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THE RECEIPT OF EVIDENCE BY QUEENSLAND COURTS:

THE EVIDENCE OF CHILDREN

Report No 55

Part 2

Queensland Law Reform Commission
December 2000

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

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

The Honourable Mr Justice J D M Muir
Chairman

The Honourable Justice D A Mullins
Member

Mr W G Briscoe
Member

Assoc Prof P J M MacFarlane
Member

Mr P D McMurdo QC
Member

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

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

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

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SUMMARY OF RECOMMENDATIONS

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

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

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

CHAPTER 2 - THE COURT ENVIRONMENT

The Commission recommends that:

2.1 Child witnesses should be provided with a waiting area which is comfortable and age-appropriate and where their privacy is secure. If there is no suitable facility available within the court precinct, then the party calling the child as a witness should be responsible for making and incurring the costs of alternative arrangements.

2.2 A courtroom in which a child witness gives evidence should be equipped with:

- **a suitable chair, which enables the child to be seated comfortably; and**
- **adequate amplification to enable the child to be clearly heard.**

2.3 Future courtroom design, including furniture and fittings and means of access, should take into consideration the needs of child witnesses.

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

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

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

CHAPTER 3 - DELAYS

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

CHAPTER 4 - FACILITATING COMMUNICATION WITH A CHILD WITNESS

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

CHAPTER 5 - SUPPORT FOR CHILD WITNESSES

The Commission recommends that:

5.1 Consideration should be given to establishing a service within the justice system to provide educational programs for child witnesses, to facilitate contact between various agencies involved in a proceeding in which a child is a witness and to enhance communication between those agencies and the child and his or her family.

5.2 To the extent that it applies to child witnesses, section 21A(2)(d) of the *Evidence Act 1977* (Qld) should be repealed.

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

(a) in a proceeding for a charge of a sexual offence or an offence of violence, or in a civil proceeding arising from the commission of such an offence, or in a proceeding for a domestic violence order, a child witness who is under the age of 16 years is entitled to the presence of a support person while he or she gives evidence;

(b) in any other proceeding where a child under the age of 16 years is to give evidence, the court may order that a support person is to be present while the child gives evidence;

(c) in any proceeding where a young person aged 16 or 17 years who is, in the opinion of the court, a "special witness" under section 21A(1) of the *Evidence Act 1977* (Qld) is to give evidence, the court may order that a support person is to be present while the young person gives evidence;

(d) a child who is entitled to the presence of a support person while giving evidence may waive the entitlement unless, in the opinion of the court, it is not in the child's best interests to waive the entitlement;

(e) a party proposing to call a child witness must apply to the court for approval of the proposed support person;

(f) a person who has provided professional therapy or counselling to a child who is to be called as a witness is ineligible to act as a support person for that child; and

(g) a support person for a child who is giving evidence is to be permitted to be within reasonable physical proximity of the child.

5.4 The courts, in consultation with relevant interested parties, should develop guidelines setting out the scope of the support person's role.

5.5 An information kit should be developed to inform support persons of the content of the guidelines and the scope of their role.

5.6 Wherever possible, issues relating to the presence of a support person for a child witness should be determined at a preliminary hearing.

CHAPTER 6 - TREATMENT BEFORE COMMITTAL OR TRIAL

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

CHAPTER 7 - COMPETENCY[1]

The Commission recommends that:

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

7.2 The test of competency for a child witness to give evidence on oath should be whether the child:

(a) understands that the giving of evidence is a serious matter, and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the truth; and

(b) is capable of giving a rational answer to a question about a fact in issue.

7.3 A child witness who is not competent to give evidence on oath should be able to give unsworn evidence if the child is able to give an intelligible account of events which he or she has observed or experienced.

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

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

CHAPTER 8 - OUT-OF-COURT STATEMENTS

The Commission recommends that:

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

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

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

- **to ensure that the evidence is taken at the earliest possible opportunity;**

- **to assist in minimising any likelihood that the child's evidence will be tainted by interviewing techniques;**

- **to ensure that, where the evidence is recorded on video or audio tape, the recording is of sufficient quality to enable it to give an accurate representation of the child's evidence.**

CHAPTER 9 - PRE-RECORDED EVIDENCE

The Commission recommends that:

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

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

- **in any trial where a child under the age of 16 is to give evidence, the party proposing to call the child as a witness may apply to the court in which the trial is to be held for an order that the child's evidence-in-chief be taken, in whole or in part, and presented to the court in the form of a videotaped recording of oral evidence given by the child;**

- **the application to pre-record the child's evidence-in-chief may be made before the trial;**

- **any opposing party be served with a copy of, and be entitled to be heard on, such an application;**

- **the judge who hears the application may make such order as the judge thinks fit, which may include directions as to -**

  (a) any facilities to be made available to assist the child;

  (b) the procedure to be followed in the taking of the evidence and the presentation of the recording and the excision of matters from it; and

  (c) the manner in which any cross-examination or re-examination of the child is to be conducted at the trial;

(d) the persons, or classes of persons, who are authorised to have possession of the videotaped recording of the evidence; the conditions, if any, attached to such possession; and the giving up of possession;

(e) the playing, copying or erasure of the recording;

- **the recommendations made by the Commission in Chapter 10 of this Report about the use of closed-circuit television and screens for the giving of evidence by a child witness apply to the pre-recording of the evidence-in-chief of a child witness;**

- **the child be available for cross-examination and re-examination at the trial;**

- **a copy of the videotape of the child's evidence-in-chief be made available to an opposing party for the purpose of preparing for cross-examination at trial;**

- **before the trial, the trial judge or a judge of equivalent jurisdiction may view the videotaped evidence and may order that any part of it be deleted or that the videotape not be admitted at the trial;**

- **the trial judge may, at the trial, order that any part of the videotape be deleted or that the videotape not be admitted at the trial;**

- **if, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a trial is a person who would qualify as a "special witness" under section 21A of the *Evidence Act 1977* (Qld), the court may order that the child's evidence-in-chief be taken, in whole or in part, in the manner outlined above.**

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

- **in any trial where a child under the age of 16 is to give evidence, the party proposing to call the child as a witness may apply to the court in which the trial is to be held for an order that the child's evidence be taken at a pre-trial hearing;**

- **any opposing party be served with a copy of, and be entitled to be heard on, such an application;**

- **the judge who hears the application may make such order as the judge sees fit which may include directions as to -**

(a) the persons who may be present at the pre-trial hearing;

(b) the persons, or classes of persons, who are authorised to have possession of the videotaped recording of the evidence; the conditions, if any, attached to such possession; and the giving up of possession;

(c) the playing, copying or erasure of the recording;

- **no person other than a person authorised by the judge is to be present at the hearing;**
- **the recommendations made by the Commission in Chapter 10 of this Report about the use of closed-circuit television and screens for the giving of evidence by a child witness apply to a pre-trial hearing;**
- **the child is to give his or her evidence at the pre-trial hearing and to be cross-examined and re-examined subject to the control of the presiding judge;**
- **where necessary, more than one pre-trial hearing may be held for the purpose of taking the child's evidence;**
- **the pre-trial proceedings are to be recorded on videotape;**
- **the child's evidence at the trial may be given by the presentation to the court of the videorecording made at the pre-trial hearing or hearings;**
- **the trial judge or a judge of equivalent jurisdiction may view the videotaped evidence before the trial and may order that any part of it be deleted or that the videotape not be admitted at the trial;**
- **the trial judge may, at the trial, order that any part of the videotape be deleted or that the videotape not be admitted at the trial;**
- **the original videotaped recording of the child's evidence is not to be edited or altered in any way without court approval before it is presented;**
- **the court has a discretion to order, in the interests of justice, that the child be present at the trial to give further evidence and, where the child has previously been cross-examined, to limit the extent of cross-examination allowed at trial;**

- **if, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a trial is a person who would qualify as a "special witness" under section 21A of the *Evidence Act 1977* (Qld), the court may order that the evidence of the child be given in the manner outlined above.**

9.4 A new provision should be inserted into the *Evidence Act 1977* (Qld) to provide that, where the whole or part of the evidence of a child has been given by means of a pre-recorded videotape, the party who called the child as a witness may apply for an order that the videotaped recording of the child's evidence be admitted at a rehearing or a retrial.

CHAPTER 10 - CLOSED-CIRCUIT TELEVISION

The Commission recommends that:

10.1 If a child under the age of 16 years is giving evidence in criminal proceedings for offences involving violence or sexual assault, in civil proceedings arising from the commission of an offence of a violent or sexual nature or in proceedings for domestic violence orders, the child's evidence should be given by means of closed-circuit television.

10.2 Recommendation 10.1 should not apply if the court orders that it would not be in the interests of justice for the child's evidence to be given in that way, or if the child chooses not to use closed-circuit television.

10.3 If a child under the age of 16 years is giving evidence in a proceeding specified in Recommendation 10.1 and closed-circuit television facilities are not available or such facilities are available but the child chooses not to use them, the child's evidence should be given with the use of a screen which prevents the witness from seeing the accused person, but does not prevent the accused from seeing the witness.

10.4 Recommendation 10.3 should not apply if the court orders that it would not be in the interests of justice for the child to give evidence with the use of a screen or if the child chooses not to use a screen.

10.5 When a child witness under the age of 16 years gives evidence using closed-circuit television or a screen the jury should be given a warning to the effect that:

(a) it is standard procedure in such cases for children's evidence to be given by those means; and

(b) the jury should not draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of closed-circuit television or a screen.

10.6 If, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a proceeding specified in Recommendation 10.1 is a person who satisfies the definition of "special witness" in section 21A of the *Evidence Act 1977* (Qld), the court may order that the child's evidence be given using closed-circuit television or, if closed-circuit television facilities are not available, using a screen which prevents the witness from seeing the accused person.

10.7 When a witness referred to in Recommendation 10.6 gives evidence using closed-circuit television or a screen, the jury should be warned not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of closed-circuit television or a screen.

10.8 Where a child gives evidence by means of closed-circuit television, the evidence given by the child should be recorded on videotape.

10.9 Where a child has given evidence by means of closed-circuit television, the party who called the child as a witness may apply for an order that the videotaped recording of the child's evidence be admitted at a rehearing or a retrial.

CHAPTER 11 - PRELIMINARY HEARINGS

The Commission recommends that:

11.1 A new provision should be inserted in the *Evidence Act 1977* (Qld) to enable a preliminary hearing to be held before trial in any matter in which a child is likely to be a witness.

11.2 Any party to the proceeding should be entitled to apply for a preliminary hearing to resolve an issue about the giving of evidence by a child witness.

11.3 If it is likely that the making of an order or the giving of a direction will be necessary in relation to the evidence of a child witness, the party proposing to call the child as a witness should be required to apply for a preliminary hearing to obtain such order or direction.

11.4 It should not be necessary for the judge who constitutes the court for the trial to preside at the preliminary hearing.

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

CHAPTER 12 - COMMITTAL PROCEEDINGS

The Commission recommends that:

12.1 The committal process should be retained in cases involving child complainants.

12.2 Section 110A(4) of the *Justices Act 1886* (Qld) should be amended to provide that, at a committal proceeding for a charge of a sexual offence or an offence of violence, the "hand up" procedure may be used, even though the accused does not have legal representation.

12.3 At a committal proceeding for a charge of a sexual offence or an offence of violence, a child who is the complainant or other prosecution witness should be cross-examined only if there are substantial reasons for requiring the child to undergo cross-examination.[2]

12.4 The term "substantial reasons" should not be restricted to questions affecting the magistrate's decision whether or not to commit the accused for trial.

12.5 Magistrates should develop guidelines for determining what constitutes substantial reasons for permitting cross-examination of a child witness at a committal proceeding involving a charge of a sexual offence or an offence of violence.

12.6 Legislative provision should be made for the pre-recording of the evidence of a child who is a complainant or other prosecution witness and who is required to undergo cross-examination at a committal proceeding for a charge of a sexual offence or an offence of violence.

12.7 Issues relating to the giving of evidence at committal by a child witness should, where practicable, be determined at a preliminary hearing.

12.8 There should not be a requirement that committals involving child complainants be heard by a Childrens Court magistrate.

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2 This is a recommendation of a majority of the members of the Commission. Mr P McMurdo QC dissents from this recommendation. Mr McMurdo's view is set out at pp 256-257 of this Report.

CHAPTER 13 - POWER TO RESTRICT INAPPROPRIATE CROSS-EXAMINATION[3]

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

Improper questioning of child witness

(1) The court may disallow a question put in cross-examination to a witness under the age of 18 years, or inform the witness that it need not be answered, if the question is:

(a) misleading or confusing;

(b) phrased in inappropriate language; or

(c) unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

(2) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account:

(a) any relevant condition or characteristic of the witness, including age, culture, personality, education and level of understanding; and

(b) any mental, intellectual or physical disability to which the witness is or appears to be subject.

CHAPTER 14 - UNREPRESENTED LITIGANTS[4]

The Commission recommends that:

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

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

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

14.2 The *Evidence Act 1977* (Qld) should be amended to prohibit, in a civil proceeding arising from the commission of a sexual offence or an offence of violence or in a proceeding for a domestic violence order, direct cross-examination of a witness under the age of 18 years by a defendant who does not have legal representation.

14.3 The *Evidence Act 1977* (Qld) should be amended to confer on the court a discretion to prohibit, in any other proceeding, direct cross-examination of a witness under the age of 18 years by a party who does not have legal representation if, in the opinion of the court, the ability of the child to testify effectively under cross-examination would be adversely affected if the cross-examination were to be conducted by the unrepresented party in person.

14.4 The *Evidence Act 1977* (Qld) should be amended to provide that, where an unrepresented party to a proceeding is prohibited from personally cross-examining a child witness, the court must:

(a) direct the unrepresented party to arrange for a legal representative to act for the purpose of cross-examining the witness; and

(b) require the unrepresented party to notify the court within a specified period whether a legal representative is to act for that purpose.

14.5 The *Evidence Act 1977* (Qld) should be amended to provide that if, by the end of the specified period the unrepresented party has notified the court that no legal representative is to act for the purpose of cross-examining the child witness, or no notification has been received, the court must appoint a qualified legal representative to cross-examine the witness in the interests of the unrepresented party.

14.6 The *Evidence Act 1977* (Qld) should be amended to provide that the legal representation referred to in Recommendations 14.4 and 14.5 should be provided at public expense.

14.7 The *Evidence Act 1977* (Qld) should be amended to provide that a legal representative who is appointed by the court to cross-examine a child witness on behalf of an unrepresented party should have the same immunity as the legal representative would have had if he or she had been engaged by that party.

14.8 The *Evidence Act 1977* (Qld) should be amended to provide that where, in a trial by jury, an accused who is unrepresented is prohibited from personally cross-examining a child witness, the court must warn the jury that:

(a) no inference adverse to the accused should be drawn from the appointment of a legal representative to conduct the cross-examination; and

(b) the evidence given as a result of the cross-examination should be given no greater or lesser weight because the cross-examination was conducted by a legal representative whose appointment was ordered or made by the court.

CHAPTER 15 - EXPERT EVIDENCE

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

15.1 The "common knowledge" rule should be abolished in relation to expert evidence about child witnesses.

15.2 If it is probative in the circumstances of the particular case, expert evidence should be admissible in relation to psychological factors which may lead to behaviour relevant to the credibility of a child witness. However, such evidence should be admissible in support of the credibility of a child witness only to rebut suggestions that the child is not a credible witness.

15.3 Expert evidence should be admissible on the questions of:

(a) whether a proposed child witness understands that the giving of evidence is a serious matter and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the truth; and

(b) whether the child is able to give an intelligible account of events which he or she has observed or experienced.

15.4 Expert evidence should be admissible in relation to the reliability of the evidence of a child witness.

15.5 Expert evidence should be admissible in relation to whether a child meets the criteria for consideration as a "special witness" under section 21A of the Act.

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

CHAPTER 16 - PROPENSITY EVIDENCE

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

CHAPTER 17 - THE DISCRETION TO ORDER SEPARATE TRIALS

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

CHAPTER 18 - IDENTIFICATION ISSUES

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

18.1 Where a child gives evidence by closed-circuit television, the court may make such order as it considers appropriate to allow the witness to identify a person or thing.

18.2 Where the court requires a child who gives evidence by closed-circuit television to be brought into the courtroom to make an identification of a person or thing, the identification evidence is to be given at the completion of the child's evidence-in-chief.

18.3 Where a child who gives evidence in the courtroom with the aid of a screen is required to identify an accused in person, the identification evidence is to be given at the completion of the child's evidence-in-chief.

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

CHAPTER 19 - ALLEGATIONS OF PERSISTENT SEXUAL ABUSE[5]

The Commission recommends that:

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

19.2 The new provision should provide that:

(a) a person who, on three or more separate occasions occurring on separate days during any period, engages in conduct, in relation to a particular child under the prescribed age, that constitutes a sexual offence commits a crime;[6]

(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;

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

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

(f) an indictment charging a person with an offence against the new section must not contain a separate charge that the accused committed a sexual offence in relation to the same child during the period covered by the charge under that section;

(g) in order for the accused to be convicted of an offence against the new section:

(i) the jury must be satisfied beyond reasonable doubt that the evidence establishes at least three separate occasions, occurring on separate days during the period concerned, on which the accused engaged in conduct constituting a sexual offence, in relation to a particular child under the prescribed age, of a nature described in the charge;

(ii) the jury must be so satisfied about the material facts of the three such occasions, although the jury need not be so satisfied about the dates or the order of those occasions; and

(iii) if more than three such occasions are relied on as evidence of the commission of an offence against the new section, all the members of the jury must be so satisfied about the same three occasions;

(h) a person who has been convicted or acquitted of an offence against the new section may not be convicted of a sexual offence in relation to the same child that is alleged to have been committed in the period during which the accused was alleged to have committed an offence against the new section;

(i) the recommendation in paragraph (h) does not prevent an alternative verdict under the recommendation in paragraph (k);

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

(k) if, on the trial of a person charged with an offence against the new section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of the commission of the offence against that section, committed a sexual offence, the jury may acquit the person of the offence charged and find the person guilty of that sexual offence, provided that the jury is also satisfied that that offence was committed in Queensland.

