See the discussion of s 66EA(8) and (9) of the *Crimes Act 1900* (NSW) at pp 95-97 of this Report.

384 *Crimes Act 1900* (NSW) s 66EA(8), which is discussed at pp 95-96 of this Report.

385 *Crimes Act 1900* (NSW) s 66EA(9), which is discussed at pp 96-97 of this Report.

386 See p 86 of this Report.

66EA, a separate charge in respect of an act alleged to have been committed during the period covered by the section 66EA charge.

(f) Special verdicts

Under section 229B(1), the maximum penalty for maintaining an unlawful relationship of a sexual nature with a child is imprisonment for 14 years. However, section 229B(3) provides for a greater penalty 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".[387] In those circumstances, the offender is liable to imprisonment for life.[388]

Because the maximum penalty for a conviction under section 229B may, depending on the nature of the sexual offences committed during the course of the relationship, be life imprisonment, it is important for a trial judge to know whether, in a particular case, the jury is satisfied that the accused has committed an offence for which he or she may be liable to imprisonment for 14 years or more.

In some circumstances, it will be obvious that the jury must have been satisfied that the accused committed, in the course of the relationship, an offence of a sexual nature for which he or she is liable to imprisonment for 14 years or more:

- where evidence of only three acts was relied on for the prosecution of the charge under section 229B and one or more of the three acts constituted an offence attracting a maximum penalty of imprisonment for 14 years or more;

- where, although more than three acts were relied on for the prosecution of the charge under section 229B, all of those acts constituted sexual offences attracting a maximum penalty of imprisonment for 14 years or more;

- where, in addition to the conviction under section 229B, the accused was convicted of a specific sexual offence, charged in the same indictment, which was committed during the course of the relationship the subject of the section 229B charge, and which attracted a maximum penalty of imprisonment for 14 years or more.

However, in other circumstances, it may not be clear whether the jury was satisfied that the accused had committed such an offence, so as to be liable to the higher maximum penalty. For example, the evidence relied on for a charge under section

387 Offences for which the maximum penalty under the *Criminal Code* (Qld) is imprisonment for 14 years or more include: unlawful sodomy (s 208); attempted sodomy committed in respect of a child under 12 years or in respect of a child above that age who is a lineal descendant of the offender or is under the offender's guardianship or care (s 209); indecent treatment of a child under 12 years or of a child above that age who is a lineal descendant of the offender or is under the offender's guardianship or care (s 210); carnal knowledge of a girl under 16 years (s 215); incest (s 222); and rape and attempted rape (ss 347, 348, 349).

388 The Commission is not, as part of this review, examining the question of the appropriate maximum penalty for this offence. See pp 110-111 of this Report.

229B might consist of three incidents of indecent dealing of a child of or above the age of 12 years who is neither a lineal descendent of the accused nor under the care or guardianship of the accused[389] and one incident of rape. In such a case, the trial judge would need to know for the purposes of sentencing whether, in returning a verdict of guilty on the charge under section 229B, the jury had been agreed as to the commission of the rape. It is possible that the verdict of guilty could have been reached on the basis of the three incidents of indecent dealing, in which case, the accused would not be liable to the higher maximum penalty provided for in section 229B(3).

Section 624 of the *Criminal Code* (Qld) makes provision for a jury to give a "special verdict" in circumstances where the finding of a specific fact is relevant to the question of punishment. That section provides:

> **Special verdict**
>
> In any case in which it appears to the court that the question whether an accused person ought or ought not to be convicted of an offence may depend upon some specific fact, or that the proper punishment to be awarded upon conviction may depend upon some specific fact, the court may require the jury to find that fact specially. [emphasis added]

If a recommendation is made to the effect that it should not be possible to charge a person in the one indictment with a charge under section 229B and with a specific sexual offence that is alleged to have been committed during the period covered by the former charge, there may be a greater need for the court to have recourse to section 624 of the *Criminal Code* (Qld), particularly in cases where, on the evidence, it might not otherwise be clear from a verdict of guilty whether the jury was satisfied that the accused had committed a sexual offence that would result in punishment in the higher range under section 229B(3).

(g) The effect of a conviction or an acquittal of a charge under section 229B on a charge of a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge

As noted above, it is permissible in Queensland to charge a person in the one indictment with an offence under section 229B and with a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge.[390] The legislation provides that the person may be convicted of and punished for any or all of the offences so charged.[391] However, where the person is convicted of an offence under section 229B and of a specific sexual offence that was

389 The maximum penalty for such a case of indecent dealing of a child is imprisonment for ten years: *Criminal Code* (Qld) s 210(1), (2), (4).

390 *Criminal Code* (Qld) s 229B(6). This course is also permitted by legislation in the Australian Capital Territory and in the Northern Territory. See p 87 of this Report.

391 *Criminal Code* (Qld) s 229B(6). See also the similar provisions in the Australian Capital Territory and in the Northern Territory: *Crimes Act 1900* (ACT) s 92EA(7); *Criminal Code* (NT) s 131A(7).

committed during the period covered by the section 229B charge, the legislation restricts the sentence that may be imposed. In effect, the legislation prevents the court from imposing cumulative custodial sentences;[392] the custodial sentences imposed in respect of the various convictions would have to be ordered to be served concurrently.

However, on the terms of section 229B(6) and (7), this limitation on sentencing would seem to apply only where the convictions are in respect of charges brought in the one indictment. Where a person has been either convicted or acquitted of an offence under section 229B and is subsequently charged with a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge, the effect of the prior conviction or acquittal, as the case may be, on the subsequent prosecution would seem to fall to be determined by more general provisions in the Code, rather than by section 229B(7).

Under the general criminal law, a person may not be convicted of the same offence twice or punished twice in respect of the same act or omission. Sections 16 and 17 of the *Criminal Code* (Qld) provide:

> **16. Person not to be twice punished for same offence**
>
> A person cannot be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof the person causes the death of another person, in which case the person may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission.
>
> **17. Former conviction or acquittal**
>
> It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged.

Section 17 is the statutory embodiment of the principle known as "the rule against double jeopardy". That rule is intended to prevent "a person from being placed in jeopardy more than once or from being punished more than once for a single act or omission".[393] Section 17 prevents a person from being convicted of an offence of which the person has previously been acquitted or convicted. It also prevents a person from being convicted of a different offence of which the person could have been convicted, by way of an alternative verdict, on the trial for the first offence.

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392 *Criminal Code* (Qld) s 229B(7). See also the similar provisions in the Australian Capital Territory and in the Northern Territory: *Crimes Act 1900* (ACT) s 92EA(8); *Criminal Code* (NT) s 131A(8).

393 Kenny RG, *An Introduction to Criminal Law in Queensland and Western Australia* (5th ed, 2000) at para 7.1

Under the present law, because there is no provision in section 229B for an alternative verdict, section 17 has no application to a subsequent charge of a specific sexual offence where the accused has previously been convicted or acquitted of a charge under section 229B.[394] The subsequent charge of a specific sexual offence is neither a charge of the same offence (that is, a second charge under section 229B relating to the same period), nor a charge of an offence in respect of which the jury could have returned an alternative verdict on the section 229B charge.

In this case, section 16 of the *Criminal Code* (Qld) may, depending on the circumstances, be relevant to the question of punishment in respect of the specific offence. Unlike section 17 of the *Criminal Code* (Qld), section 16 does not operate as a defence to a further charge. It simply provides that "a person may not be punished twice for the conduct which gave rise to the two offences".[395]

If a person has been acquitted of a charge under section 229B and is subsequently charged with a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge, section 16 will have no application to the punishment that may be imposed in respect of the conviction for the specific charge as the question of double punishment does not arise.[396]

However, if a person has been convicted of a charge under section 229B, and is subsequently convicted of a specific sexual offence that was committed during the period covered by the section 229B charge, section 16 will prevent the person from being further punished in respect of that offence if the specific offence relates to an act relied on in the prosecution of the section 229B charge. In those circumstances,

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394 Section 17 will be relevant to the issue under consideration only if a provision to allow an alternative verdict where the jury is satisfied that the accused has committed one or two of the alleged offences is implemented (see the discussion of this issue at pp 105-106 of this Report). If this approach is adopted, s 17 will provide a defence to any prosecution of a charge of a specific sexual offence on which the jury could have returned an alternative verdict on the s 229B charge. Consequently, if the charge of the specific offence relates to an act relied on in the prosecution of the s 229B charge, the effect of s 17 will be that the conviction or acquittal of the person on the s 229B charge will be a defence to a subsequent prosecution in respect of the specific charge.

395 Kenny RG, *An Introduction to Criminal Law in Queensland and Western Australia* (5th ed, 2000) at para 7.12.

396 It might be possible for the accused to apply for a stay of the prosecution of the subsequent specific offence on the basis that the prosecution of that offence amounts to an abuse of process. In *Rogers v The Queen* (1994) 181 CLR 251, the majority of the Court held (per Mason CJ at 254 and per Deane and Gaudron JJ at 278) that the doctrine of issue estoppel was not applicable to criminal proceedings. However, Mason CJ held (at 256-257) that the "[r]e-litigation in subsequent criminal proceedings of an issue already finally decided in earlier criminal proceedings" could amount to an abuse of process as such a course "is not only inconsistent with the principle that a judicial determination is binding, final and conclusive (subject to fraud and fresh evidence), but is also calculated to erode public confidence in the administration of justice by generating conflicting decisions on the same issue". Deane and Gaudron JJ also held (at 280) that the course proposed by the prosecution in that case, which constituted a "direct challenge" to a prior final determination of that issue, amounted to an abuse of process.

However, the difficulty in applying this principle in the context of a prior acquittal of a charge under s 229B and a subsequent charge of a specific sexual offence is that it may be difficult to determine whether the subsequent prosecution constitutes a direct challenge to the prior acquittal. Even where the act that is the subject of the specific charge was one of the acts relied on for the prosecution of the charge under s 229B, it is possible that the jury might have acquitted the accused of the charge under s 229B, not because they were not satisfied that the accused had committed that act, but because they were not satisfied about the commission of the two additional acts required to found a conviction under s 229B.

the conviction in respect of the specific offence will stand, but the person cannot be punished in respect of that offence.[397]

The preceding analysis of the operation of sections 16 and 17 of the *Criminal Code* (Qld) in the context of a charge of a specific sexual offence subsequent to a conviction or an acquittal under section 229B presupposes that it will be readily apparent whether the acts relied on to prosecute the charge under section 229B included, or were exclusive of, the act that is the subject of the later charge.

However, as noted above, section 229B of the *Criminal Code* (Qld) does not require proof of the dates or the exact circumstances of the three or more occasions on which the relevant acts are alleged to have been committed. Consequently, if a person is charged with an offence under section 229B and with a separate sexual offence that is alleged to have been committed during the period covered by the section 229B charge, the court may have some difficulty, because of the lack of particularity, in determining whether the conduct that is the subject of the later charge was one of the acts relied on in the prosecution of the charge under section 229B. This could make it difficult to determine whether either section 16 or 17 has any application to the issues of conviction for, or punishment in respect of, the later specific charge. For example, if in *R v S*[398] a charge had been brought alleging the commission of a specific sexual offence during the period covered in that case by the section 229B charge,[399] it might have been difficult for the court to determine, given the evidence of undifferentiated sexual acts relied on for the section 229B charge, whether or not the evidence in relation to the specific offence was evidence relied on in the prosecution of the charge under section 229B.

The legislation in New South Wales, South Australia and Western Australia specifically excludes the possibility of double jeopardy arising from the situation where a person is convicted or acquitted of a charge under the equivalent of section 229B and is also charged with a specific sexual offence that is alleged to have been committed during the period covered by the former charge.

Section 66EA(8) of the *Crimes Act 1900* (NSW) provides:[400]

> A person who has been convicted or acquitted of an offence against this 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 this section. This subsection does not prevent an alternative verdict under subsection (10).

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397 *R v Kiripatea* [1991] 2 Qd R 686 per Williams J at 702.

398 [1999] 2 Qd 89. The relevant facts are outlined at p 72 of this Report.

399 In that case, the indictment included three counts of specific sexual offences, but none of the specific charges was alleged to have been committed during the period covered by the charge under s 229B of the *Criminal Code* (Qld).

400 See also the similar provisions in South Australia and Western Australia: *Criminal Law Consolidation Act 1935* (SA) s 74(9); *Criminal Code* (WA) s 321A(10).

The effect of this provision, and of the equivalent provisions in South Australia and Western Australia, is that, once a person has been convicted or acquitted of a charge under the equivalent of section 229B, the person cannot be convicted of a specific sexual offence in relation to the same child if the specific offence is alleged to have been committed during the period covered by the section 229B charge.