19.3 It should continue to be a requirement under the new provision that a prosecution for an offence defined in that provision must not be commenced without the consent of a Crown Law Officer.

19.4 The new provision should contain the following definitions:

(a) "prescribed age" means:

(i) to the extent that the occasions in question involve an act defined to constitute an offence in section 208 or 209 of the *Criminal Code* (Qld) - 18 years;

(ii) to the extent that the occasions in question involve any other act defined to constitute an offence of a sexual nature - 16 years;

(b) "sexual offence" means:

(i) an offence of a sexual nature in relation to the child, other than an offence defined in section 210(1)(e) or (f) of the *Criminal Code* (Qld); or

(ii) an offence under the law of a place outside Queensland that would, if it had been committed in Queensland, be an offence referred to in paragraph (i).

19.5 The defences presently available under section 229B(4) and (5) of the *Criminal Code* (Qld) should continue to apply to a charge brought under the new provision. Those provisions should be incorporated into the new provision with such modifications as are necessary to reflect the fact that the new provision is no longer to refer to "the maintaining of a relationship".

19.6 The Commission makes no recommendation for any change to the term of imprisonment that may be imposed in respect of an offence under the new provision. Accordingly, those aspects of section 229B(1) and (3) that relate to the question of punishment should be incorporated into the new provision with such modifications as are necessary to reflect the fact that the new provision is no longer to refer to "the maintaining of a relationship".

19.7 The new provision should provide that, after the commencement of that provision:

(a) no further prosecutions may be brought under section 229B in its form prior to the commencement of the new provision; and

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

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

CHAPTER 20 - PROFESSIONAL AWARENESS

The Commission recommends that:

20.1 The Chief Justice of the Supreme Court of Queensland, the Chief Judge of the District Court and the Chief Magistrate should give consideration to continuing to provide information about issues relating to the ability of children to give evidence as part of the program of ongoing legal education for judicial officers in their respective jurisdictions.

20.2 The Queensland Law Society and the Bar Association of Queensland should conduct continuing legal education programs for the members of the profession about issues relating to children as witnesses, and that such programs should include input from members of other relevant professions.

20.3 Deans of Queensland Law Schools should give consideration to the ways in which issues relating to children as witnesses can be included in law school undergraduate curricula.

CHAPTER 21 - INAPPROPRIATE USE OF EVIDENTIARY MATERIAL

The Commission recommends that:

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

21.2 The provision should state that, where a person deciding an application for access to "prescribed matter" forms the view that the applicant has shown cause why access should be granted, the application should be decided in accordance with the procedure specified in the *Freedom of Information Act 1992* (Qld).

21.3 The provision should state that access to prescribed material is not to be granted unless reasonable steps have been taken to ascertain whether a person to whom disclosure of the matter is likely to be of substantial concern is of the view that:

(a) the applicant has shown cause why access should be granted; or

(b) the matter is exempt.

21.4 "Prescribed matter" should be defined as the following items in relation to the prosecution of a sexual offence or an offence of violence, or to a civil proceeding arising from the commission of such an offence or to an application for a domestic violence order:

- **audio and videotapes of the statements of a child or pre-recorded videotapes of the child's evidence;**
- **medical records relating to a child;**
- **photographs of a child;**
- **witness statements relating to a child; and**
- **a transcript of evidence given by or relating to a child witness.**

21.5 An item listed in Recommendation 21.4 is "prescribed matter" if it was used or intended to be used as evidence in the proceeding or collected during the course of the investigation of an offence.

21.6 The Criminal Practice Rules should be amended to restrict access to transcripts of evidence given by or relating to a child witness in a proceeding listed in Recommendation 21.4 unless the person requesting a copy of the transcript demonstrates a sufficient interest in the proceeding or in obtaining a copy of the record.

21.7 The *Recording of Evidence Regulation 1962* (Qld) should be correspondingly amended.

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

CHAPTER 22 - EVALUATION

22.1 The Commission recommends that the legislation implementing the changes set out in this Report should include a provision to the effect that:

(a) the Attorney-General and Minister for Justice must cause a review of the operation of the changes to be carried out;

(b) the review is to be conducted by a multi-disciplinary panel;

(c) the panel is to be constituted prior to the commencement of the changes;

(d) the review is to take place two years after the commencement of the change; and

(e) the review is to be completed within a period of six months.

CHAPTER 1

INTRODUCTION

1. THE TERMS OF REFERENCE

The Queensland Law Reform Commission was requested, as part of its Fifth Program of references, to review:

> … the capacity of the judicial system, both in its criminal and civil aspects, to properly receive the evidence of children.

The terms of reference were settled in April 1997.

The Commission was also asked, by separate correspondence,[7] to examine the Report of an Inquiry into Sexual Offences Involving Children and Related Matters (the Sturgess Report).[8]

The terms of reference recognise that children may be required to give evidence in a number of different contexts. Children may be called as witnesses in civil proceedings - for example, in claims for damages for personal injuries resulting from a motor vehicle accident or some other accidental occurrence. They may be the subject of a custody dispute.[9] If they have been victims of or observed the commission of an offence they may be witnesses in criminal proceedings relating to charges arising out of the offence. They may be applicants for compensation for injuries resulting from criminal offences, or they may appear as witnesses in civil proceedings arising out of the commission of an offence. Some children who have been accused of committing criminal offences may give evidence in their own defence.

However, although no comprehensive data are available, it would seem that children appear as witnesses most frequently in criminal proceedings, to give evidence about what they have experienced as the victims of alleged offences or what they have observed of events that have happened to others.[10] Children rarely give evidence in civil proceedings other than those which are the result of a criminal offence.[11]

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

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

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

10 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at paras 14.1, 14.9-14.10.

11 Id at para 14.13.

As a result, although in this Report the Commission has examined the issues affecting the ability of children generally to give effective evidence, from time to time specific reference is made to the situation faced by children giving evidence for the prosecution in criminal proceedings, in particular by complainants in child abuse cases.

2. THE HISTORY OF THE REFERENCE

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: *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53). The Discussion Paper was widely distributed throughout Queensland. It was also made available on the Commission's internet home page.[12] The purpose of the Discussion Paper was to stimulate and encourage community debate about the need for, and the most appropriate way of achieving, measures to assist child witnesses to be able to give evidence effectively and of providing appropriate protection to vulnerable young witnesses whilst, at the same time, where the child is a complainant or other prosecution witness, respecting the rights of the accused.

Issues considered in the Discussion Paper included:

- the most appropriate test of competency for children to be able to give evidence;
- the use of expert evidence to determine the child witness's competency and for other purposes;
- the admissibility of a child witness's statements made out-of-court instead of the child appearing at committal hearings or at trial;
- the mandatory use of closed-circuit television for the presentation of the child witness's testimony in court;
- the provision of support persons for young children giving evidence in court;
- the evidence of children with special needs - for example, indigenous children, children from a non-English speaking background, and children with disabilities;

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

- the evidence of children accused of criminal behaviour;
- the evidence of children in welfare proceedings;
- delays in proceedings involving child witnesses;
- communication difficulties relating to children as witnesses;
- the court environment;
- professional awareness of issues relating to child witnesses; and
- counselling of child witnesses.

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

The submissions received by the Commission in response to both its preliminary advertisement and its Discussion Paper have been of great assistance to the Commission in the formulation of the recommendations set out in this Report. Appendix A to the Report contains a list of respondents to the preliminary Call for Submissions. A list of respondents to the Discussion Paper is set out in Appendix B to the Report.

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

3. THE SCOPE OF THIS REPORT

This Report contains the Commission's general scheme for reforming the way in which children give evidence in Queensland courts. Because of the request by the then Attorney-General, the Hon Denver Beanland MLA, that the Commission have regard to the Sturgess Report on sexual offences involving children,[13] the Commission has given some emphasis in its recommendations to cases involving allegations of child abuse and other particular situations where, in the view of the Commission, a child witness may feel especially vulnerable.

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

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

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

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

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

Unless otherwise specified, the law is stated in this Report as at 13 October 2000.

4. THE COMMISSION'S APPROACH

In formulating the recommendations set out in this Report, the Commission has sought to achieve three objectives:

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

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

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

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

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

The recommendations made in this Report about facilitating the giving of evidence by child witnesses are the result of the careful consideration and balancing of various interests. The Commission believes that the scheme it puts forward is in the overall interests of justice.

CHAPTER 2

THE COURT ENVIRONMENT

1. INTRODUCTION

The physical environment of a court building and its facilities may make a court room an intimidating setting for anyone - more so a child - to give evidence. There are a number of factors which may make a child witness, in particular, uncomfortable or distressed, and which may therefore have an adverse effect on the child's ability to give evidence in an effective manner.

In the Discussion Paper, the Commission identified the following areas of concern:[14]

- the physical design of the building, which may mean that a child complainant cannot avoid the presence of the accused or of people associated with the accused;
- the general inability of the court to restrict who may be present when the child is giving evidence;
- the lack of "child-friendly" facilities such as appropriate seating, microphones, and waiting areas with things to occupy the child during what may be relatively long breaks;
- the formal dress of the judge and counsel.

In the submissions received in response to the Discussion Paper, there was widespread support for the development of a child-friendly environment in court precincts in order to reduce the stress of giving evidence for child witnesses.

Queensland Health observed:[15]

> Within the health sector, it has certainly been possible to modify environments and procedures to better provide for the physical, psychological and emotional needs of children.
>
> Not unlike the justice portfolio, health has a long history steeped in tradition and an inherently conservative senior workforce; combined with the need to undertake procedures which by their very nature are unavoidably evocative of stress, pain and discomfort.

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14 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 87.

15 Submission 30.

> To achieve the goal of an appropriate clinical service, it has on occasion required the physical modification of waiting areas, accident and emergency departments, operating suites and wards. It has required that physical environments themselves be decorated and furnished appropriately to the needs of children and young persons of various ages and from diverse cultural backgrounds. With careful analysis, it has proven possible to alter attire and clinical procedures to better provide for the needs of children and their families, without compromising professional standards.

2. THE NEED FOR SEPARATE FACILITIES

Few court buildings have specially designated areas for child complainants or witnesses. As a result, in a criminal trial, a complainant or prosecution witness who is a child may have to share common waiting areas and facilities with the accused, the accused's family and legal representatives.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have observed that the design of court buildings can contribute to the intimidation of a child witness.[16] The child's intimidation or distress at the possible or actual proximity to such people before the hearing or during breaks in the proceedings may adversely affect the child's ability to give evidence.

To overcome this problem, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended that:[17]

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

Further, where facilities are not available in the court building:[18]

> … the prosecutor or legal representative for the party calling the child as a witness should be responsible for taking all necessary steps to ensure that the child is provided with appropriate facilities and protected from the risk of intimidation or harassment.

In the Discussion Paper, the Commission acknowledged that steps were being taken

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16 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) paras 14.117 and 14.118 at 347. See also Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 368, citing a study for Victim Support by Raine J and Smith R, *The Victim in Court* (1991), which found that 60% of victims and witnesses in English courts had to wait in the same area as the defendant and his or her supporters; most felt worried, frightened or upset.

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

18 Ibid.

in Queensland to redress the situation.[19] Newly constructed courts will provide a witness protection room[20] which normally will be located beside the room where the closed-circuit television facilities are set up. The witness protection room will be furnished with lounge chairs and a television set, and will have its own toilet. It will be a secure room with, where possible, alternative access. The Commission also recognised that it may be difficult, without significant expense, to rectify design problems in existing court buildings.

The Commission sought submissions on the following issues:[21]

- whether more appropriate waiting facilities should be provided in court buildings where children are likely to appear as witnesses; and

- whether courts should nominate an appropriate waiting facility near the courts if there is none available in the actual court building.

The submissions received in response to the Discussion Paper strongly supported separate, "child-friendly" waiting facilities for child witnesses.[22] According to the Bar Association of Queensland:[23]

> The current waiting facilities provided in the Brisbane Supreme and District Courts complex and the Magistrates Court complex are woefully inadequate. Children are often required to wait in ordinary witness rooms that have glass walls which open out on to the public areas. Children are often in a situation where they may see the accused or his family in the corridor, though most "minders" of children will sit them with their backs to the public area. There is one room set aside for child witnesses, but its interior is dark and it has only an ordinary table and chairs. A more "child friendly" waiting area designated for that purpose would be of immense benefit to young witnesses.

A PACT volunteer submitted that child witnesses should have a waiting area with its own private toilet facilities. The respondent expressed the view that this area should not be accessible to the public and, if possible, should have direct access to the courtroom.[24]

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19 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 89.

20 Telephone conversation with Executive Officer, Courts Division, Department of Justice, 13 February 1998. There is a witness protection room located in the courts complex in Brisbane, but it appears to have been used only rarely for child witnesses. The Executive Officer of the Courts Division of the Department of Justice and Attorney-General has advised the Commission that, in the twelve months to September 2000, the vulnerable witness room with links to Court 15 in the Supreme and District Courts complex was used five times: Memorandum to the Director of the Commission, 16 November 2000.

21 Queensland Law Reform Commission, Discussion Paper*, The Receipt of Evidence by Queensland Courts: The Evidence of Childre*n (WP 53, December 1998) at 93.

22 Submissions 2, 7, 12, 19, 20, 23, 24, 25, 27, 29, 31, 32, 33, 34, 37, 40, 46, 47, 49, 53.

23 Submission 53.

24 Submission 20.

Centacare Catholic Family Services noted:[25]

> [The court environment] should offer separate waiting areas for children … . The waiting area for children needs to be child friendly with toys, food and drink facilities, child friendly toilets and where possible a playground area.

A psychologist agreed that waiting areas for child witnesses should be:[26]

> … [c]omfortable places with maybe TV, toys, games etc. and an outdoor courtyard with play equipment or else natural light and indoor playgym. Children need to be able to let off energy as well as rest.

A joint submission from three organisations associated with early childhood education concluded:[27]

> The provision of a suitable waiting area does not simply mean the provision of chairs which are suitable for both adults and children and possibly a few distractions such as a fish tank or television set in a side room off the main waiting area and accessed from it. It should mean the provision of separate areas for opposing witnesses accessed by different entrances, fully equipped with toilet and comfort facilities. The provision of suitable toys, books and small play items and good quality furniture suitable for the ages of children is an easily implemented strategy in all situations.

The Children's Commission of Queensland pointed out that the provision of separate waiting areas might not, on its own, provide sufficient protection for child witnesses:[28]

> Court processes sometimes require all parties to wait in a designated area at a specified time, or enter the court precinct through a single common access point at around the same time. Even without any overt response from the accused, the child can be intimidated or stressed just by being in the presence of the accused in these situations.

It recommended that:[29]

> Where physical limitations exist, such as only one access point, the court processes and procedures be reviewed, and where necessary, modified, to ensure the required separation and privacy. One individual, such as the prosecutor or a legal representative for the party calling the child as a witness, should be nominated as having responsibility for ensuring the court processes and procedures protect the child from unwanted contact with others.

This view was shared by the Bar Association of Queensland which, while acknowledging the resource implications of its proposal, commented that it would be desirable to arrange for a child to be able to enter the court from an area set apart

25 Submission 23.

26 Submission 25.

27 Submission 29.

28 Submission 31.

29 Ibid.

from the public area.[30] A regional youth counselling and support organisation also commented on the desirability of a special entrance and exit for child complainants.[31]

The Queensland Council for Civil Liberties also recognised the need for separate waiting facilities for child witnesses:[32]

> It is accepted that it is undesirable for child witnesses to have to associate with persons against whom they are giving evidence by having to share toilet facilities and witness/waiting room facilities …

According to the Queensland Branch of the International Commission of Jurists:[33]

> If banks, dentists and hairdressers (let alone Macdonalds!) can at least make some attempts at providing facilities for children then courts must have this capacity. Funding should be made available for family friendly court waiting areas, particularly in the low level criminal courts.

Some respondents commented that the provision of appropriate waiting facilities would be relatively inexpensive compared to, for example, the cost of modifications which are sometimes required to provide acceptable access and facilities for people with disabilities.[34] The Bar Association of Queensland suggested that the designation of a waiting facility close to the courthouse in question may be the only cost effective solution.[35] Families, Youth and Community Care Queensland observed:[36]

> Generally, most courts would have a room that could be used and outfitted even on a temporary basis for the use of child witnesses. This would be the case even in courts in rural and remote areas. Even a non-purpose built facility modified for use by a child witness for a short period would be better than leaving the child to share facilities with the offender. The key is awareness of the child's needs, with counsel and court personnel giving the matter some forethought and being flexible with existing facilities and resources.

Several submissions also agreed that, where it was not possible to provide a suitable waiting area within the court building, an appropriate facility should be nominated close to the court.[37] The Queensland Council for Civil Liberties pointed out that it

30 Submission 53.

31 Submission 24.

32 Submission 40.

33 Submission 37.

34 Submissions 30, 33, 44.

35 Submission 53.

36 Submission 49.

37 Submissions 7, 19, 20, 25, 31, 32, 40, 49.

may not always be necessary for such a facility to be located outside the court building, since:[38]

> … where hearings are held in high-rise buildings a simple yet effective arrangement can be made for the child and his/her support person to wait on a floor different from that which contains the hearing room.

3. THE COURTROOM

The physical appearance of a courtroom may be unfamiliar to a child witness, and the child may be overwhelmed or confused by his or her surroundings. As a result, the child's ability to give evidence effectively may suffer.