(h) The effect of a conviction or an acquittal of a specific sexual offence on a charge under section 229B that relies on evidence of the commission of the same specific offence

In Queensland, as noted above, a charge under section 229B and a specific charge of a sexual offence that is alleged to have been committed during the period covered by the section 229B charge may be brought in the one indictment. Where that occurs and the person is convicted of both charges and sentenced to a term of imprisonment in respect of both charges, cumulative custodial sentences cannot be imposed.[401] However, section 229B does not address the situation where a person who has been convicted or acquitted of a specific sexual offence is subsequently charged with an offence under section 229B that is prosecuted on the basis that the specific sexual offence is relied on as one of the three or more relevant acts.

Where a person has been convicted of a prior specific sexual offence that is later relied on as one of the constituent offences for a charge under section 229B, section 16 of the *Criminal Code* (Qld) applies so as to prevent the person from being punished twice in respect of the same act.

However, where a person has been acquitted of a prior specific sexual offence, and the same act is relied on for a subsequent charge under section 229B, no question of double punishment arises under section 16. In these circumstances, the accused might be able to apply for a stay of the prosecution under section 229B on the basis that it amounts to an abuse of process for the reason that the further prosecution is, in part, based on evidence of an offence of which the accused was previously acquitted and is, therefore, inconsistent with the jury's previous verdict.[402]

New South Wales is the only jurisdiction whose provision expressly addresses the situation where a person who has been convicted or acquitted of a specific sexual offence is subsequently charged with the offence of persistent sexual abuse. It limits the circumstances in which such a person may be convicted of an offence under the equivalent of section 229B in relation to the same child. Section 66EA(9) of the *Crimes Act 1900* (NSW) provides:

401 *Criminal Code* (Qld) s 229B(7).

402 The doctrine of abuse of process is discussed at note 396 of this Report.

> A person who has been convicted or acquitted of a sexual offence may not be convicted of an offence against this section in relation to the same child if any of the occasions relied on as evidence of the commission of the offence against this section includes the occasion of that sexual offence.

The operation of this section is quite narrow. It prevents the one act from being used to found the conviction for both the specific offence and the offence under the equivalent of section 229B. Although the application of the New South Wales provision would not produce a very different result from the application of the present Queensland law, it is, perhaps, a simpler principle to apply, in that it does not raise the issue of whether the second prosecution amounts to an abuse of process.

(i) Transitional provisions

In New South Wales, section 66EA(6)(d) of the *Crimes Act 1900* (NSW) provides that one of the matters of which a jury must be satisfied in order for an accused person to be convicted of the offence of persistent sexual abuse is that the three occasions relied on as evidence of the offence occurred after the commencement of that section. That provision is consistent with the usual rule that if "an Act makes an act or omission an offence, the act or omission is only an offence if committed after the Act commences".[403]

In the present case, the issue for consideration is whether, if the Commission recommends that section 229B of the *Criminal Code* (Qld) should be amended, or repealed and replaced by a new provision, a prosecution under the new or amended provision should be limited to acts committed after the commencement of the new provision or of the relevant amendments, as the case may be.

Unless the new or amended provision provides to the contrary, acts occurring prior to the commencement of the new provision or of the relevant amendments will continue to be prosecuted under section 229B in its form at the time of the commission of the alleged offence. The *Acts Interpretation Act 1954* (Qld) authorises the prosecution of an offence under repealed or amended legislation or under a repealed or an amended provision[404] where the relevant acts were committed prior to the repeal or amendment of the legislation or provision,[405]

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403 *Acts Interpretation Act 1954* (Qld) s 20C(2).

404 The definition of "Act" in s 20 of the *Acts Interpretation Act 1954* (Qld) includes a provision of an Act: *Acts Interpretation Act 1954* (Qld) s 20(1).

405 *Acts Interpretation Act 1954* (Qld) s 20(2). See the discussion of the effect of the equivalent provision in the Victorian legislation in *Byrne v Garrisson* [1965] VR 523. In that case, the Court observed (at 525) that prior to the enactment of provisions of this kind "and apart from any special saving clause in the repealing statute, a liability to punishment for contravention of a penal statute did not continue after the repeal of the enactment which imposed it".

The Queensland provision is slightly broader in its application than the Victorian provision. Section 20(2) of the *Acts Interpretation Act 1954* (Qld) provides that the "repeal or amendment of an Act" does not affect certain matters, whereas the Victorian provision under consideration in *Byrne v Garrisson* dealt only with the effect of the repeal of an enactment.

although the effect of the *Acts Interpretation Act 1954* (Qld) in that respect may be displaced by a contrary intention in particular legislation.[406]

Because it is common for allegations of sexual offences involving children to be made some years after the alleged events, the effect of relying on the usual operation of the *Acts Interpretation Act 1954* (Qld) would be that, for many years to come, prosecutions would continue to be brought under section 229B in its form at the time of the commission of the alleged offence. Only acts committed after the commencement of a new provision or of any amendments to the provision could be prosecuted under the new or amended provision.

Further, if acts committed prior to the commencement of the new provision or of any relevant amendments were to continue to be prosecuted under section 229B in its present form, difficulties could arise if one of the three sexual offences required to found a conviction was alleged to have been committed before the commencement of the new provision, while the other two acts were alleged to have been committed after its commencement, or vice versa.

6. THE COMMISSION'S VIEW

(a) The type of offence: a course of conduct or the commission of specific acts?

The Commission considered whether section 229B of the *Criminal Code* (Qld) should be repealed and replaced by a provision that creates a continuing offence, that is, one in which it is the accused's course of conduct in relation to a child, rather than the commission of a specified number of separate acts, that constitutes the offence. The Commission notes that the Report of the Taskforce on Women and the Criminal Code recommended that such a change should be made.[407]

The Taskforce did not elaborate on what should amount to a sufficient course of conduct to prove the unlawful relationship. If the proposed new offence were to be analogous to the continuous offence of drug trafficking, the prosecution would have to prove a course of conduct over the relevant period. The jury would not be required to be agreed as to the commission of any particular act of which evidence might be given, but would have to decide whether it could be inferred, from the totality of the evidence, that the accused had been engaged in a course of conduct over the relevant period.[408] As noted above in the context of drug trafficking, proof of

406 *Acts Interpretation Act 1954* (Qld) s 4.

407 See p 80 of this Report.

408 See the discussion of the offence of drug trafficking at pp 80-81 of this Report.

only several incidents might be insufficient to prove the continuing offence over the period alleged.[409]

More importantly, however, the Commission is of the view that, despite the criticism levelled at section 229B,[410] the provision addresses some of the difficulties experienced by child complainants in giving evidence, in that it is not necessary to prove "the dates or the exact circumstances" of the occasions on which acts constituting the three or more sexual offences are committed.