In the Discussion Paper, the Commission sought submissions on the following issues:[39]

- what difficulties does the court environment create for child witnesses;
- do those difficulties impact on the ability of child witnesses to give evidence effectively;
- how can the court environment be modified to facilitate the evidence of child witnesses?

Many of the submissions agreed that, for child witnesses, the unfamiliarity and formality of the courtroom atmosphere caused difficulties which could impact adversely on a child's ability to give evidence.[40]

A joint submission from three organisations involved in early childhood education expressed the view that:[41]

> … the physical situation in which child witnesses are placed is of concern. … The formality of the court situation, traditional court style of dress, formal legal language, physically imposing buildings, furniture and fittings along with the presence of many other adults (most unknown but some possibly known and even feared) will all add to the intimidation of the child. Such considerations will inevitably affect not only the ability of the child to give evidence and the reliability of such evidence but the effect the experience will have on the child in many other ways.

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38 Submission 40.

39 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 93.

40 Submissions 2, 4, 7, 17, 20, 23, 25, 29, 32, 33, 44, 47, 49, 51.

41 Submission 29.

A consulting paediatrician was also concerned at the psychological effect of the court environment on a child witness, particularly a complainant:[42]

> From the child's point of view you must understand they are relatively impotent, they are confined to a witness box which is not dissimilar to an enclosed play pen … . It is just possible that the courtroom situation is going to replicate the same dominant subjugate situation which resulted in the action which the trial is investigating. It is therefore possible that we may re-inforce these negative terrifying experiences in the child and actually make the outcome worse.

Similarly, Families, Youth and Community Care Queensland observed that:[43]

> … the court environment is threatening to children and adults, and contributes to well documented secondary trauma children experience in the legal process.

That Department's submission cautioned:[44]

> One of the fundamental issues to be taken into account when discussing child witnesses is related to the fact that children present differently at different stages of their development. They are growing and maturing throughout childhood and adolescence. It is almost impossible to cater for these children as if they are an homogenous group. Flexibility is therefore a key to creating a situation where a child is given the best environment for giving evidence.

PACT (Protect All Children Today) expressed the view that:[45]

> The provision of physical facilities appropriate to the physical and psychological needs of community members, including children, is now a fundamental tenet of social justice in relation to the concepts of access and equity.

A number of respondents identified practical measures which could be taken to reduce the difficulties faced by children who give evidence in the witness box.

The President of the Childrens Court noted:[46]

> In most courts in which I have presided in Queensland, there is a major problem in hearing the evidence of a child, and in particular younger children. In my opinion, a child is severely disadvantaged if he or she is constantly reminded to speak up, because of poor acoustics or lack of amplification.

A number of other respondents referred to the need for microphones to ensure that the child could be heard clearly.[47]

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42 Submission 4.

43 Submission 49.

44 Ibid.

45 Submission 44.

46 Submission 45.

47 Submissions 23, 32, 37, 53.

Several respondents also referred to the need for appropriate seating for child witnesses.[48] A District Court Judge observed:[49]

> The accused's dock and the witness box are constructed for adults. When dealing with small children, it is impossible to even see the children when they are sitting in the dock or witness box. Similarly, the children are unable to see the barrister asking them questions, and they only have an obstructed view of the jury and the Judge.

These concerns are confirmed by the findings of a taskforce convened by the Attorney-General of New South Wales to report on ways of reforming the law with a view to facilitating the reception of evidence given by children. The taskforce concluded that:[50]

- courtroom architecture is often unsuited to child witnesses, since bench, jury box and witness box areas are usually elevated, the witness seat is frequently non-adjustable and witness box fascias and bench tops are higher than is comfortable for a child;

- courtroom architecture, together with the fact that child witnesses are typically softly spoken, may make it difficult for a child's evidence to be clearly audible to the judge or magistrate, the lawyers and the jury, if any. The need to constantly repeat answers may make it more distressing for the child to give evidence.

The taskforce made the following recommendations:

> all new courtroom designs incorporate profiles and elevations of furniture and fixtures accommodating of child witnesses;[51]
>
> the witness position be provided with a gaslift chair (non-swivel, with arms) to accommodate both adult and child witnesses suitably and comfortably;[52]
>
> microphones at the witness position in courtrooms be amplified and distributed to provide that a child's testimony is audible to key positions in the courtroom (that is, bench, bar table, jury box and dock).[53]

48 Submissions 17, 20, 23, 29, 37, 47, 49, 53.

49 Submission 17.

50 NSW Attorney-General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at paras 5.4.1, 5.4.3.

51 Id, Recommendation 8 at 43.

52 Id, Recommendation 9 at 43.

53 Id, Recommendation 10 at 44.

4. POWER TO EXCLUDE PEOPLE FROM THE COURT

It is fundamental to our understanding of the concept of justice that, as a general rule, court proceedings are open to the public. The principle underlying this rule has been explained by the House of Lords:[54]

> The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent to both parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect.

This view has been endorsed by the High Court of Australia:[55]

> This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuse may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character.

However, there are exceptions to the general rule. The House of Lords recognised that there were certain kinds of case in which justice could not be done if they were heard in public:[56]

> … the exceptions are themselves the outcome of a yet more fundamental principle that the object of Courts of justice must be to secure that justice is done. … It may often be necessary, in order to attain its primary object, that the Court should exclude the public. … As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield.

Another member of the House of Lords observed:[57]

> It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.

In Queensland, the test has been expressed in the following terms:[58]

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54 *Scott v Scott* [1913] AC 417 per Lord Atkinson at 463.

55 *Russell v Russell* (1976) 134 CLR 495 per Gibbs J at 520. See also per Stephen J at 533.

56 *Scott v Scott* [1913] AC 417 per Viscount Haldane LC at 437-438.

57 Id per Earl Loreburn at 446.

58 *R v His Honour Judge Noud, ex parte MacNamara* [1991] 2 Qd R 86 per Williams J at 106.

> Thus it appears that the court should only depart from the basic principle that proceedings take place in public, and without any limitation thereon, if [it] is positively established to the court that without such direction justice could not be done because of the grave difficulty in having the witnesses come forward in cases of that type.

In addition to the exceptions to the general rule which are recognised at common law, further exceptions may be created by legislation:[59]

> The policy of widening the area of secrecy is always a serious one; but this is for Parliament, and those to whom the subject has been consigned by Parliament, to consider.

Further, the category of such exceptions is not closed to the Parliament:[60]

> The need to maintain secrecy or confidentiality, or the interests of privacy or delicacy, may in some cases be thought to render it desirable for a matter, or part of it, to be held in closed court.

In certain circumstances, it may be desirable for the court to have power to restrict who may be present while a child testifies. Protecting the child from the potential embarrassment of revealing personal details in public may promote the overall interests of justice by encouraging and assisting the child to give evidence which may not otherwise be forthcoming.

A study commissioned by the Judicial Commission of New South Wales concluded:[61]

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

At present, section 21A of the *Evidence Act 1977* (Qld) allows the court, in certain circumstances, to restrict who may be present in court when a young child gives evidence.[62] However, section 21A does not apply if the witness is 12 years of age or

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59 *Scott v Scott* [1913] AC 417 per Lord Shaw of Dunfermline at 485.

60 *Russell v Russell* (1976) 134 CLR 495 per Gibbs J at 520.

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

62 Section 21A(2)(b) of the *Evidence Act 1977* (Qld) provides that, where a special witness is to give or is giving evidence in any proceeding, the court may order "that, while the special witness is giving evidence, all persons other than those specified by the court be excluded from the room in which it is sitting".

above, unless the child is a "special witness".[63]

The power conferred by section 21A is discretionary.[64] In South Australia, on the other hand, the court has no discretion in a case of alleged sexual assault against a child. The people who may be present in court are prescribed by legislation and the court must make an order excluding all persons except:[65]

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

The idea of legislation which allows a court to exclude the general public while a child gives evidence is not new. Almost a hundred years ago, legislation enacted in the United Kingdom provided for the exclusion of the public in the trial of offences contrary to decency or morality during the giving of evidence of a child or young person.[66]

In the Discussion Paper, the Commission sought submissions on the questions of whether there should be restrictions on who is present in court when a child complainant gives evidence and, if so, whether the power to exclude should be a discretionary one.[67]

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63 Section 21A of the *Evidence Act 1977* (Qld) was amended by s 46 of the *Criminal Law Amendment Act 2000* (Qld), which received Royal Assent on 13 October 2000. Section 21A(1)(b), as amended, defines a "special witness", other than a child under the age of 12, as:

> a person who, in the court's opinion -
>
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
>
> if required to give evidence in accordance with the usual rules and practice of the court.

"Relevant matter" is defined in s 21A(1) as the person's "age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant".

64 See also *Supreme Court Act 1986* (Vic) s 19(e), *Magistrates' Court Act 1989* (Vic) s 126 and Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) Recommendation 114 at 348, recommending that courts should have a discretion to exclude from the court any or all members of the public if necessary to prevent undue distress to a particular child witness.

65 *Evidence Act 1929* (SA) s 69(1a).

66 *Children Act 1908* (UK) s 114, cited by Lord Shaw of Dunfermline in *Scott v Scott* [1913] AC 417 at 485.

67 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 93.

There was considerable support amongst respondents for a restriction on the people allowed to be in court during the evidence of a child witness.[68] The Director of the Social Work Department at the Royal Children's Hospital explained:[69]

> A child complainant is already under considerable duress by the instigation of the legal processes. To expect disclosure, yet again, in such a formidable setting, in front of 'strangers' as well as family members, court staff, and of course, the accused, is unrealistic and may, on occasion, be counterproductive. Disclosing can not only be very painful for the child witness, it can also be very embarrassing. Child witnesses should be afforded the court's protection from embarrassment and/or distress in this matter by excluding members of the public.

Of these submissions, the majority favoured the enactment of legislation specifying who may be present, rather than a discretionary power to exclude.[70] The former Director of Public Prosecutions expressed the view that any legislative provision should apply to child witnesses up to the age of 18 years.[71]

Of the respondents who addressed this issue, only one suggested that the enactment of legislation to control who could be present in the court was unnecessary. The Queensland Council for Civil Liberties considered that an existing provision in the *Criminal Law (Sexual Offences) Act 1978* (Qld) dealt adequately with the situation.[72]

Section 5 of that Act provides:

> **Exclusion of public**
>
> 5.(1) Whilst a complainant is giving evidence in any examination of witnesses or trial, the court shall cause to be excluded from the room in which it is then sitting all persons other than -
>
> (a) the counsel and solicitor of the complainant;
>
> (b) the defendant and the defendant's counsel and solicitor;
>
> (c) a Crown law officer or a person authorised by a Crown law officer;
>
> (d) the prosecutor;
>
> (e) any person whose presence is, in the opinion of the court, necessary or desirable for the proper conduct of the examination or trial;
>
> (f) any person whose presence will provide emotional support to the complainant;

68 Submissions 2, 7, 12, 19, 20, 23, 25, 29, 32, 47, 49.

69 Submission 47.

70 Submissions 2, 20, 25, 29, 32, 49.

71 Submission 32.

72 Submission 40.

(g) where the complainant is under or apparently under the age of 17 years - the parent or guardian of the child unless, in the court's opinion, the presence of that person would not be in the child's interest;

(h) any person who makes application to the court to be present and whose presence, in the court's opinion -

(i) would serve a proper interest of the applicant; and

(ii) would not be prejudicial to the interests of the complainant.

(2) The provisions of subsection (1) shall be construed so as not to prejudice the power of the court had under any other provision or rule of law to exclude from the room in which it is sitting any person, including a defendant.

5. ROBES AND WIGS

The traditional robes and wigs worn by judges and barristers may be foreign to the experience of child witnesses, especially if they are very young, and may appear frightening or intimidating. In one incident reported to the Commission:[73]

> … the [prosecutor] leant towards the child and said, "There's absolutely nothing to fear," as he stood over the girl with his black cape and wig.

The complainant, who was about 6 years old, was so terrified she was unable to take the stand, even though the barrister's approach was well meant and his intention kind.

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recognised the effect which formal court dress might have on a child witness.[74] They recommended that a court should have a discretion to require the removal of wigs and gowns if necessary to prevent undue distress to a particular child witness.[75]

Some Australian jurisdictions have provisions relating to court dress. In Victoria, legislation provides that the court may direct legal practitioners not to robe and to be seated while examining or cross-examining a complainant.[76] In Western Australia, where the whole or part of the evidence of a child witness may, in certain circumstances, be pre-recorded on videotape,[77] judicial guidelines require the judge

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73 Submission 24.

74 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) para 14.116 at 347.

75 Id, Recommendation 114 at 348.

76 *Evidence Act 1958* (Vic) s 37C(3)(d), (e). The section is not limited to child complainants.

77 See pp 160-164 of this Report.

and counsel to wear formal court dress if only part of the child's evidence is pre-recorded, so as to ensure consistency for the jury when the rest of the child's evidence is given at trial. However, when the whole of the child's evidence is videotaped before the trial commences, wigs and bibs may be discarded, since they are inconsistent with the less formal setting and may be intimidating to the child witness.[78]

In the Discussion Paper, the Commission asked whether the wearing of wigs and gowns should be left to the discretion of the judge or whether a protocol should be adopted requiring less formal attire when children appear as witnesses.[79]

Several respondents favoured the adoption of a protocol requiring less formal court dress when children are giving evidence.[80] The former Director of Public Prosecutions was of the view that wigs should be dispensed with, but that the question of whether gowns should be worn should be left to the discretion of the court and would depend largely on the age of the child.[81] Four other respondents, two of whom were PACT volunteers, considered that the issue could be left to the discretion of the trial judge.[82] One PACT volunteer observed:[83]

> Some children find formal court attire more impersonal and therefore more acceptable, while others find it intimidating. Maybe [the] child's view could be ascertained on this question before proceedings start.

The other PACT volunteer commented:[84]

> The wearing of wigs and gowns does not seem to worry the children, they appear to be quite interested in this protocol.

This diversity of views was also reflected in the comments of children and young people consulted by a group of non-government organisations for the purposes of their submission:[85]

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78 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes and Other Means for the Giving of Evidence* (May 1998) at para 3.6. See Chapter 9 of this Report in relation to pre-recording the evidence of a child witness on videotape.

79 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 94.

80 Submissions 2, 19, 23, 25, 27, 49, 51.

81 Submission 32.

82 Submissions 7, 12, 20, 53.

83 Submission 12.

84 Submission 20.

85 Submission 33.

> Most children described the court experience as dark, sombre, tense and scary with one expressing the view that "the black robes were a bit much". A number of young teenagers, however, said that they did not mind the elevated seating or the black robe and wig of the judge, as they became used to it fairly quickly and it bestowed a sense of authority on the judge.

One respondent suggested that wigs and gowns may not themselves be intimidating, but that they may exacerbate stresses caused by other factors:[86]

> There is a need for some formality or else the seriousness of the entire proceeding may not be conveyed. However it would appear that current formalities may be intimidating. The presence of a support person[87] may alleviate this intimidation. It is perhaps more likely to be the nature of cross-examination that will be intimidating than the actual wigs and gowns, but if cross-examination is intimidating it may be that the wigs and gowns compound that.

On the other hand, a judge of the District Court of Western Australia, who has had considerable experience in matters involving child witnesses, was of the view that robes and wigs should always be worn:[88]

> Children have expectations that the judge will be dressed in a certain way, counsel in another way and that both will be distinctive from other persons, such as the jury, witnesses etc. Alteration of that regime confuses and may frighten them.

6. THE COMMISSION'S VIEW

In this Report, the Commission has made a number of recommendations about alternative ways for child witnesses to testify. If implemented, these recommendations would reduce the need for children to appear in a courtroom to give their evidence.[89] However, there will still be some occasions when it is necessary for a child witness to give direct testimony. In such a situation, it is important that, where possible, measures be taken to relieve the child's anxiety by minimising the impact of the court environment on the child, so that the child is able to present his or her evidence as effectively as possible.

The Commission's views on aspects of the actual court environment are set out below. The Commission also believes that preparing child witnesses for the experience of giving evidence by adequate familiarisation with the legal process, the role of the various participants, court procedures and the courtroom layout would greatly assist in reducing the level of stress felt by child witnesses.[90]

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86 Submission 37.

87 See Chapter 5 of this Report for a discussion of support persons.

88 Submission 54.

89 See Chapters 8, 9 and 10 of this Report.

90 These issues are discussed in Chapter 5 of this Report.

(a) Waiting facilities

The Commission agrees that it is totally inappropriate for a child witness to have to share facilities or come in contact with a person against whom the child is giving evidence or that person's supporters.

In the Commission's view, child witnesses should be able to wait in a comfortable, age-appropriate facility where their privacy is secure. If it is not possible for such a facility to be made available within the court precinct, even on a temporary basis, then alternative arrangements should be made for a child witness who is waiting to give or to continue giving evidence.

Future courtroom design should take into consideration the desirability of providing an alternative means of access to the court for children and other vulnerable witnesses. In existing facilities, the party who calls the child as a witness should ensure that, if it is necessary for the child to give evidence in the courtroom or if the child chooses to do so,[91] the child is not inadvertently exposed to unwanted contact with people connected with the case.

(b) The courtroom

The Commission believes that it is unreasonable to expect child witnesses to be able to give evidence if they are not seated comfortably and are unable to see over the edge of the witness box. Moreover, it is important, particularly in relation to a criminal prosecution in which the child is the complainant or a significant prosecution witness, that the presiding judicial officer, the jury, if any, and the defence be able to observe the child as he or she gives evidence. In the view of the Commission, provision should be made to ensure that appropriate seating arrangements can be made available in a courtroom where a child witness is to appear.

The Commission also believes that it is to be expected that children who are ill at ease in their surroundings will lack confidence and that consequently child witnesses may speak softly and indistinctly. Further, it is unlikely that a child witness who feels intimidated by the courtroom environment will be reassured by constant demands for repetition of inaudible responses. A courtroom in which a child witness appears should therefore be equipped with adequate means of amplification so that the child can be clearly heard.

The Commission understands that, in the past year, sound amplification equipment has been installed in six District Courts in Brisbane, and that six portable amplifiers have been provided and are available for use in both Brisbane and circuit centres.

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91 See Chapter 10 of this Report for the Commission's recommendations in relation to the use by child witnesses of closed-circuit television to give their evidence.

Extra funding has been provided this financial year to install the necessary equipment in more of these courts.[92]

(c) Power to exclude people from the court

The Commission acknowledges that it is important that court proceedings should be seen to be conducted fairly. However, the Commission believes that there are circumstances in which the public interest in open court proceedings may be outweighed by other factors.

The Commission considers that the need to facilitate the giving of evidence by child witnesses is, in certain types of case, such a situation. The Commission accepts the likelihood that, in prosecutions for sexual offences, a child witness may be unwilling or may find it impossible to give evidence in public about the sensitive and personal matters which may be involved. In the view of the Commission, it is not only very young children who are likely to be adversely affected if they are required to give evidence of this kind in open court. The Commission has therefore reached the conclusion that, consistently with the provisions of the *Criminal Law (Sexual Offences) Act 1978* (Qld), the *Evidence Act 1977* (Qld) should also specify the people who may be present in court when a complainant or other witness who is a child is giving evidence about the alleged commission of a sexual offence. The Commission is also of the view that the provision should apply not only to a child who gives evidence in the actual courtroom, but also to a child whose evidence is presented by means of closed-circuit television.[93] In the latter situation, although the child may not be able to see everyone who is in the courtroom, the knowledge that there are members of the public present may inhibit the child's ability to relate his or her account of events.

There may also be other situations, for example cases involving allegations of domestic violence in the child's family, where the child may be too afraid or embarrassed to testify to an open court. The Commission is of the view that, in criminal proceedings for offences of violence, in civil proceedings arising from the commission of an offence of a violent or sexual nature or in proceedings for domestic violence orders, the court should have a discretion to exclude persons from the court. The discretion should also apply if the child is giving evidence by means of closed-circuit television.

(d) Robes and wigs

The Commission recognises that the reaction of a child witness to the traditional court attire will depend upon the child in question. While some children

92 Memorandum from the Executive Officer of the Courts Division of the Department of Justice and Attorney-General to the Director of the Commission, 20 November 2000.

93 See Chapter 10 of this Report for a discussion of the use of closed-circuit television by child witnesses.

understandably feel intimidated by robes and wigs, others may regard them as an integral part of the court experience and be confused if they are not worn.

The Commission therefore considers it desirable to retain flexibility with regard to the wearing of formal court dress. In the view of the Commission, the court should retain a discretion to decide whether or not robes and wigs should be worn when a child witness gives evidence. However, in exercising this discretion, the court should take into consideration the need for consistency if the child's evidence is presented partly in the form of a pre-recorded videotape, with further examination to take place at the actual hearing.[94]

7. RECOMMENDATIONS

The Commission makes the following recommendations for modification of the courtroom environment to facilitate the evidence of child witnesses:

2.1 Child witnesses should be provided with a waiting area which is comfortable and age-appropriate and where their privacy is secure. If there is no suitable facility available within the court precinct, then the party calling the child as a witness should be responsible for making and incurring the costs of alternative arrangements.

2.2 A courtroom in which a child witness gives evidence should be equipped with:

- **a suitable chair, which enables the child to be seated comfortably; and**
- **adequate amplification to enable the child to be clearly heard.**

2.3 Future courtroom design, including furniture and fittings and means of access, should take into consideration the needs of child witnesses.

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

- **deleting section 21A(2)(b);**
- **inserting a new provision, which should apply to a complainant or other witness who is a child, equivalent to section 5 of the *Criminal Law (Sexual Offences) Act 1978* (Qld); and**

94 See Chapter 9 of this Report for a discussion of pre-recorded evidence.

- **inserting a new provision to the effect that, in a criminal proceeding for an offence of violence, in a civil proceeding arising from the commission of an offence of a violent or sexual nature or in a proceeding for a domestic violence order, the court has a discretion to exclude from the courtroom while a child witness is giving evidence all persons other than those specified by the court.**

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

CHAPTER 3

DELAYS

1. INTRODUCTION

Children who are required to appear as witnesses in court proceedings often are faced with a considerable delay between the time when they experience or observe the incident to which the proceedings relate and the time when they are asked to recall details of the event in court.

Studies in the United Kingdom have recorded average delays of between six and ten and a half months.[95] These figures are consistent with data maintained by the Queensland volunteer child witness support organisation, Protect All Children Today (PACT). In a preliminary submission to the Commission, PACT advised that, from the point of view of children who give evidence, unacceptable delays exist throughout the criminal justice process.[96] Delays can occur between complaint and charge, between charge and committal and between committal and trial. There may also be delay during the trial process. Unfortunately, however, it is difficult to estimate accurately the extent of these delays, as few official statistics are kept.

In the Discussion Paper,[97] the Commission sought information about the extent of and reasons for delays in cases involving child witnesses, and the effect of any such delays on the children concerned and their ability to give evidence.[98]

2. DELAY PRIOR TO CHARGE

In some cases of alleged sexual abuse, there may be a significant period of time between when the alleged abuse took place and when a complaint was made. There may be further delays after a complaint has been made, perhaps because of difficulty in locating the alleged offender,[99] or because the alleged perpetrator refuses to be interviewed,[100] or because of the time taken to investigate the

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95 Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 299.

96 Preliminary submission 40.

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

98 Id at 111.

99 Submissions 32, 49.

100 Submission 49.

complaint.[101] Other reasons for delay may be that police investigators are seeking advice from their superiors as to whether charges should be laid, or that they are awaiting the results of scientific examination of exhibits.[102]

3. DELAY BETWEEN CHARGE AND COMMITTAL

A committal proceeding is a preliminary hearing, usually before a magistrate,[103] 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.[104]

Information provided to the Commission is to the effect that, in the Brisbane region, the time between arrest and a committal mention is usually 6 weeks and that committals are usually disposed of in 2 to 3 months,[105] although the majority of committals are disposed of more within a two month time limit.[106] These figures are generally consistent with PACT findings that the standard waiting time for children who are required to give evidence in Queensland courts is 3 months to committal.[107]

In an effort to minimise delays in the commencement of committal proceedings, a Committals Project has been established involving close liaison between representatives of the Magistrates Court, the Office of the Director of Public Prosecutions, Police Prosecutions and the Legal Aid Office, to ensure the case management of committals from their earliest mention to their conclusion and transfer to higher courts.[108] The Chief Stipendiary Magistrate informed the Commission that:[109]

> The officers who meet regularly on this issue … are constantly striving to streamline the process as much as possible but … it is not possible to contract the process much more than is currently being processed. Such things as the necessity for police prosecutors to complete the collection of statements from witnesses and prepare their own statements takes time, especially given the pressures on police prosecutors' time.

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101 Submission 40.

102 Submission 53.

103 A single justice of the peace (magistrates court) is also able to hear a committal: *Justices Act 1886* (Qld) s 104 and *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(b). See also Queensland Law Reform Commission, Report, *The Role of Justices of the Peace in Queensland* (R 54, December 1999).

104 See Chapter 12 of this Report for a discussion of the committal process.

105 Meeting between representatives of the Commission and Mr Deer CSM and Mr Pascoe SM, 23 April 1998.

106 Letter to the Commission from Ms D Fingleton CSM, 5 October 1999.

107 Submission 33.

108 Letter to the Commission from Ms D Fingleton CSM, 5 October 1999.

109 Ibid.

4. DELAY BETWEEN COMMITTAL AND TRIAL

The District Court is the principal trial court for persons charged with serious offences under the *Criminal Code*. Most criminal trials before a judge and jury are conducted in the District Court.[110] In 1998-1999, the time taken in Brisbane for disposal of matters in the criminal jurisdiction of the District Court from presentation of indictment to completion of trial or sentencing was under 6 months for 80% of cases.[111]

In the Supreme Court, where the most serious criminal offences are tried, the time from presentation of indictment to completion of trial was under 6 months in 60% of cases during the same period. The remaining 40% were disposed of in under 12 months.[112]

According to PACT's records, the usual waiting time in prosecutions for sexual offences against children is approximately twelve months from committal to trial.[113] Other organisations concerned with children giving evidence in such cases made similar observations, citing periods of 12 to 18 months between the initial statement to police and the matter coming to trial.[114] Officers of Families, Youth and Community Care Queensland have experienced delays of approximately 12 months between committal and trial.[115]

Reasons suggested by respondents to the Discussion Paper for these delays included:

- inadequate resourcing for the legal, police, health and child protection systems;[116]
- the defence not being ready to proceed;[117]
- administrative practices, such as the late allocation of a prosecutor, within the Office of the Director of Public Prosecutions;[118]

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110 The District Court has jurisdiction for indictable offences except murder, attempted murder, manslaughter and serious drug offences: *District Court Act 1967* (Qld) s 61.

111 District Court of Queensland, *Annual Report* (1998-1999) at 3.

112 Supreme Court of Queensland, *Annual Report* (1998-1999) Table 13 at 29.

113 Submission 33.

114 Ibid.

115 Submission 49.

116 Ibid.

117 Submission 20.

118 Submission 40.

- legal tactics,[119] particularly by defence counsel.[120]

There may also be delays once a matter has been listed for trial. A New South Wales study found that a case may be listed for hearing on a number of occasions and that, in New South Wales, approximately 30% of cases involving child witnesses are not heard on first listing.[121] This finding is supported by the experience of a Queensland PACT volunteer who gave the following examples:[122]

Committal date	First listing	Hearing date
16.4.96	14.10.96	24.3.97
4.3.97	29.10.97	3.2.98
31.7.97, 12.9.97	20.4.98	6.7.98[123]
20.2.98	2.11.98	2.11.98
20.3.98	9.11.98	9.11.98
29.1.98	16.11.98	16.11.98

The Commission understands that attempts are made in the Queensland Supreme Court and District Court to ensure that matters involving child complainants or witnesses are listed for hearing as soon as possible. Further, when the matter involving a child is given a trial date, attempts are made to ensure that the case is set down as the first or second trial on the list for the day.[124]

5. THE EFFECT OF DELAYS BEFORE TRIAL

There are two issues of considerable concern relating to delay between the happening of an event and the retelling of the event in court by a child witness.

The first issue of concern, which relates to the child's welfare, is the prolonging of any trauma suffered by the child as a result of experiencing or witnessing the event. While the court proceedings continue the child may be unable to effectively put the incident behind him or her and, where necessary, to begin the process of healing. In some cases, therapeutic counselling may be postponed in order to avoid allegations that the child's evidence has been tainted by suggestion.[125]

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119 Submission 25.

120 Submissions 31, 49.

121 Cashmore J, *The Evidence of Children* (Judicial Commission of New South Wales, 1995) at 57.

122 Submission 20.

123 The trial did not proceed because the family had "had enough and cleared out of home and left the district".

124 Meeting between a representative of the Commission and the Listing Clerk of the District Court at Brisbane, 4 November 1998.

125 See Chapter 6 of this Report.

The second issue of concern, which relates to the reliability of the child's evidence, is the effect of the delay on the child's memory. Studies vary in their interpretation of experiments designed to test the ability of children to recount details of events some time after they happened. Some researchers have found that children are susceptible to "memory fade" over a period of time, while others believe that even very young children are able to give accurate detailed accounts of their personal experiences after extended periods.

There is research which indicates that, although "children, including very young children, are able to remember and retrieve from memory large amounts of information (especially when the events are personally experienced and highly meaningful), … children (and adults to a lesser degree) have significant memory loss after long delays".[126]

In one study, a group of 10 and 11 year olds was shown a film of a theft. When the children were questioned about it 2 months later, the amount of information they remembered had decreased, although the accuracy of the recall was maintained.[127] In another study, a group of 5 year olds was taken on a museum trip. When the children were 11 years old, their memories of the trip were tested. This study concluded that, while the delay had reduced the amount of information recalled, with appropriate cues, the children could recall details of their trip 6 years after the event.[128]

Another study, however, raises questions about the accuracy of children's recall after a significant period of time. The experiment involved four age groups - 4, 6, and 8 year olds, and adults. When interviewed a week after witnessing a staged event the children, in response to open-ended questions, remembered the event just as accurately as the adults. The subjects were interviewed again 2 years later. The researchers found that all three age groups of children were less accurate. Of the information volunteered by the members of the youngest group, who were 6 when they were interviewed for the second time, 25% was inaccurate. The inaccuracy rate for the children who were 8 at the second interview was 19% and, for the children who were 10 at the second interview, the inaccuracy rate was 17%. The inaccuracy rate for the adult group after 2 years was 7%.[129]

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126 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.20, referring to Ceci S and Bruck M, "Suggestibility of the child witness: a historical review and synthesis" (1993) 113 *Psychological Bulletin* 403 at 434. See also Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 299-301.

127 Dent HR and Stephenson GM, "Identification Evidence: experimental investigations of factors affecting the reliability of juvenile and adult witnesses" in Farrington D, Hawkins L and Lloyd-Bostock S (eds), *Psychology, Law and Legal Process*, referred to in Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 299-300.

128 Hudson J and Fivush R, "As time goes by: Sixth graders remember a kindergarten experience" 5 *Applied Cognitive Psychology* 347 at 347-360, referred to in Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 300.

129 Poole DA and White LT, "Two Years Later: Effects of Question Repetition and Retention Interval on the Eyewitness Testimony of Children and Adults" (1993) 29 *Developmental Psychology* 844-853, referred to in McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 62-63.

One reviewer, summarising the literature, observed:[130]

> The findings on children's long-term memory certainly confirm the presence of memory-fade and cast doubt on the accuracy of the entirety of a child's recollection of an event that occurred months or years ago.

On the other hand, a further study found that very young children are able to give "accurate, detailed accounts of their personal experiences even after extended periods of time".[131] This project was a longitudinal study of preschoolers' memories of personally experienced events at four time points across a two and a half year period from 3 years 4 months to 5 years 10 months. The study focused on spontaneous verbal recall without the use of prompts or cues, and without giving misleading or suggestive information. The research revealed that the children's accounts were highly likely to be inconsistent on different recall occasions:[132]

> While the total amount of information recalled about specific events does not seem to change over time, children recall different information each time they recount an event.

The researchers noted that inconsistency is not the same as inaccuracy,[133] but attributed the inconsistent accounts to the children's difficulty in expressing their memories verbally:[134]

> It is possible that children are able to remember a great deal about a past event but have difficulty putting what they remember into words. This process may be difficult enough that it exhausts young children's ability to recount all that they remember. … It seems that, although children can tell *a* coherent story about a personal experience, they have not yet developed *the* coherent story about that experience.

Whether delay has an actual effect on the child's reliability as a witness or whether it results in an adverse and possibly unnecessary impression of the child's credibility, it is likely to expose the child to more rigorous cross-examination. In cases where the child is the complainant, the child may feel that he or she is being re-victimised by the legal system and may be unable to continue to give evidence effectively or may even refuse to testify further.

The submissions received by the Commission in response to its Discussion Paper[135] confirm the undesirable effects for child witnesses of delay in bringing matters to court.

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130 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 64.

131 Fivush R and Shukat JR, "Content, Consistency, and Coherence of Early Biographical Recall" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 22.

132 Id at 17.

133 Id at 22.

134 Id at 20-21.

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

A number of respondents commented on the adverse impact of delay on the child's psychological development or recovery.[136]

A PACT volunteer observed:[137]

> Delays between first complaint and completion of case have a very detrimental effect on a child, whose only wish is to end the trauma, but is unable to forget the matter until the trial is ended …

A church welfare agency expressed the view that:[138]

> Long delays will only serve to increase the child's anxiety and, in some situations, guilt surrounding the event.

A psychologist described the effect of delays, particularly repeated cross-examination over several months:[139]

> Where recovery has commenced, the child's natural processing of the events proceeds at a faster rate and as a result requires them to move on. This has led to a feeling of being repeatedly dragged back, when their need is to be able to move on conflicts with legal process. The result has been increased distress, resentment, opposition from the child re giving evidence. Medically, this is like leaving a broken limb so long that it heals naturally and has to be rebroken in order to be reset, doubling the pain and recovery.
>
> Where recovery has not commenced, the impact is to keep the child emotionally fragile, increasing the stress the child is under and compounding the traumatic impact of events.

The Children's Commission also referred to the psychological effect on the child:[140]

> While children are waiting to appear in court, the anticipated ordeal of giving evidence frequently overshadows everything they do. It often limits their capacity to come to terms with what has occurred and prevents them developing new interests and taking on new challenges, or in some cases, just continue with their lives as they were, to the extent that some children even stop attending school. The result is that, for many children, at a crucial stage of their cognitive, emotional and social development until the trial is over, their lives are effectively on hold. [notes omitted]

A submission co-ordinated by the Children's Commission on behalf of a group of non-government organisations concerned with child welfare and of a number of children and young people who were consulted noted:[141]

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136 Submissions 12, 23, 25, 30, 31, 32, 33, 42, 47, 49.

137 Submission 12.

138 Submission 23.

139 Submission 25.

140 Submission 31.

141 Submission 33.

> For children whose counselling is held over until after the trial, the frequent delays and adjournments extend the period of time for which they remain untreated and essentially carry the burden of the abuse on their own.

Respondents were also concerned about the effect of delay on the quality of children's testimony, and on the credibility of child witnesses.[142]

A PACT volunteer commented:[143]

> After a period of 2 years between an offence and trial, children are not able to focus well on times and dates. If this issue is disputed and emphasised by defence and the child is made to appear confused and unreliable, he/she tends to become withdrawn and nervous, so does not answer further questions well.