Before the advent of provisions such as section 229B and the equivalent provisions in other jurisdictions, one of the difficulties encountered in prosecuting, in the one indictment, a number of sexual offences committed in relation to the one child, was that it was necessary for each count[411] to specify the approximate date on which, or the approximate dates between which, each offence was alleged to have occurred. If a complainant, because of confusion as to the dates on which the relevant incidents occurred, gave evidence of more than one incident that fitted the description of one of the counts charged - as occurred in *S v The Queen*[412] - the prosecution was then faced with the prospect of correcting the "latent ambiguity".[413]

Section 229B enables the prosecution to bring a case that various acts were committed during a single period that is defined by reference only to the commencement and end of that period.[414] The section does not require proof of the dates or exact circumstances of the relevant acts. It therefore overcomes a difficulty that might be faced by the prosecution if the various acts were the subject of separate counts in the indictment and the complainant, although giving evidence of three or more specific acts committed between the earliest and latest dates given for any of the counts in the indictment, did not give evidence of individual acts that accorded with the particulars as to dates given for each separate count in the indictment.

In the Commission's view, the introduction of section 229B of the *Criminal Code* (Qld) effected a significant change to the law in this regard. Against that background, the Commission considers the proof of three offences to be an important safeguard for ensuring a fair trial for the accused.

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409 See p 81 of this Report.

410 See p 74 of this Report.

411 See the explanation of the term "count" at note 254 of this Report.

412 (1989) 168 CLR 266. This decision is discussed at pp 61-63 of this Report.

413 See the discussion of this issue at p 61 of this Report.

414 That is, it is not necessary to give particulars of the dates between which each individual act is alleged to have occurred.

The Commission understands the concern that a child complainant who is the alleged victim of prolonged sexual abuse may have difficulty in identifying, in the course of his or her evidence, three separate occasions on which the abuse occurred. However, the Commission is also concerned that, if an offence of a continuing nature were created, proof of which could be established by evidence of a general course of sexual misconduct by the accused, it would not be possible to ensure a fair trial for the accused. As the High Court observed in *S v The Queen*, the admission of evidence of an indeterminate number of unspecified acts:

- makes it difficult for the accused to know the case he or she has to meet;[415]
- reduces the accused to a "general denial" of the charges;[416]
- precludes the accused from raising more specific and effective defences, such as the defence of alibi;[417]
- requires the accused to defend himself or herself in respect of each occasion on which an offence might have been committed;[418]
- has the result that the accused is effectively denied an opportunity to test the credit of the complainant by reference to surrounding circumstances.[419]

For these reasons, the Commission does not favour the creation of a new offence based on a course of conduct. In the Commission's view, a provision like section 229B of the *Criminal Code* (Qld) - which creates an offence that is proved by the commission of a specified number of acts constituting sexual offences - strikes a better balance between accommodating the possible limitations on the complainant's recall as to the dates and circumstances of the events in question and affording the accused a fair trial by requiring the jury to agree unanimously on the commission of a certain specified number of acts.

In the Commission's view, an offence that is proved by the commission of a specific number of sexual offences, rather than by a course of conduct, is more appropriately described as the offence of "persistent sexual abuse". In particular, the Commission considers that the offence of "persistent sexual abuse" more aptly describes the nature of the conduct that is sanctioned by the offence than does the offence of "maintaining a sexual relationship with a child", which may have connotations of a consensual relationship between the accused and the child.

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415 Id per Toohey J 281-282.

416 Id per Dawson J at 275.

417 Ibid.

418 Id per Gaudron and McHugh JJ at 286.

419 Ibid.

The Commission is nevertheless of the view that the operation of section 229B could be improved in a number of respects. The Commission's views on these issues are set out below.

(b) The elements of the offence

(i) Proof of three or more separate acts committed on separate days

The Commission notes that all Australian jurisdictions in their equivalent provisions require proof of three or more acts constituting sexual offences in relation to the same child.[420] Prior to the decision of the High Court in *KBT v The Queen*,[421] it was not entirely clear whether the proof of three acts, each of which constituted a sexual offence in relation to the child, was sufficient to found a conviction under section 229B or whether, in addition, it was necessary to prove the existence of a relationship. For example, in *R v Kemp (No 2)*,[422] Pincus JA made the following comment when discussing the provision that is now section 229B(2):[423]

> The subsection does not say, nor imply, that the offence of maintaining an unlawful relationship must necessarily be held proved if the three acts mentioned in subs. (1A) are proved; it is easy to imagine circumstances in which those three acts could be proved without necessitating the conclusion that there was such a relationship as the section contemplates.

Given the Commission's view that the offence should be defined by the commission of a specified number of separate acts, the Commission is of the view that the New South Wales provision more clearly describes the offence, in that it avoids any reference to the maintenance of a "relationship". Section 66EA(1) of the *Crimes Act 1900* (NSW) provides:

> A person who, on 3 or more separate occasions occurring on separate days during any period, engages in conduct in relation to a particular child that constitutes a sexual offence is liable to imprisonment for 25 years.

As noted previously, the legislation in both New South Wales and South Australia expressly provides that, to found a conviction under the relevant section, the jury must be agreed as to the material facts of the same three acts.[424] In the Commission's view, the requirement that the prosecution must prove the commission of three or more separate acts and the further

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420 See note 343 of this Report.

421 (1997) 191 CLR 417. This decision is discussed at pp 69-71 of this Report.

422 [1998] 2 Qd R 510.

423 Id at 512.

424 *Crimes Act 1900* (NSW) s66EA(6)(b); *Criminal Law Consolidation Act 1935* (SA) s 74(5)(b). These provisions are set out at pp 79-80 of this Report.

requirement that the jury must be agreed as to the commission of the same three acts operate as a safeguard against the possibility that a jury might convict on the mere suspicion that "something" must have happened, especially given that it is common for a charge under section 229B of the *Criminal Code* (Qld) to be brought in conjunction with a number of other charges of specific sexual offences.

The Commission also notes that the legislation in New South Wales, South Australia and Western Australia expressly provides that the three offences must occur on separate days.[425] In the Commission's view, it is difficult to characterise the offence as one of "persistence" if the relevant acts occur only on one or two days. Moreover, where the relevant acts occur very closely in time, there should not be the same difficulty in bringing separate charges in respect of the individual acts as there is when the acts occur over a greater period of time with the result that there is greater difficulty in specifying the dates on or about which the individual acts occurred.

In the Commission's view, although the High Court held in *KBT v The Queen* that, to convict a person under section 229B of the *Criminal Code* (Qld), the jury must be unanimously agreed as to the commission of the same three acts, it would still be desirable for section 229B to be amended to make this requirement apparent on the face of the section. With the exception of paragraph (d), section 66EA(6) of the *Crimes Act 1900* (NSW) would be an appropriate model in this regard. Section 66EA(6) provides:

> In order for the accused to be convicted of an offence against this section:
>
> (a) the jury must be satisfied beyond reasonable doubt that the evidence establishes at least 3 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 of a nature described in the charge, and
>
> (b) the jury must be so satisfied about the material facts of the 3 such occasions, although the jury need not be so satisfied about the dates or the order of those occasions, and
>
> (c) if more than 3 such occasions are relied on as evidence of the commission of an offence against this section, all the members of the jury must be so satisfied about the same 3 occasions, and
>
> (d) the jury must be satisfied that the 3 such occasions relied on as evidence of the commission of an offence against this section occurred after the commencement of this section.

425 See note 357 of this Report.

As observed earlier in this chapter, the requirement in paragraph (d) of section 66EA(6) of the *Crimes Act 1900* (NSW) is consistent with the usual approach taken in legislation that creates a new offence.[426] However, as the Commission is recommending changes to an existing offence, it has specifically considered the issue of the appropriate transitional arrangements for the implementation of its recommendations. The Commission's views on that issue are discussed below.[427]

(ii) The three acts need not be of the same nature

The Commission has noted above that it would appear that it is presently possible for a range of sexual offences to be prosecuted as the relevant acts for the purposes of a charge under section 229B of the *Criminal Code* (Qld).[428]

In the Commission's view, it is desirable for section 229B to be amended to remove any doubt about whether the three or more acts must be of the same nature. Section 66EA(2) of the *Crimes Act 1900* (NSW) would be an appropriate model for such a provision. That section provides:

> It is immaterial whether or not the conduct is of the same nature, or constitutes the same offence, on each occasion.

(iii) Jurisdiction

At present, an act that is committed outside Queensland cannot be relied on as one of the three or more sexual offences that are required to found a conviction under section 229B.[429]

In the Commission's view, it should not be necessary to prove that all three acts forming a constituent part of the offence under section 229B were committed in Queensland. It should be sufficient to found a conviction under section 229B if the members of the jury are satisfied beyond reasonable doubt that one of the three or more relevant acts was committed in Queensland.[430]

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426 See the discussion of s 66EA(6)(d) of the *Crimes Act 1900* (NSW) and s 20C(2) of the *Acts Interpretation Act 1954* (Qld) at p 97 of this Report.

427 See pp 111-112 of this Report.

428 See for example *Criminal Code* (Qld) ss 208 (Unlawful sodomy); 210(1)(a) (Unlawfully and indecently dealing with a child under the age of 16 years); 215 (Carnal knowledge of girls under 16); 222 (Incest); and 347 (Rape).

429 See note 363 of this Report.

430 See the discussion of s 2(1) of the *Australia Act 1986* (Cth) in *R v Elhusseini* [1988] 2 Qd R 442 per McPherson J at 449 where it is noted that:

> Section 2(1) of that Act expressly enables State Parliaments to enact laws having extra-territorial operation, provided that they are for the peace, order and good government of the State.

Section 66EA(3) of the *Crimes Act 1900* (NSW) would be an appropriate model for such a provision.[431]

Insofar as a complainant might be sure that one of the three acts was committed in Queensland, but be uncertain as to the location of the other two acts, the Commission's view in this regard is consistent with its view that it should not be necessary to prove the "exact circumstances" of each of the three occasions.[432]

If this approach is adopted, it will be necessary to include in the new provision a definition of the term "sexual offence" that is broad enough to apply to a sexual offence committed outside Queensland. In the Commission's view, a provision based on the definition of the term "sexual offence" in section 66EA(12)(c) of the *Crimes Act 1900* (NSW)[433] should be incorporated in the new provision, so that the definition of "sexual offence" will mean, in addition to those matters that are already relevant sexual offences for the purposes of section 229B,[434] an offence under the law of a place outside Queensland that would, if it had been committed in Queensland, be one of those relevant sexual offences.

(iv) The required degree of particularity

The Commission considers it appropriate that section 229B(2) of the *Criminal Code* (Qld) does not require proof of the "dates or the exact circumstances" of the three relevant acts. In this respect, the provision addresses one of the difficulties that arose, before the introduction of section 229B, when it was sought to prosecute a number of sexual offences in the one indictment.[435]

Although section 66EA(4) of the *Crimes Act 1900* (NSW) is in substantially similar terms to section 229B(2),[436] the Commission is of the view that, in the context of an offence that consists of the commission of three or more separate acts, rather than of the maintenance of a relationship,[437] the New South Wales provision is expressed in more appropriate language. It does not refer to the evidence being "probative of the maintenance of the

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431 This provision is set out at p 76 of this Report.

432 See pp 104-105 of this Report.

433 This provision is set out at p 84 of this Report.

434 For the purposes of s 229B of the *Criminal Code* (Qld), the relevant sexual offences are "an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f)": *Criminal Code* (Qld) s 229B(2). See note 289 of this Report for an explanation of the offences defined in s 210(1)(e) and (f). The Commission is not generally reviewing what should be a relevant sexual offence for the purposes of the section. In that regard, see the explanation at pp 110-111 of this Report.

435 See the discussion of *S v The Queen* (1989) 168 CLR 266 at pp 61-63 of this Report.

436 These provisions are set out at p 85 of this Report.

437 See the Commission's view on this issue at pp 98-100 of this Report.

relationship", as does section 229B(2) of the *Criminal Code* (Qld), but simply provides that:

> … 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.

Consequently, the Commission favours the adoption of a provision to the effect of section 66EA(4) of the *Crimes Act 1900* (NSW).

The Commission is of the view that the indictment should specify with reasonable particularity the period during which the offence is alleged to have occurred, and should describe the nature of the separate offences alleged to have been committed by the accused during that period. Consequently, the Commission also favours the adoption of a provision to the effect of section 66EA(5) of the *Crimes Act 1900* (NSW).[438]

(c) Alternative verdicts

The Commission has expressed the view that, in order for a person to be convicted under section 229B, it should be necessary for the jury to agree on the commission of the same three acts.[439] The Commission regards that requirement as an important safeguard for an accused person who might otherwise be convicted without the jury being unanimously agreed as to the commission of any particular conduct that is alleged against the accused. The consequence of that view is that, if the jury is not unanimously agreed as to the commission of the same three acts, the jury must acquit the accused of the charge under section 229B.

It is possible, however, that, although the members of the jury are not unanimously agreed as to the commission of the same three acts, they are nevertheless agreed as to the commission of one or possibly two of the acts relied on in prosecuting the charge under section 229B.