Queensland Health observed:[144]

> Delays have the effect of diminishing a child's capacity to recall events, increasing the likelihood of children and families not wishing to continue with prosecutions; and compound existing stress within families. These effects ultimately impact upon children's behaviour and functioning, both inside the court and subsequently.

The Queensland Branch of the International Commission of Jurists submitted:[145]

> Children are prone to, over time, become more forgetful, confuse reality with imagined, confuse what they have seen with what they have heard, and be susceptible to misleading intrusions. In short, they become less confident in their memories and more reliant on questions to cue their answers. … children's memory responses after a delay represent gist information at the expense of specifics. In all, the child's evidence will be less believable, reliable, and credible after delays of more than a few months. [note omitted]

The Queensland Branch of the Australian Medical Association expressed the view that:[146]

> Delay affects the ability of child complainants to present their evidence effectively to a very significant extent. … As well, the ability of child complainants to objectively recount a situation, particularly one of some trauma, is affected over time, although their memory of such situations remains constant.

Families, Youth and Community Care Queensland also observed that:[147]

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142 Submissions 5, 12, 19, 20, 23, 29, 30, 32, 37, 42, 45, 47, 49, 53.

143 Submission 12.

144 Submission 30.

145 Submission 37.

146 Submission 42.

147 Submission 49.

> Delays … potentially undermine the possibility of a successful prosecution, as each delay may effect the ability of children to provide accurate recall. Research on children's memory suggests that recall of the essential features of the matter, ie the abusive experiences themselves, will not be diminished by delays, but that peripheral facts - the clothing worn, the room furnishings, the television program which was on - which are so often focussed on in the search for inconsistencies which may undermine the child's credibility, may begin to erode in the child's memory.

6. MINIMISING THE EFFECTS OF DELAY BEFORE TRIAL

In the Discussion Paper,[148] the Commission emphasised the importance of minimising the delays which occur before a child gives evidence.[149]

The submissions received in response to the Discussion Paper identified a number of measures which could be implemented to minimise the delays which occur before the commencement of a trial in which a child is the complainant or a significant witness.

Several respondents referred to the need to prioritise cases involving child witnesses, particularly complainants.[150]

The Children's Commission commented that "all parties need to review their processes and prioritise these matters".[151] It advocated priority:

- in the preparation of briefs by police;
- in listing by the Magistrates Court;
- in the preparation of indictments by the Director of Public Prosecutions;
- in the preparation of the defence case; and
- in listing in the District Court.

The Queensland Council for Civil Liberties proposed the following "relatively simple administrative steps":[152]

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

149 Id at 109.

150 Submissions 20, 23, 30, 31, 32, 33, 34, 40, 41, 44, 45, 47, 49.

151 Submission 31.

152 Submission 40.

- Obliging police and prosecution services to comply early with the duty of disclosure. A certificate of disclosure such as operates in New South Wales with the Director of Public Prosecutions and police certifying that all material has been handed to the defence would assist in speeding up the resolution of a trial.

- The early presentation of an indictment by the Director of Public Prosecutions within 4-6 weeks of the conclusion of the committal hearing would assist the early listing of a trial.

- The appointment of a Director of Public Prosecutions prosector to handle a child sex accusation prosecution from committal through to trial so that the same person is responsible for handling the matter within the Office of the Director of Public Prosecutions would significantly speed up the resolution of the court process.

A number of respondents raised the possibility of separate listing procedures for cases involving child complainants.[153] These submissions echoed the recommendation of the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission to the effect that:[154]

> When setting hearing dates, courts should give priority to cases involving child witnesses and set a fixed date for the evidence of the child. The prosecutor or legal representative for a party calling a child as a witness should be required to inform the court that a child is scheduled to appear so that the court can … prioritise the matter and set the trial for a specified time rather than allocating it to a rolling list.

However, two respondents commented on the resource implications of these proposals.[155]

The former Director of Public Prosecutions, while noting that attempts are made to give priority to cases where there are child witnesses, made the following observation about difficulties at a practical level:[156]

> … circumstances will sometimes require the matter to be adjourned and there will then be a new hearing date set, but, unfortunately, it will be some time off because other cases have already been given fixed starting dates. In other words a case that was once at the top of the ladder might slip down to the lowest rung.

153 Submissions 30, 31, 41, 45, 49, 53.

154 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 96 at 320.

155 Submissions 41, 45.

156 Submission 32.

7. DELAYS IN THE COURSE OF COURT PROCEEDINGS

Once proceedings have commenced, there may be delays which adversely affect a child witness.

A child may be called as a witness for a particular day and be required to stay in the court precinct until he or she is called to give evidence. The child may have to wait some time if there are other witnesses to appear before the child on that day.

There may also be breaks or adjournments during which the child's evidence is interrupted. The child may have to resume giving evidence later in the day or on another occasion.

A number of respondents commented on the adverse effects on child witnesses of delays during court proceedings.

One submission, from a youth counselling service in a busy regional centre, recounted an incident where five child complainants alleging sexual abuse had to wait for a total of about eight hours before being called to give evidence. Four were so traumatised by the experience that they were unable to take the stand.[157]

The Children's Commission observed:[158]

> Long delays on the day result in children becoming tired and bored and more anxious, with the result that they are usually poorer witnesses by the time they finally appear. [note omitted]

There was support for the idea that child witnesses could be placed on "standby" and not required to wait at the court[159] and that, where possible, child witnesses should be scheduled to testify early in the day to reduce waiting times and to minimise their anxiety.[160]

The Bar Association of Queensland noted:[161]

> The question of when and how a child is produced at Court is exclusively within the province of the Crown Prosecutor. …
>
> There should be a protocol for Crown Prosecutors which focuses upon the need to arrange the appearance of a child at Court in a way which is conducive to the child giving his/her best evidence. If the protocol requires a brief adjournment whilst the

157 Submission 24.

158 Submission 31.

159 Submissions 24, 30, 33, 40.

160 Submissions 27, 33, 31, 40, 50.

161 Submission 53.

> child is brought to Court, so be it. The prudent course for Crown Prosecutors is to produce the child at 10.00am on a particular day during the trial, rather than to call the child to give evidence late in the day, thus requiring the child to return to Court the following day.

8. OTHER CONSEQUENCES OF DELAY

Two submissions referred to the likelihood that delays may cause such frustration that a child complainant and his or her family do not wish to proceed with the complaint.[162]

Another respondent expressed the view that:[163]

> A more relevant consequence of delay for the child and ultimately for the prosecution of the offence is the child's experience of the consequences of disclosure. Threats made by offenders at the time of the offence (the child would be removed to a foster home, would never see their siblings again, that their mother would not believe them, that the family would have to move or would lose their home) often progress in this time to painful realities for children who have disclosed abuse. The result, described in Roland Summit's "The Child Sexual Abuse Accommodation Syndrome" … is that up to 30% of children who disclose sexual abuse subsequently retract their allegations. The majority of these retractions are a result of the children's post-disclosure experiences. The end result is the suspension or termination of proceedings and a heightened vulnerability for the children who have been failed by the legal system. The research available on children who recant allegations also indicates that over 90% of those children re-disclose that the abuse did occur at a later date.

9. THE COMMISSION'S VIEW

The Commission recognises the importance for both the welfare of the children concerned and the overall interests of justice of recording a child's testimony in a timely manner and of minimising, to the greatest possible extent, the potential distress resulting from delays within the actual court system. It is clearly desirable that children who have experienced or witnessed a traumatic event should be allowed to attempt to put the past behind them and to continue with all aspects of their development as normally as they are able to do so. Equally clearly, it is undesirable that an accused person should be prejudiced by evidence which may have been rendered unreliable by the passage of time, or that the community interest in seeing a wrongdoer brought to justice should be thwarted because frustration at delays causes a complainant to refuse to proceed.

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162 Submissions 30, 32.

163 Submission 49.

In this Report, the Commission has made certain recommendations aimed at ensuring that the evidence of a child witness is recorded at the earliest possible opportunity.[164] The implementation of these recommendations would go a considerable way towards alleviating the problems resulting from delays in bringing matters to court and during the court process.

The Commission also acknowledges that proposals put forward in the submissions may help to reduce delay in bringing matters involving child witnesses to a resolution. However, in the view of the Commission, issues such as procedures within the Office of the Director of Public Prosecutions and prioritisation throughout the criminal justice system of cases involving child witnesses are not matters for legislative reform. Rather, they should be dealt with by a review of administrative arrangements within the relevant organisations and by practice directions within the court system.

For example, while there would be obvious benefits if a matter involving a child witness were handled by the same prosecutor from committal through to trial, this is ultimately a question of resource allocation and caseload management within the Office of the Director of Public Prosecutions.

Similarly, the question of separate listing of cases and fixed hearing dates for cases involving child witnesses, while advantageous to the children concerned, may involve significant practical difficulties in the administration of the court's schedule. The Commission notes the existing practice in the court system of giving priority, within current listing arrangements, to matters involving child complainants or witnesses where it is possible to do so.[165] In the view of the Commission, this policy can operate successfully only if timely notice is given that a child witness is involved in a particular proceeding. The Commission therefore sees merit in the proposal made by the Australian Law Reform Commission that the prosecutor or legal representative for a party calling a child as a witness should be required to inform the court that a child is scheduled to appear.[166] Again, however, the Commission sees this as essentially an administrative matter which is better dealt with by a practice direction rather than by legislation.

164 See for example Chapters 8 and 9 of this Report.

165 See p 29 of this Report.

166 See p 35 of this Report.

10. RECOMMENDATION

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

CHAPTER 4

FACILITATING COMMUNICATION WITH A CHILD WITNESS

1. INTRODUCTION

As a general rule, witnesses in court proceedings are required to appear and to present their evidence orally to the court.[167] Where the witness is a child, the extent to which he or she is able to testify effectively will depend on how well he or she responds to the questions asked in both examination-in-chief and cross-examination.[168] This, in turn, will depend to a significant degree on the communication skills of the child and of the lawyers who question the child.[169]

The communication skills of a child witness will be affected not only by the child's chronological age, but also by the child's developmental age and emotional status.[170] The younger the child, the more difficult it may be to communicate with him or her. Difficulties may arise not only from the child's limited or idiosyncratic vocabulary range, but also from the child's lack of understanding of certain concepts, familiarity with which is usually taken for granted by adults. For example, a 2 to 4 year old child generally can answer only closed questions, but the amount and quality of the description the child is able to provide increases as the child matures and, by age 5, the child may be able to respond to open ended questions.[171] A child aged between 2 and 2½ years may be able to explain his or her current whereabouts, but is unlikely to be able to tell where previous events took place. This ability does not develop until after the age of 3 and, the younger the child, the poorer the description is likely to be.[172] Similarly, the concepts of colour and number are usually not well established until after the age of 3.[173] Understanding of time and dates is very limited before the age of 8.[174]

Misunderstandings between lawyers and child witnesses may be compounded because children being questioned by a stranger in a formal and unusual situation

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167 However, see Chapter 8 of this Report in relation to the admissibility of out-of-court statements made by child witnesses, and Chapter 12 of this Report in relation to evidence given by children in committal proceedings.

168 See Chapter 13 of this Report for a discussion of inappropriate cross-examination of child witnesses.

169 See Chapter 20 of this Report for a discussion of the need for professional awareness programs dealing with issues affecting the ability of children to give evidence.

170 The particular needs of certain child witnesses - for example, indigenous children and children from non-English speaking backgrounds - will be considered in Part 3 of this Report, to be published in 2001.

171 Brennan M and Brennan R, *Strange Language: Child Victims under Cross Examination* (3rd ed, 1988) at 55.

172 Ibid.

173 Ibid.

174 Id at 56.

may be reluctant to admit that they have not understood a question, or to contradict an assertion put to them as fact. It has been suggested that the response "I don't know", for example, may not necessarily indicate uncertainty or lack of credibility on the part of a child witness, but rather unwillingness to admit a lack of comprehension or to answer particular questions.[175] Children may also interpret repetition of a question as an indication that their first answer was wrong or unacceptable.[176]

However, the age of a child witness should not of itself prevent the court from endeavouring to obtain evidence from the child. In this Report, the Commission has recommended that a child of any age should be able to give unsworn evidence provided he or she is able to give an intelligible account of events which he or she has observed or experienced.[177]

It is important to remember that:[178]

> … children's competence is a function also of the competence of those dealing with them. Their evidence is not received in a vacuum but is dependent on the context, the nature of the event, the type of information required and the approach of those asking the questions. Given age appropriate demands, children are generally able to provide reliable testimony. The onus is on adults, and especially the professionals within the system, to meet some of these demands, communicate effectively with children and search for further solutions.

2. REFORM INITIATIVES IN OTHER JURISDICTIONS

Recommendations for effective and empathetic communication with child witnesses have been in the forefront of international law reform proposals about children's evidence. Special measures for facilitating communication with child witnesses have been implemented or recommended in a number of jurisdictions in Australia and overseas, and have received consideration in others.

(a) Western Australia

In its Report on the evidence of children and other vulnerable witnesses, the Law Reform Commission of Western Australia recommended the introduction of "child

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175 Flin RH, Bull R, Boon J and Knox A, "Children in the Witness Box" in Dent H and Flin RH (eds), *Children as Witnesses* (1992) at 175.

176 Cashmore J, "Problems and Solutions in Lawyer-Child Communication" (1991) 15 *Criminal Law Journal* 193 at 201, citing Rose and Blank, "The Potency of Context in Children's Cognition: An Illustration through Conservation" (1974) 45 *Child Development* 499-502.

177 See Chapter 7 of this Report.

178 Cashmore J, "Problems and Solutions in Lawyer-Child Communication" (1991) 15 *Criminal Law Journal* 193 at 202.

interpreters" to facilitate communication with child witnesses.[179] It proposed that the function of a child interpreter would be analogous to that of a foreign language interpreter in a case where the witness does not have sufficient understanding of English.[180]

The Commission considered that child interpreters would have to possess appropriate professional and practical skills in communicating with children, and would also need to be able to comprehend the language counsel use in examining and cross-examining witnesses.[181]

The Commission also envisaged that, where there was a perceived need for a child interpreter in a particular case, issues relating to the appointment of the interpreter would ordinarily be determined at a preliminary hearing.[182] The role of the interpreter would be to "translate" for the child witness any questions which the court considered the child could not understand and, if necessary, to translate the child's answer.[183]

The Commission's recommendations were implemented by amendments to the *Evidence Act 1906* (WA) which provided for the assistance of a communicator for a child witness under the age of 16. Under these amendments, the statutory function of the communicator is:[184]

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

In Western Australia, the operation of the special procedures available in that State for the taking of children's evidence is regulated by judicial guidelines.[185] The guidelines refer to the child communicator as "effectively a 'child interpreter'".[186] They envisage that such a facility would most likely be necessary where a child is of a young age and there is a need for a trained person "such as a child psychologist or a kindergarten teacher" to assist the child in understanding the questions put to him

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

180 Id at para 6.41.

181 Ibid.

182 Preliminary hearings are discussed in Chapter 11 of this Report.

183 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.42.

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

185 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (May 1998).

186 Id at 5.

or her and the court in understanding the child's responses:[187]

> The difficulties which very young children have in court are often not fully appreciated and can be due to the disparity between the questioner's expectations and the child's understanding.

However, in practice, communicators are rarely used for child witnesses in Western Australian courts.

The Commission has been informed of only two occasions when arrangements have been made for a communicator to assist when a child gave evidence.[188] One occasion involved a five year old complainant who was very nervous and distressed, and was refusing to answer questions even from the remote room equipped with closed-circuit television facilities. It was decided that the Co-ordinator of the Child Witness Service should act as a communicator for the child, and that the child would whisper her answers to the communicator who would then relay them to the court. The child agreed to give evidence in this way. However, in the event, once the communicator had been appointed the child whispered so loudly that her answers were able to be heard in court quite clearly without the need for intervention by the communicator. The other occasion involved a young complainant from a remote Aboriginal community in northwest Western Australia. Because English was the complainant's second language, and because there was a concern that the nature of the evidence to be given might give rise to cultural difficulties, arrangements were made for a respected elder from the complainant's community to be appointed as her communicator. Again, however, the complainant succeeded in giving her evidence without the communicator's assistance.

It seems that, in both these instances, the mere presence of the communicator gave the child sufficient confidence to be able to testify. In both cases, the role of the communicator was largely to provide support for the child. It would appear that, in Western Australia, factors such as the routine use of closed-circuit television for child witnesses to give evidence in certain kinds of case, greater judicial and professional awareness of the needs of child witnesses, the preparation received by child witnesses and the entitlement of a child witness to the presence of a support person have all contributed to a much lower than anticipated need for the use of a child communicator.

(b) New South Wales

In New South Wales, a Taskforce established by the Attorney-General considered, but did not adopt, the Western Australian child communicator provisions. The Taskforce was of the opinion that:[189]

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187 Ibid.

188 Telephone conversation between a representative of the Commission and the Acting Co-ordinator of the Child Witness Service, 23 October 2000.

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

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

(c) Commonwealth

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission in their report on children and the legal process noted the trend towards legislative provisions for the appointment of child interpreters to "shield child witnesses from the confusion and intimidation caused by incomprehensible questions".[190] However, the Commissions saw the solution to this problem as more fundamental than simply providing for a child interpreter, attributing responsibility for many of the difficulties that children have in giving evidence to a failure on the part of judges and magistrates to control proceedings in their court.[191]

The Commissions observed that many submissions to them had opposed the use of child communicators, "considering them a poor substitute for requirements that judges and lawyers themselves have training in appropriate skills for dealing with children".[192] The Commissions made a number of recommendations about training for judges and magistrates to assist them in dealing with child witnesses.[193]

(d) Ireland

Section 14 of the *Criminal Evidence Act 1992* (Ireland),[194] which has a more limited operation than its Western Australian equivalent, provides:

> (1) Where -
>
> (a) a person is accused of an offence to which this Part applies, and
>
> (b) a person under 17 years of age is giving, or is to give, evidence through a live television link,

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

191 Id at para 14.115.

192 Id at para 14.113.

193 These recommendations are discussed in Chapter 20 of this Report.

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

> the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.
>
> (2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the questions being asked.
>
> (3) An intermediary referred to in subsection (1) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such.