In the Commission's view, section 229B should be amended to allow for an alternative verdict to be returned by the jury in respect of any sexual offence that the jury is satisfied has been committed. A provision of this kind should mitigate, to some extent, the consequences of failing to prove the commission of the three required acts.

Subject to one qualification, section 66EA(10) of the *Crimes Act 1900* (NSW) would be an appropriate model for such a provision. The Commission has expressed the view above that it should be sufficient to found a conviction under section 229B if it is proved that one of the three relevant acts on which the jury is agreed was committed

438 This provision is set out at p 85 of this Report.

439 See pp 101-102 of this Report.

in Queensland.[440] In the Commission's view, a jury should be able to return an alternative verdict only if it is satisfied that the particular sexual offence was committed in Queensland.

(d) Directions to the jury

The Commission notes that, in New South Wales and in South Australia, the legislation expressly provides that the judge must inform the jury of the matters of which the jury must be satisfied in order to convict a person of the offence under the relevant section.[441]

In effect, these provisions do no more than re-state the general obligations of a trial judge in this regard. Section 620 of the *Criminal Code* (Qld) provides that it is the duty of the court "to instruct the jury as to the law applicable to the case". Given the general application of that provision, the Commission does not consider it necessary to include in section 229B a specific provision about the directions that should be given to a jury.

(e) The charging in the one indictment of an offence under section 229B and of a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge

Section 229B(6) of the *Criminal Code* (Qld) provides that a person may be charged in the one indictment with an offence under section 229B 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". The Commission has noted that the specific sexual offence that is charged in the same indictment as the section 229B charge may be unrelated to the evidence relied on for the section 229B charge or, alternatively, may be one of the three or more acts relied on for the charge under that section.[442]

The Commission considers that, if section 229B were amended to allow the return of an alternative verdict,[443] there would be no reason to include in an indictment charging an offence under section 229B any separate charges of sexual offences that were alleged to have been committed during the period covered by the section 229B charge. If that approach were adopted, a jury that was not satisfied of the commission of the offence under section 229B could nevertheless find the accused guilty of any individual sexual offence that it was satisfied had been committed.

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440 See pp 103-104 of this Report.

441 See p 87 of this Report.

442 See the discussion of *R v Kemp (No 2)* [1998] 2 Qd R 510 at p 88 of this Report.

443 See the Commission's view at pp 105-106 of this Report.

The Commission is therefore of the view that the new section 229B should provide that an indictment charging a person with having committed an offence against that section must not contain a separate charge that the accused committed an unlawful sexual act in relation to the same child during the period covered by the former charge.

The adoption of such a provision would not prevent the Crown from presenting an indictment charging a person with an offence under section 229B and with a specific sexual offence that was alleged to have been committed outside the period covered by the section 229B charge. The prohibition in relation to the charging of a specific sexual offence would relate only to an offence that was alleged to have been committed during the period covered by the section 229B charge.[444]

(f) Special verdicts

Because the maximum punishment for a conviction under section 229B depends on the nature of the sexual offences committed during the period covered by the offence,[445] it may be necessary for the trial judge to ask the jury to make a particular finding as to whether the jury is satisfied that an offence of a certain type has been committed during the period covered by the section 229B charge.[446]

However, given that section 624 of the *Criminal Code* (Qld),[447] which deals with special verdicts, is a provision of general application, the Commission does not consider it necessary to include a specific provision to that effect in section 229B.

(g) The effect of a conviction or an acquittal of a charge under section 229B on a charge of a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge

Under the present law, the question of the effect of a conviction or an acquittal of a charge under section 229B of the *Criminal Code* (Qld) on a charge of a specific offence that is alleged to have been committed during the period covered by the section 229B charge could arise where the specific offence is charged in a separate count in the same indictment as the section 229B charge or where the specific offence is charged in a later indictment. The Commission has expressed the view that an indictment under which a person is charged with an offence against section

444 For example, in *R v S* [1999] 2 Qd R 89, the appellant was charged with an offence under s 229B and with three charges of specific sexual offences. None of the three specific charges related to an incident that was alleged to have been committed during the course of the period that was the subject of the charge under s 229B. An indictment in these terms would still be permissible under the Commission's proposal.

445 See the discussion of s 229B(3) of the *Criminal Code* (Qld) at p 91 of this Report.

446 See pp 91-92 of this Report for a discussion of the situations in which it might be necessary for the trial judge to seek such a finding.

447 This provision is set out at p 92 of this Report.

229B should not be able to contain a separate charge of a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge.[448] If that approach is adopted, this question will arise only where the specific offence is charged in a later indictment.

Where the charges are brought in the one indictment, section 229B(6) authorises the conviction and punishment of the accused on both charges, subject to the restriction in section 229B(7) in relation to the manner in which any custodial sentences are to be served.[449] However, as the Commission has observed, that restriction does not seem to apply where the charges are brought in separate indictments.[450]

The Commission has considered the difficulties in applying sections 16 and 17 of the *Criminal Code* (Qld) to the situation where a person who has been convicted or acquitted of an offence under section 229B is later charged with a specific sexual offence that is alleged to have been committed during the period covered by the section 229B charge.[451]

In the Commission's view, sections 16 and 17 are not well-suited for dealing with this situation. An acquittal of an offence under section 229B does not operate as a defence to a subsequent charge of a specific offence that is alleged to have been committed during the period covered by the section 229B charge, not even where the same act is the subject of both charges. The Commission considers it inappropriate that a person who been acquitted of a charge under section 229B should not, where an act relied on for the prosecution of that charge is the subject of a later specific charge, have a defence to that charge. At present, the person might be able to apply for a stay of the later prosecution on the basis that it amounted to an abuse of process. However, as the Commission has observed, it would not necessarily be clear that, in prosecuting the further specific charge, the prosecution was adopting a course that was inconsistent with the prior acquittal on the section 229B charge.[452]

One of the difficulties in applying sections 16 and 17 to the situation being considered is that a conviction under section 229B is founded on the commission of a number of acts over a period of time, whereas most offences involve the commission of a single act or omission. This difficulty is compounded by the fact that, depending on the specificity of the evidence relied on for the section 229B charge, it may not always be a simple matter to determine whether or not the later specific charge concerns an act that was relied on for the section 229B charge or relates to a different act.[453]

448 See pp 106-107 of this Report.

449 See p 87 of this Report.

450 See p 93 of this Report.

451 See pp 92-96 of this Report.

452 See note 396 of this Report.

453 See the discussion of this issue at p 95 of this Report.

The same difficulties would arise if section 229B were amended so that the offence was based on a course of conduct. In those circumstances, it would be even more difficult to determine whether the prosecution of a specific offence was inconsistent with a prior acquittal of the offence under section 229B. Further, because it is likely that an offence based on a course of conduct would facilitate the admission of more generalised evidence than an offence requiring proof of the commission of three or more sexual offences, it might also be more difficult to determine whether the later charge concerned an act relied on for the prosecution under section 229B or a different act.