The provision applies to matters involving sexual offences or offences involving violence or the threat of violence to a person.[195]

(e) New Zealand

New Zealand legislation permits the use of an intermediary where a complainant is a child or mentally handicapped person[196] who is giving evidence by means of closed-circuit television or by audio-link from behind a partition.

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

> **Modes in which complainant's evidence may be given**
>
> …
>
> Where the complainant is to give his or her evidence in the mode described in paragraph (b) or paragraph (d) of subsection (1) of this section,[197] the Judge may direct that any questions to be put to the complainant shall be given through an appropriate audio link to a person, approved by the Judge, placed next to the complainant, who shall repeat the question to the complainant. [note added]

The New Zealand Law Commission favoured the use of intermediaries:[198]

> The Commission believes that witnesses should be able to use intermediaries whenever their assistance is necessary to enable the witness to understand the questions put to them in court. We propose that in any case where the rational ascertainment of facts would be assisted by the use of an intermediary, the judge

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

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

197 Where the necessary facilities and equipment are available, evidence is to be given outside the courtroom but within the court precincts and the evidence transmitted to the courtroom by means of closed-circuit television: *Evidence Act 1908* (NZ) s 23E(1)(b).

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

> should have a discretion to direct that one be provided. The judge should also have a discretion as to who may act as intermediary.

The New Zealand Commission noted that the function of the intermediary under the New Zealand legislation is merely to put questions to a witness, not to rephrase the questions or interpret the witness's answer. It referred to a discussion of the role of an intermediary by the New Zealand High Court:[199]

> [The intermediary] is professionally experienced and has no therapeutic obligation to or bond with the child … I think it would be going too far to say the intermediary must not "jolly along" the child to answer … so long as the intermediary is responsibly and fairly putting the questions as asked, careful supplementary comments or requests to the child to attend or answer would not be objectionable. If it seems that the child does not understand the question the intermediary will understand that it will be for counsel to rephrase it or approach the matter from some other angle.

It proposed that the intermediary should have a broader function:[200]

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

The Commission stressed that the use of intermediaries must be subject to procedural fairness. It suggested that it should be part of the judge's role to give guidance to the intermediary on how to perform his or her function in a particular case and to "oversee the fairness and accuracy of rephrased questions".[201]

It envisaged that the intermediary would take an oath and that an intermediary who made a misleading or false statement would be subject to criminal sanction.[202]

As an alternative mechanism for assisting witnesses with communication difficulties, the New Zealand Commission proposed the appointment of an expert witness to advise the court and counsel on the most appropriate way to question the witness:[203]

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199 Id at para 170. See also note 177 quoting *R* v *Accused* (Unreported, High Court, Wellington, T91/92, 5 March 1993 per Neazor J at 5).

200 Id at paras 173-174.

201 Id at para 175.

202 Ibid.

203 Id at para 176. See also Chapter 15 of this Report for a discussion of the role of expert witnesses.

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

The Commission acknowledged the importance of the court and of counsel in facilitating communication with vulnerable witnesses. The Commission observed that, although in some cases the assistance of a specialist intermediary may be needed:[204]

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

(f) South Africa

In its Issue Paper, *Sexual Offences Against Children*, the South African Law Commission noted that in 1991 South Africa had introduced a system of using an intermediary in matters involving child witnesses. This system was introduced by section 170A of the *Criminal Procedure Act 1977* (South Africa) which was quoted in the following terms:[205]

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

The South African Law Commission observed:[206]

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204 Id at para 172.

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

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

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

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

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

At present the following people may become intermediaries:

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

The Law Commission commented on the need for amendment of the necessary qualifications, on the basis that it is patently inappropriate for a medical practitioner with no special training and experience in communicating with children to perform this role.[207]

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207 Letter from the South African Law Commission, 29 October 1998.

(g) England

The court in a criminal proceeding may make a "special measures" direction for certain witnesses.[208] If the witness is under the age of 17 at the time of the hearing, or has a defined mental or physical disability, the special measures direction may provide for the examination of the witness to be conducted through an interpreter or other person approved by the court as an intermediary.[209] The function of the intermediary is:[210]

> … to communicate -
>
> (a) to the witness, questions put to the witness, and
>
> (b) to any person asking such questions, the answers given by the witness in reply to them,
>
> and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

A person who acts as an intermediary must first make a declaration that he or she will perform the role faithfully,[211] and is subject to liability for perjury.[212]

3. ISSUES FOR CONSIDERATION

In its Discussion Paper,[213] this Commission raised the question of whether, in the light of developments in other jurisdictions, it would be desirable to provide for the use of a child communicator to assist the court in obtaining the evidence of child witnesses and, if so, whether the court should have a discretion to appoint a communicator and what the scope of the communicator's role should be.[214]

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208 As at 13 October 2000 the relevant provisions of the *Youth Justice and Criminal Evidence Act 1999* had not commenced.

209 *Youth Justice and Criminal Evidence Act 1999* ss 16, 19, 29.

210 *Youth Justice and Criminal Evidence Act 1999* s 29(2).

211 *Youth Justice and Criminal Evidence Act 1999* s 29(5).

212 *Youth Justice and Criminal Evidence Act 1999* s 29(7).

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

214 Id at 76-77.

(a) Should there be provision for a child communicator

A number of respondents referred to the communication difficulties which can arise when a child is required to give evidence in court.[215] Queensland Health observed:[216]

> The difficulties in communication experienced by a child witness may have a developmental component, an emotional component, or a complex combination of both.

The Director of the Social Work Department at the Royal Children's Hospital underlined the importance of effective communication strategies with young witnesses:[217]

> It is through the spoken word that children typically are required to express their memories. Even when a child's memory is accurate and strong, efforts to elicit reliable reports from children may be frustrated by developmental limitations on communication.
>
> …
>
> The implications of this developmental process are that children conceptualise events in a different manner from adults. This can lead to a misunderstanding or misinterpretation of the child's description of the events.

Respondents were concerned about the effect which communication difficulties could have on the emotional well-being of a child witness.[218] There was also concern that, in abuse cases, communication difficulties which were perceived to compromise the quality of a child's evidence would result in charges being discontinued.[219] These concerns resulted in a recognition of the need to facilitate communication between child witnesses and the court.[220]

However, respondents differed as to whether legislative provision for a child communicator would be desirable.

Several respondents expressed support for the concept of a child communicator.[221]

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215 Submissions 1, 24, 30, 32, 37, 47, 48, 49, 50, 53. Some respondents made specific reference to communication problems which may confront child witnesses from an indigenous or other non-English speaking or cultural background, and children with disabilities. These issues will be considered in greater detail in Part 3 of this Report, to be completed in 2001.

216 Submission 30.

217 Submission 47.

218 Submissions 10, 24, 25, 30, 49.

219 Submissions 20, 25, 30.

220 Submissions 30, 34, 37, 49.

221 Submissions 10, 25, 32, 34, 37, 39, 41, 47, 49.

Families, Youth and Community Care Queensland was of the view that:[222]

> The introduction of a communicator who has experience working with children of the particular age group of the witness would assist by providing the child with the opportunity to give their testimony in response to appropriately worded questions.

A child psychiatrist considered that the assistance of a communicator who could establish an empathetic relationship with a child witness and understand the developmental level of the child would "lead to the most reliable information being provided to the court".[223]

Other respondents, while generally supportive of the idea, had some reservations about the introduction of a child communicator.[224] One concern was the potential for inaccuracies to arise as a result of questions and answers being reworded.[225] It was suggested that, while appointment of a child communicator might assist the court by facilitating identification of communication difficulties and appropriate strategies to overcome them, it would not permit interpretation of information as for a foreign language:[226]

> Language interpreters are working on the basis of transforming one set of verbal symbols representing a fact into another set of verbal symbols representing the same fact. This assumption does not allow for the ideas and concepts that may not be part of the child or young person's verbal symbolic framework. … The development of a communication system and the deficits that may occur in that communication system cannot be accounted for in a direct translation into "child language".

A provider of counselling and youth services for children and their families recognised that any strategy that would assist a child's contact with the court process should be supported, but expressed concern at adding another layer of complexity to the court process. The respondent also expressed the view that, for a child communicator to be effective, there would need to be a relationship of trust between the child and the communicator:[227]

> That being the case, the very nature of the relationship between the child and the intermediary may itself be scrutinised on the grounds of objectivity and whether, in fact, the person is more of an advocate for the child.

A number of the submissions in favour of a child communicator expressed the view that there should be a legislative entitlement to the use of the communicator.[228]

222 Submission 49.

223 Submission 39.

224 Submissions 7, 29, 33, 48, 50.

225 Submissions 7, 29.

226 Submissions 48, 50.

227 Submission 23.

228 Submissions 10, 37, 39, 47, 49.

However, other respondents considered that the use of a communicator should be discretionary,[229] with factors such as the age of the witness[230] and, for young people, the existence of any communication disorder,[231] to be taken into account. Two respondents supported a widely framed right to apply for the use of a communicator.[232] Others favoured a more limited approach, with the prosecution,[233] the parties[234] and the child witness[235] entitled to request the communicator's assistance. It was also proposed that the court should be able to raise the issue itself.[236]

Some respondents considered that the need for a child communicator could be reduced[237] or obviated[238] by strategies such as increased awareness of age-appropriate communication techniques on the part of judicial officers[239] and other members of the legal profession,[240] and the implementation of guidelines to protect child witnesses from inappropriate questioning.[241]

This approach accords with the experience in Western Australia where, although there is legislative provision for a child communicator to facilitate effective communication with a child witness, in practice communicators are rarely used.[242]

However, other respondents were of the view that such strategies, while desirable, were not a substitute for a child communicator.[243] Reasons given included the influence of the adversarial nature of court proceedings,[244] the difficulty of changing

229 Submissions 20, 25, 32, 48, 50.

230 Submission 32.

231 Submissions 48, 50.

232 Submissions 10, 19.

233 Submission 20.

234 Submissions 32, 39.

235 Submission 32.

236 Submission 39.

237 Submissions 7, 39.

238 Submissions 20, 26, 31, 33, 53.

239 Submissions 7, 26, 33, 53.

240 Submissions 26, 31, 53.

241 Submissions 20, 26, 31, 33, 39, 53.

242 See p 43 of this Report for a discussion of the use of child communicators to assist children to give evidence in Western Australia.

243 Submissions 18, 19, 25, 32, 39, 41, 48, 49, 50.

244 Submissions 39, 49.

an entrenched legal culture[245] and the fact that, if professional awareness programs are not to be compulsory,[246] child witnesses may be disadvantaged by the lack of a suitable qualified communicator in cases involving lawyers and judges who may not have participated in such programs.[247]

Four submissions rejected the introduction of a child communicator.[248] The Bar Association of Queensland claimed that:[249]

> … the insertion of a "communicator" into the trial could not be in the interests of the child, the accused, or the Court. It could unduly lengthen and complicate the trial process.

The Youth Advocacy Centre noted:[250]

> There are already a number of adults playing a variety of roles in the court system and children are often very confused about this. To add another person may exacerbate this problem. The proposal also seems a very cumbersome approach to the issue of communication.

The Queensland Children's Commission was also of the view that the use of a child communicator could make proceedings more complex and that it might lead to an increase of the number of appeals:[251]

> … the reinterpretation of questions by a communicator to a more simple and age appropriate level may not reflect the nuances and subtleties that the counsel, particularly the defence counsel, intended in the original question and could make the process the subject of appeals.

The Queensland Council for Civil Liberties also considered that the interposition of a child communicator would be unduly prejudicial to an accused.[252]

A further reason against the introduction of a child communicator, put forward by a number of organisations involved with children who have given evidence, was that:[253]

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245 Submission 41.

246 See Chapter 20 of this Report for the Commission's recommendations in relation to professional awareness programs.

247 Submission 18.

248 Submissions 26, 31, 40, 53.

249 Submission 53.

250 Submission 26.

251 Submission 31.

252 Submission 40.

253 Submission 33.

> … it … would remove the onus from judges to become more educated about children's issues and to control court practices more effectively …

(b) The scope of a child communicator's role

Amongst those respondents who supported the use of a child communicator, there was some difference of opinion as to what the scope of the child communicator's role should be.

Three respondents were of the view that a child communicator should be able to interpret all questions put to a child witness and the child's responses to those questions.[254] Families, Youth and Community Care Queensland proposed:[255]

> The communicator should have the authority to rephrase questions in language that is accessible to the child and, where necessary or appropriate, explain to the court the child's answers.

A child psychiatrist agreed that:[256]

> The crucial element is for the communicator to act as an interpreter for a child in relation to all questions put to the child. This promotes the stability of the relationship with the communicator in the child's eyes, as well as minimising the biases to answering … It also protects the child from the deliberate or inadvertent emotional abuse of inappropriate questioning.

However, in relation to the child's responses, the psychiatrist submitted that the communicator should intervene only if the communicator or the court considered that the child's answer would be misunderstood by an ordinary person.[257]

The former Director of Public Prosecutions envisaged that the role would be even more narrowly confined, with the communicator able to object to questions (subject to being overruled by the presiding judicial officer) and to reformulate questions, but not to interpret the child's answers:[258]

> If the answer given, in the mind of the intermediary, requires further questions to be put in order to ascertain the true and unambiguous response of the witness, leave from the court should be sought by the intermediary to put a further or further questions.

Other respondents, although in favour of a child communicator, considered that the communicator should reformulate questions for a child witness only if the court was

254 Submissions 10, 19, 29, 49.

255 Submission 49.

256 Submission 39.

257 Ibid.

258 Submission 32.

of the view that the child could not understand the question.[259] Two further respondents proposed that, if the communicator's role were to be dependent on an assessment of the child's ability to comprehend or answer a particular question, then the communicator should have a role in determining the child's need for assistance.[260]

A number of respondents were of the view that a child communicator should be required to take an oath,[261] while others disagreed.[262] The former Director of Public Prosecutions noted:[263]

> … if the intermediary is merely to rephrase inappropriately formed questions I see no need at all for the intermediary to be sworn. The intermediary's question replacing the objectionable question would be recorded and would be heard by the trier of fact, and if the intermediary is not to be permitted to interpret the witness's response then there is no need at all for swearing the intermediary.

There was some support for criminal sanctions against a communicator who made a false or misleading statement,[264] but not if the mistake or misunderstanding were genuine.[265]

(c) Qualification to act as a child communicator

A child psychiatrist expressed the view that there should be stipulated minimum standards for a child communicator, including "some formal study in child development, both normal and psychopathological, and also in legal concepts", and that the court should have a discretionary power to impose additional standards in particular cases after considering all the relevant circumstances.[266]

A number of other respondents recognised the need for a child communicator to have expertise and experience in child development,[267] and to be able to develop a rapport with the child.[268]

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259 Submissions 7, 20, 25.

260 Submissions 32, 49.

261 Submissions 12, 20, 39, 49.

262 Submissions 10, 19, 32.

263 Submission 32.

264 Submissions 12, 19, 20, 39, 49.

265 Submission 12.

266 Submission 39.

267 Submissions 23, 25, 29, 48, 49, 50.

268 Submissions 23, 25.

However, some respondents considered that the question of the appropriateness of a proposed child communicator should be left to the discretion of the court.[269]

(d) The time for determining issues relating to the use of a child communicator

The submissions which considered this issue were generally of the view that issues relating to the use of a child communicator should, wherever possible, be determined at a preliminary hearing,[270] with provision for an appointment to be made at a later stage if necessary.[271]

There was also general agreement that one of the issues to be decided at the preliminary hearing should be the identity of the communicator.[272] Two respondents recommended the establishment of a panel of experts with relevant qualifications from whom the communicator could be chosen.[273]

4. THE COMMISSION'S VIEW

The Commission is not persuaded that legislative provision for the use of a child communicator would be a desirable development. The Commission is, of course, mindful of the need for improved communication between child witnesses and others involved in the court process. It recognises that, without effective communication with child witnesses, courts may be denied essential evidence and that, in the absence of age appropriate communication with child witnesses, courts risk being seen as out of step with contemporary social expectations. However, the Commission does not believe that a child communicator is the most effective means of facilitating communication with child witnesses.

The Commission shares the reservations expressed by some respondents that the introduction of a child communicator may add a further layer of complexity to court proceedings involving child witnesses, and may be confusing for some children. The Commission is concerned that the interposition in the court process of another person, whose role may not be readily apparent to the child witness, and with whom the child may not have had sufficient opportunity to develop a rapport, may in fact be counter-productive. Attempts to "interpret" what the child says may actually increase

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269 Submissions 19, 20, 32.

270 Submissions 19, 20, 25, 39, 48, 50. See Chapter 11 of this Report for a discussion of preliminary hearings in proceedings involving a child witness.

271 Submission 39.

272 Submissions 19, 20, 25, 39, 48, 49, 50.

273 Submissions 39, 49.

the risk of misunderstanding, and may also make the child feel less confident about his or her ability to tell the court about what he or she has seen or experienced.

In the view of the Commission, the preferable approach would be to increase awareness on the part of the court and members of the legal profession involved with child witnesses of appropriate strategies for communicating effectively with them. In this Report, the Commission has made a number of recommendations about professional awareness of issues relevant to child witnesses.[274] In some cases, it may be advisable for parties to seek appropriate professional advice about the child's level of ability to communicate and about ways of facilitating communication with the child in court. Advice of this kind could, for example, assist lawyers in framing questions in such a way that the child is able to understand and respond to them.