For these reasons, the Commission is of the view that, regardless of whether section 229B continues to require the proof of the commission of three sexual offences or is amended so as to be based on proof of a course of conduct, a provision to the effect of section 66EA(8) of the *Crimes Act 1900* (NSW) should be incorporated in the section. The Commission favours the New South Wales provision over the similar provisions in South Australia and Western Australia because it expressly provides that an acquittal of an offence against the section does not prevent the return of an alternative verdict. Section 66EA(8) provides:

> A person who has been convicted or acquitted of an offence against this 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 this section. This subsection does not prevent an alternative verdict under subsection (10).

A provision in these terms would avoid the difficulties that arise in applying sections 16 and 17 of the *Criminal Code* (Qld) to this situation.

The Commission is conscious that a potential disadvantage of adopting such a provision is that it would not be possible, once a person had been convicted or acquitted of an offence under section 229B, for the person to be convicted of a specific sexual offence that was alleged to have been committed during the period covered by the section 229B charge; such a provision would, in effect, prevent the prosecution of an unrelated offence where the evidence of that offence did not emerge until after the conviction or acquittal of the accused on the section 229B charge. However, given that it would be necessary to take a full statement from a complainant in order to particularise the nature of the offences alleged against the accused for the purposes of the section 229B charge, the Commission does not consider that this situation would be likely to arise. Further, given the gravity of a conviction under section 229B, the Commission considers it appropriate that such a conviction, in effect, subsumes any individual offences that might be alleged to have been committed during the period that is the subject of the former conviction.

(h) The effect of a conviction or an acquittal of a specific sexual offence on a charge under section 229B that relies on evidence of the commission of the same specific offence

The Commission has observed that there are also difficulties in applying sections 16 and 17 of the *Criminal Code* (Qld) to the situation where a person who has been convicted or acquitted of a specific sexual offence is subsequently charged with an offence under section 229B in circumstances where the act that was the subject of the prior conviction or acquittal is relied on for the purposes of the charge under section 229B.[454]

These difficulties would not be avoided or reduced if section 229B were amended so that the offence was based on a course of conduct, rather than on proof of the commission of three or more sexual offences. It is likely that, if section 229B were amended in that way, it would be all the more difficult to determine whether the act the subject of the prior conviction or acquittal was the same as, or different from, the acts relied on as evidence of the course of conduct.

Where a person has been convicted of, and punished in respect of, a specific sexual offence, the Commission sees no reason why it would be necessary to bring a further prosecution based on the same act. Further, where a person has been acquitted of a specific sexual offence, the Commission would regard it as improper to attempt to base a prosecution under section 229B on acts including the act of which the person was previously acquitted.

The Commission is therefore of the view that, regardless of whether section 229B continues to require the proof of the commission of three sexual offences or is amended so as to be based on proof of a course of conduct, a provision to the effect of section 66EA(9) of the *Crimes Act 1900* (NSW) should be incorporated in the section. Section 66EA(9) provides:

> A person who has been convicted or acquitted of a sexual offence may not be convicted of an offence against this section in relation to the same child if any of the occasions relied on as evidence of the commission of the offence against this section includes the occasion of that sexual offence.

(i) Provisions of section 229B not specifically addressed

There are a number of provisions in section 229B of the *Criminal Code* (Qld) that have not been specifically addressed by the Commission in this chapter, for example:

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454 These difficulties are discussed at pp 96-97 of this Report.

- the maximum term of imprisonment for a person convicted under the section;[455]
- the relevant sexual offences for the purposes of the section;[456]
- the "prescribed age" of the child for the purposes of the section;[457]
- the defences to a charge under the section;[458]
- the requirement for the consent of a Crown Law Officer to be obtained before commencing a prosecution under the section.[459]

The Commission does not propose to make any specific recommendations about these provisions. It is the Commission's intention that these provisions should be imported into the recommended new provision, with such modifications as are necessary to reflect the fact that the new provision should no longer refer to "the maintaining of a relationship".

(j) Transitional provisions

The Commission has noted earlier in this chapter that, unless the effect of the *Acts Interpretation Act 1954* (Qld) is displaced by a contrary intention in any amending legislation, only acts committed after the commencement of a new section 229B or of any amendments to that provision could be prosecuted under the new or amended provision. Acts alleged to have been committed prior to that date would continue to be prosecuted under section 229B in its form at the time of the commission of the relevant acts.[460]

While that is the position that is usually adopted in amending legislation, the Commission has particular concerns about whether that course is appropriate in the context of a prosecution of this kind.

If only acts alleged to have been committed after the commencement of a new or amended provision can be prosecuted under that provision, there is the likelihood that, for many years to come, prosecutions will be brought under section 229B in its present form, because of the possibility that the allegations themselves may not be made for some years. To the extent that the Commission has expressed the view

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455 *Criminal Code* (Qld) s 229B(1), (3).

456 *Criminal Code* (Qld) s 229B(2).

457 *Criminal Code* (Qld) s 229B(9).

458 *Criminal Code* (Qld) s 229B(4), (5).

459 *Criminal Code* (Qld) s 229B(8). The definition of "Crown Law Officer" is set out at note 291 of this Report.

460 See pp 97-98 of this Report.

that a number of improvements can be made to the operation of section 229B, this would not seem to be a desirable result.

Further, the Commission has observed that, if acts committed prior to the commencement of the new provision were to continue to be prosecuted under section 229B in its form at the time of the commission of the relevant acts, difficulties could arise if one of the three sexual offences required to found a conviction was alleged to have been committed before the commencement of the new provision, while the other two acts were alleged to have been committed after its commencement, or vice versa.

For these reasons, the Commission is of the view that - with one exception - if section 229B is repealed and replaced by a new provision in accordance with the views expressed above, all subsequent prosecutions should be made under the new provision. To the extent to which an act could have been relied on to found a conviction under section 229B prior to the commencement of the new provision, it should be possible to rely on that act as evidence of the commission of a relevant act for the purposes of a charge under the new provision.

The exception relates to those cases 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.