The Commission is also of the view that a child witness is more likely to be able to communicate his or her evidence effectively if he or she is comfortable with the environment in which the evidence is to be given. In this Report, the Commission has made recommendations about the way in which children should give evidence[275] and about preparing children for the experience of giving evidence.[276] The Commission believes that implementation of these recommendations would help to remove some of the barriers to effective communication with child witnesses.

The Commission considers that its view is supported by the experience in Western Australia.[277]

5. RECOMMENDATION

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

274 See Chapter 20 of this Report.

275 See for example Chapters 8, 9 and 10 of this Report.

276 See Chapter 5 of this Report.

277 See p 43 of this Report.

CHAPTER 5

SUPPORT FOR CHILD WITNESSES

1. INTRODUCTION

Having to give evidence in a legal proceeding is likely to be stressful for a child witness. The level of stress experienced may not only be detrimental to the child's emotional health, but may also affect the quality of the child's evidence. In this Report, the Commission has recommended a number of measures intended to help overcome the difficulties faced by children who are required to give evidence and to allow them to testify as effectively as possible.[278] However, even if all these measures are implemented, many of the children who are called as witnesses are still likely to feel intimidated.

They will be in unfamiliar surroundings, even if they are able to give their evidence by closed-circuit television from a remote location and do not actually have to appear in court. They are unlikely to have a high degree of understanding of the procedures that will be followed. They will be required to answer questions which may be asked in a form of language that they have difficulty comprehending. They may be subjected to cross-examination which is designed to test and weaken their credibility. In some cases, these factors may also be compounded by the child's emotional distress at the nature of the evidence that the child is asked to give.

Providing practical and emotional support to a child witness may reduce the stress felt by the child, which may in turn assist the child to give his or her evidence. Before the child gives evidence, practical support can be given in the form of programs designed to familiarise the child with the court environment, legal procedures and the role played by the various participants, and any special facilities to be made available to the witness. Emotional support can be provided to a child who is giving evidence by allowing the child to have the presence of a support person with whom the child feels comfortable while the child testifies.

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278 See for example Chapters 8, 9, 10, 13 and 20 of this Report.

2. COURT FAMILIARISATION AND PREPARATION

(a) The need for preparation

The courtroom is an unfamiliar setting for most children. Research in Britain and the United States[279] and also in Canada[280] has indicated that children are generally ignorant of the nature and function of the court and its officials. This lack of knowledge, together with other factors such as a child's limited social awareness and inexperience, means that children are generally ill-prepared for the demands made upon witnesses in a court proceeding and are therefore at a significant disadvantage in the court environment.[281] Exposure to unfamiliar procedures that are easily misunderstood by children who do not know the legal terminology or the adversarial context has been identified as a significant source of stress for child witnesses.[282]

In a number of jurisdictions, programs have been developed to assist in preparing children who are to be called as witnesses. These programs are intended to:[283]

> … empower children by educating them about courtroom procedures and personnel, by helping them to tell their story competently during testifying, and by helping the children cope with their stress and anxieties relating to their role as a witness.

Children who have participated in such programs and are prepared for their experience as a witness appear to display lower levels of anxiety and to present better in court.[284] It has been suggested that the programs may also have a wider impact, since their advocacy on behalf of child witnesses may influence the way in which people such as police investigators and prosecutors approach their task in cases where children are to give evidence.[285]

There is now a widespread recognition in Australian jurisdictions of the need to inform child witnesses about court processes and the physical environment in which the child will give evidence. The Australian Law Reform Commission and the

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279 Davies G and Westcott H, "The Child Witness in the Courtroom: Empowerment or Protection?" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 200.

280 Dezwirek-Sas L, "Empowering Child Witnesses for Sexual Abuse Prosecution", in Dent H and Flin RH (eds), *Children as Witnesses* (1992) at 195.

281 Id at 185, 195.

282 Id at 184.

283 Davies G and Westcott H, "The Child Witness in the Courtroom: Empowerment or Protection?" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 204.

284 Dezwirek-Sas L, "Empowering Child Witnesses for Sexual Abuse Prosecution", in Dent H and Flin RH (eds), *Children as Witnesses* (1992) at 196, citing Dezwirek-Sas L et al, *Reducing the system induced trauma for sexual child abuse victims through court preparation, assessment and follow-up* (1991).

285 Davies G and Westcott H, "The Child Witness in the Courtroom: Empowerment or Protection?" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 205-206, citing Dezwirek-Sas L et al, *Reducing the system induced trauma for sexual child abuse victims through court preparation, assessment and follow-up* (1991).

Human Rights and Equal Opportunity Commission recommended that child witnesses should have the right to assistance, support and preparation for the experience of giving evidence:[286]

- Specialist child witness support units should be established to undertake these functions. These services should be staffed by trained counsellors, although this should not preclude the use of volunteers. They should provide individualised assistance to children appearing as witnesses in civil and criminal proceedings.

- The functions of support units should include

  - explaining the court process and preparing the child for the experience of giving evidence

  - keeping the child informed of the progress of the case and liaising with prosecutors, solicitors and police on behalf of the child

  - …

  - making necessary referrals for the child and his or her family to therapeutic counselling, medical care and other services necessary to assist the child.

A commentator has observed that:[287]

> A child cannot be expected to be confident or self-assured if they do not have sufficient knowledge of the court process and the skills to employ while under cross-examination.
>
> …
>
> A well-prepared child is not only a better, more confident witness but is also more likely to find the experience of giving evidence in court a positive step towards regaining their control and self-esteem.

Several of the submissions received by this Commission in response to the Discussion Paper[288] referred to the importance of ensuring that child witnesses are adequately informed about the nature of the court environment and procedures.[289]

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286 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 106 at 339.

287 Cunneen M, "Preparing the Child Witness" in Vernon J (ed), *Children as Witnesses* (Australian Institute of Criminology: Australian Institute of Criminology Conference Proceedings No 8, 1988) at 76.

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

289 Submissions 30, 31, 33, 37, 44, 47.

(b) Existing Australian services

A number of specialised programs have been initiated throughout the various Australian jurisdictions to prepare witnesses and to reduce anxiety associated with legal proceedings. However, these services vary widely, and not all are dedicated to child witnesses. The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission observed:[290]

> These support services are located in the courts or Departments of Justice, DPPs, family services departments or outside the legal system. They may be staffed by social workers, legal personnel or specially trained volunteers. The services offered include all or some of the following: trial preparation and counselling, court visits, liaising with prosecutors or courts to keep the child informed of the progress of the case, attendance in court as the child's court companion and assistance in the preparation of Victim Impact Statements.

Two of the existing service models in Australia are discussed in more detail below.

(i) Queensland

In Queensland there is a dedicated child witnesses support program offered by a community-based, non-government organisation called Protect All Children Today (PACT), which provides both therapy and support and acts as an advocate for abused and neglected children and their families.

PACT has established a Child Witness Support Program (CWSP) to assist children who have experienced abuse or neglect and who subsequently become involved as witnesses within the criminal justice system. Support is provided by trained volunteers, who operate under the supervision of salaried professional staff. Volunteers make home visits to meet the child and family members prior to the court proceedings, and maintain telephone contact in the lead up to hearing dates.

Volunteers are trained to concentrate on four key areas:

- informing the child about the court process, and participants at both Magistrates Court and superior court level;
- instilling confidence in the child to engage in the court setting;
- providing a physical support whilst waiting to give evidence and during the actual court appearances; and
- debriefing the child about the results of the proceeding.

290 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 337.

The volunteers familiarise witnesses with the typical courtroom layout, and identify the participants in the proceeding and their roles. They organise for the witnesses to visit the court prior to the proceeding and provide information kits to the children and their families.

The volunteers are not informed of the details of the allegations prior to the court hearing, and do not discuss details of the case with the child or the family.

Referral to the program is made by a number of agencies, including the Queensland Police Service, Families, Youth and Community Care Queensland, and Suspected Child Abuse and Neglect (SCAN) Teams. The CWSP currently operates in the Brisbane metropolitan area, Ipswich, Logan City, the Gold and Sunshine Coasts, Gladstone, Toowoomba and Rockhampton, and provides an outreach service from Brisbane to Longreach, Biloela, Emerald, Maryborough, Mackay, Townsville/Mt Isa and Cairns.[291] Further expansion into northern centres is anticipated over a five year period.

Although there is a Victim Support Service within the Office of the Director of Public Prosecutions, it does not provide any court familiarisation programs or other support services for potential witnesses. The Service produces videos and brochures to inform victims of violent crime and, in particular, victims of rape and sexual assault, about the criminal justice system and the court process. It refers potential child witnesses to PACT for assistance on a personal basis.

(ii) Western Australia

In Western Australia, the Child Witness Service (CWS) is administered through the Court Services division within the Ministry of Justice, and is located in the Central Law Courts in Perth.

The purpose of the CWS is to prepare child witnesses for the court experience, including both pre-court preparation and post-court debriefing. In particular, the preparation program has the following objectives:

- to provide information about the process and progress of legal proceedings;
- to reduce the trauma experienced by the child victim witness as a result of involvement in the legal process; and
- to increase case and systems co-ordination involving child witnesses.

291 Memorandum to the Commission from the Child Witness Program, 23 November 2000.

The key strategy adopted by the CWS is to provide, through a child-friendly environment and child focused service, an atmosphere in which children who have been abused feel safe to participate in subsequent court proceedings:[292]

> The Child Witness Service provides a unique service to children in that the atmosphere created is one in which children quickly feel at home. It is permissive, open, bright yet restful. Children are free to play with the large number of toys, chat with the receptionist, or simply be. Wherever possible children are provided with opportunities to make choices. They are clear that the Service is there for them.

The program educates child witnesses about the criminal justice process, thereby relieving their emotional distress and assisting them to give credible evidence. It concentrates on familiarisation with court procedures and also on stress reduction techniques to overcome the sense of powerlessness and lack of control which children may feel when faced with the prospect of giving evidence, particularly in a case involving allegations of child abuse.

Children who seek assistance from the program are seen on an individual basis over six to eight sessions. Sessions commence approximately eight weeks before the child gives evidence. The program for each child is developed to meet that child's particular needs.

Quality assurance mechanisms have been developed in conjunction with key stakeholders, including the Criminal Law Association, the Director of Public Prosecutions, the judiciary and the Police Service. The operation and development of the Service is guided by a Reference Group, chaired by a Supreme Court Judge, which was instituted to formulate the protocols, procedures and processes that govern the working relationship between the Service and key stakeholders.[293]

The CWS receives referrals from the Child Abuse Unit of the Western Australian Police Service and the Criminal Investigation Branch. The referrals are made directly after charges are laid. CWS staff also liaise with other agencies involved with the child witness as required.[294]

The Service does not have details of the allegations on which the charge is founded, and is careful to avoid situations which could lead to contamination of the child's evidence. The preparation program is non-evidentiary, and includes an educational component to inform the child in relation to the layout of the courtroom, the use of closed-circuit television, roles of participants in

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292 Bellett S, *Child Witness Service - What's So Special About It?* (Paper presented to the 7th Australasian Conference on Child Abuse and Neglect, Perth, October 17-20, 1999) at 20.

293 O'Grady C and Shannon C, *An Evaluation of the Child Victim Witness Service: I don't know what we would have done without her* (Ministry of Justice (WA), Report, June 1997 (Revised January 1999)) at 2-3.

294 Bellett S, *Child Witness Service - What's So Special About It?* (Paper presented to the 7th Australasian Conference on Child Abuse and Neglect, Perth, October 17-20, 1999) at 15.

the process, court procedures and basic legal terminology such as "beyond reasonable doubt". The child is also assisted to understand the role and responsibility of a witness in listening to and answering questions and in telling the truth.[295]

Tasks that the CWS may undertake on behalf of a child may include advising the Office of the Director of Public Prosecutions of the child's need of special measures or facilities to give evidence, liaising with prosecutors to arrange appointments, making referrals for counselling, reporting breaches of bail and assisting in the preparation of victim impact statements.[296]

The location of the CWS allows for ready access to and familiarisation with court facilities.[297] The closed-circuit television facilities which are used for child witnesses in some kinds of case are located within the CWS premises, so that the child is able to be reassured about the situation in which he or she will testify and about the protection that will be available.[298] Visits to the Service enable the children to become familiar with the atmosphere of the court complex, which thereby loses its daunting and potentially threatening atmosphere. The children therefore feel more able to participate effectively in the proceedings and approach the giving of their evidence with less fear and anxiety.[299]

The location of the Service also promotes co-operation and co-ordination between the Service and the Office of the Director of Public Prosecutions. This allows the CWS to assist child witnesses by keeping them up to date with the progress of the case. It also enables the CWS to provide the prosecution with relevant information which may impact upon the child's ability to testify. The kind of information which the CWS may be able to provide may include knowledge of factors such as the child's background, family environment, level of anxiety and attitude towards giving evidence.

An independent evaluation of the Service conducted after its first two years of operation found that the expectations of all major stakeholders had been met. Those defence counsel who had had direct contact with the Service were satisfied that the Service provided assistance to child witnesses in such a way that there was no chance that the children's evidence would be contaminated. The evaluation also revealed that, although the experience of giving evidence remained stressful, there were two significant indicators that children

295 Id at 21.

296 Ibid.

297 Id at 20.

298 Research has shown that, for many child witnesses, the possibility of having to confront the accused is one of the most stressful aspects of giving evidence. See note 1255 of this Report.

299 Bellett S, *Child Witness Service - What's So Special About It?* (Paper presented to the 7th Australasian Conference on Child Abuse and Neglect, Perth, October 17-20, 1999) at 21.

benefited from the preparation they received. Three quarters of the children interviewed considered the co-ordinator of the Service to be the person most helpful to them in preparing to give evidence, and every child said they would recommend the Service to other children in a similar situation. Further, in comparison with children who did not receive assistance from the Service, children who had attended the CWS had a more favourable view of defence counsel, indicating that the level of understanding achieved of the criminal justice process had succeeded in reducing the negative impact which many children feel as a result of being cross-examined.[300]

(c) Issues for consideration

Although each of the programs outlined above has similar objectives, and although both are well regarded for the services they provide both prior to and during court proceedings, there are some significant differences between the two models.

The Child Witness Service in Western Australia is fully staffed by paid professionals. This type of service would obviously be more expensive to fund than one such as PACT, which relies heavily on the assistance of trained volunteers operating under the supervision of qualified professionals. The involvement of volunteers may also more easily facilitate cost-effective expansion into regional areas and the provision of culturally appropriate assistance to indigenous children and children from other cultural backgrounds.

PACT is financially and administratively independent of both the Police Service and the Department of Justice, while the CWS is funded and administered through the Ministry of Justice. However, the CWS operates as a separate entity and is able to maintain its independence as a service provider. In fact, in contrast to PACT, which provides assistance only to victims of sexual abuse and their non-offending family members, the CWS provides services to both the prosecution and defence, although the utilisation of the service by children giving evidence for the defence is small. Further, the administrative structure of the CWS and its physical location allow it to act as a valuable link between the child witness and the prosecution, providing relevant information to each about the other. Because its premises are within the court complex, child witnesses are enabled to feel more familiar with and secure about the physical environment in which they will testify, and they may therefore feel less anxious about giving evidence.

One of the submissions received by the Commission in response to the Discussion Paper, while acknowledging the valuable role played by PACT in Queensland, proposed:[301]

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300 O'Grady C and Shannon C, *An Evaluation of the Child Victim Witness Service: I don't know what we would have done without her* (Ministry of Justice (WA), Report, June 1997 (Revised January 1999)) at 171-175.

301 Submission 47.

- the development of specific court support services to child witnesses and their families;

- that this support not only include the very important and necessary component of emotional support but that it include strong educative components which emphasise courtroom processes and cross-examination tactics; and

- that appropriate funding be provided for this service from the State government.

3. SUPPORT IN COURT

A child witness may require, in addition to programs which provide familiarisation with the court environment and procedures before the child gives evidence, to have a support person present with the witness while he or she actually testifies. The presence of a supportive person may not only help to reduce the distress which the child may experience, but may also have a positive effect on the quality of the child's evidence and may lead to more accurate testimony.[302] The reassurance of a supportive adult may be of particular assistance in helping a child witness cope with cross-examination.[303]

(a) Existing legislation

All Australian jurisdictions now have legislation permitting a child witness, in certain circumstances, to have a support person present while the child gives evidence. In some jurisdictions, the child has an entitlement to the presence of such a person while in others, such as Queensland, the decision whether to allow a support person to be present with the child is a matter within the discretion of the court. In some jurisdictions, the legislation also specifies how and when the support person is to be chosen, where the support person is to be located in the courtroom, and the role which the support person is permitted to play.

(i) Queensland

Section 21A(2)(d) of the *Evidence Act 1977* (Qld) gives the court a discretion to order that a support person approved by the court may be present in court to provide emotional support to a "special witness" while the witness is giving

302 Tobey A et al, "Balancing the Rights of Children and Defendants: Effects of Closed-Circuit Television on Children's Accuracy and Jurors' Perceptions" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 222, citing Moston S and Engelberg T, "The effects of social support on children's eyewitness testimony" (1992) 6 *Applied Cognitive Psychology* 61.

303 Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office Central Research Unit, 1995) at 143.

evidence in any proceeding. A special witness is a child under the age of 12 years or a person who, in the opinion of the court, would be likely, as a result of one of a number of specified factors, to suffer severe emotional trauma or who would be likely to be disadvantaged as a witness if required to give evidence in the usual way.[304]

This provision does not ensure that a support person is always present for a child witness or that, when a support person is permitted to be in court, that person is in close physical proximity to the child. The former Director of Public Prosecutions noted that, occasionally, the location of the support person in the courtroom has created difficulties for the child witness. For example, the support person might be obscured from the witness's view by the accused, or the support person might be seated so that, in searching for the support person, the child is unable to avoid eye contact with the accused. Accordingly, the following guideline was issued to prosecutors:[305]

> Counsel appearing for the prosecution, whether in the magistrates court or at trial, in cases where a witness has been declared a special witness and the magistrate or judge has made an order under section 21A(2)(d), should ensure, with the approval of the presiding judge or magistrate, that the support person is so seated that the special witness is enabled to see the support person without having also to have in view the face of the person charged.