It is not the Commission's intention that the new provision should operate retrospectively in relation to acts committed in another jurisdiction. Although the Commission has expressed the view that it should be sufficient to found a conviction under the new provision if one of the three or more acts occurs in Queensland,[461] the Commission is of the view that it should be possible to rely on the commission of an act in another jurisdiction only where that act has been committed after the commencement of the new provision.

7. RECOMMENDATIONS

The Commission recommends that:

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).

461 See pp 103-104 of this Report.

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;[462]

(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;

(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;

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

(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;[463]

(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; [464]

(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.

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.[465]

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463 The Commission has expressed the view that a provision of this kind would be required even if an offence based on a course of conduct were enacted. See p 109 of this Report.

464 The Commission has expressed the view that a provision of this kind would be required even if an offence based on a course of conduct were enacted. See p 110 of this Report.

465 See note 291 of this Report.

4. The new provision should contain the following definitions:

(a) "prescribed age" means:[466]

(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);[467] **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).

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".

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".

466 See *Criminal Code* (Qld) s 229B(9).

467 See *Criminal Code* (Qld) s 229B(2).

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.[468]

8. Recommendation 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.

468 The effect of this recommendation is that, for the purposes of a prosecution under the new provision, it would not be possible to rely on evidence of the commission of a sexual offence outside Queensland if that offence was alleged to have been committed before the commencement of the new provision. See the discussion of this issue at p 112 of this Report.

APPENDIX 1

RESPONDENTS TO THE CALL FOR PRELIMINARY SUBMISSIONS

Brown, Dr J
Bundaberg Area Sexual Assault Service Inc (Ms K Prentice)
Campbell, Mr C MLA
Child and Youth Mental Health Service
Children's Commission of Queensland
Cleaver, Mr M
Connolly, Mr FG
Cox, Ms M
Crighton, Ms L
Dethlefs, Mr G
Director of Public Prosecutions (Qld), Mr RN Miller QC
Doomadgee Women's Shelter (Mrs H Johnny)
Doyle, Superintendent J
Dwyer, Ms K
Fitton, Mrs MC
Forrester, Mrs M
Hanger, Dr M
Haughton, Ms J
Howard, Ms C
Kay, Ms MH
Kerswell, Ms D
Latham, Dr S, FRACP
Legal Aid Office (Qld) (Ms C Reynolds)
Miss P (Anonymous) [Foster parent to 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 K
Protect All Children Today (PACT)
Queensland Deaf Society (Inc) (Ms M Spring)
Queensland Department of Families, Youth and Community Care (The Rev AC Male)
Queensland Department of Health, Social Work Department (Ms J Benfer & Ms E Drew)
Queensland Department of Justice (Courts Division)
Queensland Police Service
Ryan, Ms S
Ryan, Mr T
Speech Pathology Australia (Queensland Branch) (Ms N Anger)
Trudinger, Mr P
Turnbull, Mr D
Tyszkiewicz, Mr M
Violence Against Women Unit [now Victims Support Unit] (Ms H Taylor)
Warlow, Dr J
Women's Legal Centre (Ms A Lynch)
Youth Advocacy Centre Inc (Ms A McMillan)

APPENDIX 2

RESPONDENTS TO THE DISCUSSION PAPER

Aboriginal & Torres Strait Islanders Corporation (QEA) for Legal Services
Aboriginal and Islander Child Care (Rockhampton)
Abused Child Trust
Anger, Ms N, Speech Pathologist
The Association of Independent Schools of Queensland Inc
Australian Early Childhood Association (Qld Branch), the Creche and Kindergarten Association of Queensland and the Early Childhood Teachers' Association
Australian Justice & Reform Inc
Australian Parent Advocacy Inc
Bar Association of Queensland
Brisbane Youth Service
Centacare, Catholic Family Services
Cerebral Palsy League of Queensland
Child Protection Unit - Mater Children's Hospital
Children's Commission of Queensland
Cox, Dr J (Consulting Paediatrician)
Crighton, Ms L (Confidential)
Criminal Justice Commission
Director of Public Prosecutions (Qld), Mr RN Miller QC
Director of Public Prosecutions (WA), Acting, Mr R Cock QC
D'jekic, Mr P
Drew, Ms E, Director, Social Work Department, Royal Children's Hospital
Edmond MLA, The Honourable Ms W, Minister for Health
Family and Community Support Program - Uniting Church of Australia
Fitton, Mrs MC
Forrester, Mrs M
Goldman, Ms J, Ph D (Faculty of Education and the Arts, Griffith University)
Gould, Mrs L
Hamilton-White, Ms J
Harley Ivor & Associates
Inala Shared Family Care Program
International Commission of Jurists (Queensland Branch)
Jackson, His Honour Judge H H (District Court of Western Australia)
Kerswell, Ms D
Latham, Dr S, FRACP (Confidential)
Multicultural Affairs Queensland, Department of the Premier and Cabinet
Neate, Mr G, Tribunal Chairperson, Aboriginal and Torres Strait Land Tribunal
O'Sullivan, Her Honour Judge H (District Court of Queensland)
Oehlman, Ms D
Palmer, Ms C, Psychologist
Peirson Adolescent Support Service, Mr S Gear, Coordinator)
Pincus, The Hon Mr Justice CW (Court of Appeal of the Supreme Court of Queensland)
Protect All Children Today Inc (PACT)
Protect All Children Today Inc, Rockhampton Group
Queensland Aboriginal and Islander Legal Service
Queensland Advocacy Inc
Queensland Association of Fostering Services
Queensland Association of State School Principals
Queensland Association of State School Principals, Ingham Branch
Queensland Branch of Australian Medical Association
Queensland Corrective Services Commission
Queensland Council for Civil Liberties
Queensland Department of Families, Youth and Community Care
Queensland Health
Queensland Health, Child and Adolescent Forensic Unit, Child and Youth Mental Health Service
Queensland Law Society Inc
Queensland Police Service
Mr R [Father of child sexual assault complainants]
Robertson, His Honour Judge J (President, Childrens Court of Queensland)
The Royal Australian College of General Practitioners, Queensland Faculty
Ryan, Mr T and Ms S
St Vincent's Centre (Nudgee)
Sargent, Mr JG
Self-health for Queensland Workers In the Sex Industry (SQWISI)
South-Side Education Centre
Speech Pathology of Australia, Queensland Branch
Talera Child & Family Therapy Centre
Teen Challenge

Wilson, Dr I, Child Psychiatrist, Director, Gold Coast Child and Youth Mental Health Service
Women's Legal Service Inc (Ms A Lynch)
Woorabinda Aboriginal Council
Youth Advocacy Centre Inc (Ms N Straker)
Youth Affairs Network Qld