(ii) Victoria

In Victoria, there is a discretionary provision enabling the court to make an order permitting the presence of a support person. There is no age limit for witnesses who may have a support person in proceedings that relate to a charge for a sexual offence.[306] In proceedings relating to a charge of an indictable offence involving an assault or injury or a threat of injury to any person, a support person may be present with a witness who is under the age of 18 or has impaired mental functioning. The legislation specifically allows

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304 Section 21A of the *Evidence Act 1977* (Qld) was amended by s 46 of the *Criminal Law Amendment Act 2000* (Qld) which received Royal Assent on 13 October 2000. Section 21A(1)(b) defines a "special witness", other than a child under the age of 12, as:

> a person who, in the court's opinion -
>
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
>
> if required to give evidence in accordance with the usual rules and practice of the court.

"Relevant matter" is defined in s 21A(1) as the person's "age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant".

305 Director of Public Prosecutions Queensland, *Annual Report 1998-1999* Guideline No 6 of 1997 at 98.

306 *Evidence Act 1958* (Vic) s 37C(2)(a).

the support person to "be beside the witness while he or she is giving evidence".[307]

(iii) Northern Territory

In the Northern Territory, there is a discretionary provision enabling the court to make an order that, where a vulnerable witness is giving evidence in any proceeding, the witness may be accompanied by a relative or friend for the purpose of providing emotional support.[308] A "vulnerable witness" is a witness who is under the age of 16 years, has an intellectual disability, is the alleged victim of a sexual offence to which the proceedings relate or is, in the opinion of the court, under a special disability because of the circumstances of the case or the circumstances of the witness.[309]

(iv) Western Australia

In Western Australia, a child witness under the age of 16 years is entitled to have a support person near to him or her while he or she is giving evidence in any proceeding in a court.[310] The court does not have a discretion as to whether or not to allow a support person to be present. The support person must be approved by the court, and must not be a witness in or a party to the proceeding.[311] The party who is to call the witness must apply for a preliminary hearing for the purpose of having the support person approved.[312]

The Western Australian provision was enacted in response to a recommendation made by the Law Reform Commission of Western Australia.[313]

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307 *Evidence Act 1958* (Vic) s 37C(3)(c).

308 *Evidence Act* (NT) s 21A(2)(c).

309 *Evidence Act* (NT) s 21A(1).

310 *Evidence Act 1906* (WA) s 106E(1).

311 *Evidence Act 1906* (WA) s 106E(2).

312 *Evidence Act 1906* (WA) s 106S(1). Section 106S is to be amended by cl 29 of the *Acts Amendment (Evidence) Bill 1999* (WA). The Bill has passed both Houses of Parliament but, because of an amendment made in the Legislative Council, had to be referred back to the Legislative Assembly. As of 13 October 2000, it had not been considered further by the Legislative Assembly. Clause 29 will replace the term "preliminary hearing" with the term "special hearing".

313 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at paras 6.24-6.35.

(v) South Australia

There are two provisions in the *Evidence Act 1929* (SA) relating to the presence of a support person for a witness who is a child.

A child who is under the age of 12 years[314] is, while giving evidence, entitled to have present in court, and within reasonable proximity, a person of his or her choice to provide emotional support.[315] The person must not interfere in the proceedings.[316] A person who is a witness or a prospective witness in the proceedings cannot act as a support person unless the court otherwise allows.[317]

The Act further provides that the court should, if it is practicable and desirable to make special arrangements for taking evidence from a witness in order to protect the witness from embarrassment or distress, to protect the witness from being intimidated by the atmosphere of the courtroom or for any other proper reason, order that special arrangements be made for taking the evidence of that witness.[318] The orders which the court may make in such a situation include an order that the witness be accompanied by a relative or friend for the purpose of providing emotional support.[319] There is no restriction on the age of the witness or the kind of proceedings to which this provision applies. However, if the proceeding involves a trial by jury, the judge must warn the jury not to draw any inference from the special arrangements and not to allow the special arrangements to influence the weight to be given to the evidence.[320] The support person must be visible to the parties, the judge and, in the case of a trial by jury, the jury while the witness is giving evidence.[321] If evidence is to be given in criminal proceedings by a witness who is under the age of 16 years, or who has an intellectual disability, or who is the alleged victim of a sexual offence to which the proceedings relate, or who is, in the opinion of the court at some special disadvantage because of the circumstances of the case or the circumstances of the witness, the court should, before the witness gives evidence, determine whether an order for special arrangements such as the presence of a support person should be made.[322]

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314 *Evidence Act 1929* (SA) s 4 (definition of "young child").

315 *Evidence Act 1929* (SA) s 12(4).

316 *Evidence Act 1929* (SA) s 12(4).

317 *Evidence Act 1929* (SA) s 12(5).

318 *Evidence Act 1929* (SA) s 13(1).

319 *Evidence Act 1929* (SA) s 13(2)(c).

320 *Evidence Act 1929* (SA) s 13(7).

321 *Evidence Act 1929* (SA) s 13(6).

322 *Evidence Act 1929* (SA) s 13(9), (10) (definition of "vulnerable witness").

(vi) Tasmania

A child under the age of 17 years[323] is entitled, while giving evidence in any proceeding, to have near him or her a person, approved by the judge, who may provide the child with support.[324] The judge must not approve a person who is a witness in or a party to the proceeding.[325]

(vii) New South Wales

In New South Wales, the *Evidence (Children) Act 1997* provides that a child who is under the age of 16 years at the time of giving evidence is entitled to have a person present when he or she testifies in certain kinds of proceedings.[326] The person may be there as an interpreter, for the purpose of assisting the child with any difficulty in giving evidence associated with a disability, or for the purpose of providing the child with other support.[327] This entitlement applies to a criminal proceeding in any court, a civil proceeding arising from the commission of a personal assault offence, a proceeding in relation to a complaint for an apprehended violence order, and a proceeding before the Victims Compensation Tribunal relating to a personal assault offence.[328]

The child may choose the person whom the child would like to have as a support person.[329] The legislation specifies that the child is entitled, while giving evidence, to have the person of his or her choice near to him or her[330] and that, to the extent that it is reasonable to do so, the court must make appropriate directions to give effect to the child's decision to have the person near the child and within the child's sight.[331]

(b) Issues for consideration

The legislation outlined above raises a number of issues for consideration. These issues include:

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323 *Evidence Act 1910* (Tas) s 122A (definition of "child").

324 *Evidence Act 1910* (Tas) s 122E(1).

325 *Evidence Act 1910* (Tas) s 122E(2).

326 *Evidence (Children) Act 1997* (NSW) ss 6, 27.

327 *Evidence (Children) Act 1997* (NSW) s 27(3)(b).

328 *Evidence (Children) Act 1997* (NSW) s 27(1).

329 *Evidence (Children) Act 1997* (NSW) s 27(2).

330 *Evidence (Children) Act 1997* (NSW) s 27(2).

331 *Evidence (Children) Act 1997* (NSW) s 27(4).

- whether there should be a legislative entitlement for a child witness to have a support person present in court and, if so, in what circumstances the entitlement should apply;

- whether, if there were a legislative entitlement to the presence of a support person, a child witness should be able to choose not to have a support person present when he or she gives evidence;

- who should be the support person for a child witness and, in particular, to what extent should the wishes of the child as to the identity of the support person be taken into account;

- whether the legislation should specify that the support person is to be located close to the child while the child is giving evidence;

- what limitations should be placed on the role of the support person, and whether these limitations should be spelt out in the legislation.

(i) Entitlement to a support person

As noted earlier, the presence of a support person may not only assist a child witness emotionally, but may also increase the child's ability to testify and may therefore result in more accurate evidence.[332] However, under the existing provisions of the *Evidence Act 1977* (Qld), a child witness is not automatically entitled to a support person. Section 21A(2)(d) enables the court to exercise a discretion to allow certain child witnesses to have a support person present in court while they give evidence.[333]

A. A legislative entitlement

In Western Australia, New South Wales, Tasmania and South Australia, the legislation entitles a child witness to be accompanied by a support person in certain circumstances.[334]

The submissions received by the Commission in response to the Discussion Paper[335] strongly favoured the introduction in Queensland of a legislative entitlement to the presence of a support person for a child witness.[336] The Children's Commission of Queensland observed:[337]

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332 See notes 302 and 303 of this Report.

333 See pp 66-67 of this Report.

334 See pp 68-70 of this Report.

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

336 Submissions 2, 19, 20, 21, 29, 31, 33, 34, 37, 44, 49.

337 Submission 31.

> Although there is currently a provision that enables the court to order that a support person be present, the entitlement is at the discretion of the magistrate or judge, and is not an as of right entitlement of the child. As support persons are recognised as being a genuine source of security and reassurance for the child, with research suggesting that their presence can improve children's accuracy and ability to give evidence, it appears inappropriate that, at judicial discretion, some children are denied this support, particularly as there is little suggestion that the presence of a support person unfairly prejudices the accused or interferes with court processes. [note omitted]

Other reasons put forward for supporting a legislative entitlement were that it would overcome inconsistency and lack of uniformity in the support services offered to child witnesses, thus enabling child witnesses to know with some degree of certainty what their support options are,[338] and that it would be in keeping with Australia's international obligations under the United Nations Convention on the Rights of the Child.[339]

However, the President of the Childrens Court expressed the view that, in the absence of any evidence that support persons are being unreasonably excluded, there was no need to change the present position.[340]

The former Director of Public Prosecutions was also opposed to the idea that all child witnesses should have an as of right entitlement to the presence of a support person:[341]

> It is unthinkable, to my mind, that a child aged 17 and nearly 18 who is of robust personality should have as of right an entitlement to a support person; … Whilst I consider the interests of the witness paramount, I do think it should be upon the applicant, and this in usual circumstances means the Crown, to make out its case for the provision of a support person to the witness.

Although this submission expressed the view that the court should retain its discretion to determine the extent of support with which the witness should be provided by way of a support person, it also suggested that there could be a legislative requirement for the court, in exercising its discretion, to have regard to factors such as:

> … the age of the witness, the environment from which the witness comes (examples: dysfunctional family, special school, ethnic background) maturity of the child, relationship between the witness and the defendant, whether the defendant is legally represented or not, the duration of the evidence expected to be given by the witness and other relevant factors.

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338 Submissions 33.

339 Submission 37.

340 Submission 45.

341 Submission 32.

B. The age of the witness

In other Australian jurisdictions, the legislation relating to the presence of a support person for a child witness generally applies to children under the age of 16 years.[342]

A number of submissions considered the age of the child witnesses to whom the presence of a support person should be available in Queensland.[343] All of the respondents who referred to this issue thought that the age limit in the existing Queensland legislation - under 12 years unless the child is under a special disadvantage as a witness[344] - is too low. Two respondents submitted that all children should be entitled to a support person, regardless of their age.[345] The Children's Commission of Queensland - whose submission was supported by PACT - was of the view that the age limit should be raised to 16 years,[346] and the former Director of Public Prosecutions considered that children up to the age of at least 16 should have protection available to them.[347] The Children's Commission observed:[348]

> Children between 12 and 16 years are still developmentally and socially disadvantaged compared with adult witnesses and generally experience unacceptable levels of stress when they are required to give evidence without the concessions, such as a support person … that children under 12 years may be afforded.

C. Types of proceeding

The legislation in other Australian jurisdictions relating to the presence of a support person for a child witness varies as to the kinds of proceeding to which the legislation applies.[349] For example, in Western Australia, Tasmania and the Northern Territory, the legislation applies to "any proceeding"; in New South Wales it applies to all criminal proceedings and certain specified civil proceedings; and in Victoria, it applies only in relation to sexual offences.

None of the submissions received by the Commission in response to the Discussion Paper specifically considered the issue of the type of proceedings in which the presence of a support person should be available to a child

342 See pp 67-70 of this Report.

343 Submissions 29, 31, 32, 33.

344 See pp 66-67 of this Report.

345 Submissions 29, 33.

346 Submissions 31, 44.

347 Submission 32.

348 Submission 31.

349 See pp 67-70 of this Report.

witness in Queensland. However, one respondent referred to the availability of a support person for all children,[350] while others referred to all children under the age of 16 years,[351] or to all child complainants.[352] The comments of a number of respondents were impliedly limited to children who are complainants.[353]

D. Right to refuse support

A number of respondents submitted that, if there were a legislative entitlement to the presence of a support person, child witnesses should be able to refuse this form of assistance if they felt sufficiently strong to testify alone.[354] However, the former Director of Public Prosecutions qualified his support for this proposition by observing that it should be recognised that the child's needs may change in the course of giving evidence and emphasising the need for flexibility to deal with such a situation.[355]

(ii) Identity of the support person

A. The need for training or professional qualifications

A number of submissions considered the categories of people who would be appropriate to act as support persons for child witnesses. The main groups identified were qualified professionals, trained volunteers and family members.

There was considerable support for PACT from respondents involved in providing assistance to abused children. These respondents included Queensland Health,[356] the Children's Commission of Queensland,[357] the Queensland Police Service[358] and Families, Youth and Community Care Queensland.[359] They also included a group of almost 20 non-government

350 Submission 29.

351 Submissions 31, 44.

352 Submissions 2, 49.

353 Submissions 30, 31, 33, 44.

354 Submissions 20, 32, 34, 37.

355 Submission 32.

356 Submission 30.

357 Submission 31.

358 Submission 34.

359 Submission 49.

organisations concerned with children's issues, and some 25 children and young people with experience in giving evidence.[360]

Two respondents, while acknowledging the importance of the role played by PACT in supporting child witnesses, considered that, ideally, the role should be performed by trained professionals.[361] The Queensland Council for Civil Liberties expressed concern about PACT volunteers going beyond their role of familiarising the child with the court environment or explaining the child's role as a witness:[362]

> There is always a considerable concern that where a complainant seeks an adjournment because they are apparently upset that the pressure of the situation could cause a support person to make some comment to the complainant as to how a particular line of cross-examination should be handled.

The respondent considered that the risk of a professional support person from, for example, the Office of the Director of Public Prosecutions acting improperly in this manner would be less than with a volunteer from a community organisation.

B. Family members as support persons

Some respondents recognised the potential for family members to act as support person for a child witness.[363] The Children's Commission of Queensland observed:[364]

> … it needs to be recognised that, for some children, the sense of security and emotional support they derive from a close family member or friend may be more significant than the informed support provided by trained personnel. If the role of the support person is ultimately to be a source of comfort and reassurance to the child, which is the role that the Children's Commission supports, then it is unnecessary for support persons to be restricted to those with specialised training.

However, family support may not always be available. One respondent considered that, in cases involving allegations of abuse, family support would be more likely to be consistent if the accused were remote from the family - for example, a sporting coach - than if the accused were a member of the child's family, a situation in which family members are often inconsistent in their attitudes to both the child and the accused.[365] The President of the

360 Submission 33.

361 Submissions 29, 47.

362 Submission 40.

363 Submissions 31, 37, 45.

364 Submission 31.

365 Submission 33.

Childrens Court also noted that, although children, in his experience, appear more comfortable when supported by a relative or close friend, it is sometimes the case that the family is divided as a result of the child's allegations, leaving the child without support from the family.[366] A judge of the District Court observed that, while it may be inappropriate for parents who are to give evidence to act as support person for their child,[367] often there are no other suitable persons available to fulfil the role.[368]

Two PACT volunteers expressed the view that, even where support is available from within the family, children may be more comfortable with an independent support person rather than a family member.[369] One of these respondents submitted that an independent third party, such as a PACT volunteer, would be preferable to a family member because, although familiar to the child, the PACT supporter is not emotionally involved and has no ongoing relationship with the child, so that the child is better able to put the incident behind him or her after the case is over.[370] Both respondents suggested that the child may not have divulged to the family all that has happened and may be uncomfortable with family members hearing all the details, and therefore may rather be supported by someone from outside the family.

C. Other factors

Two respondents specified some other factors which they considered should be taken into account in determining the identity of an appropriate support person for a child witness. These factors included the nature of the case, the age of the child, the personal qualities of the support person[371] and the readiness of the proposed support person to comply with directions or instructions given by the court.[372]

D. Ineligibility to act as a support person

Two submissions received in response to the Discussion Paper observed that it would not be appropriate for a person who is himself or herself a witness in the proceeding to act as a support person for a child witness.[373] This view is

366 Submission 45.

367 See pp 76-77 of this Report.

368 Submission 17.

369 Submissions 12, 20.

370 Submission 12.

371 Submission 19. These factors were raised in the context of children with special needs.

372 Submission 32.

373 Submissions 17, 31.

consistent with legislation in a number of Australian jurisdictions.[374] However, it has been suggested that it may sometimes be possible to avoid this problem simply by rearranging the order of the witnesses so that the support person gives evidence before the child witness and is then able to be with the child when the child testifies.[375]

The submissions also identified some further limitations on the persons who should be eligible to provide support to a child witness.

It was considered inappropriate that a person who has discussed the details of the case with the child witness[376] or provided counselling to the child,[377] or who is a respected public figure whose association with the witness may lend undue weight to the child's evidence[378] should be able to act as a support person for a child witness.

E. The child's right to choose

There were differing views among respondents to the Discussion Paper as to whether a child witness should be entitled to choose whom he or she wished to act as a support person.

Several submissions expressed the view that the child's wishes should be respected,[379] although two of these respondents - the Children's Commission of Queensland[380] and the former Director of Public Prosecutions[381] - qualified their support for the child's right of choice by adding the proviso that the person chosen by the child should not fall within one of the categories outlined above as disqualifying a potential support person from eligibility.[382]

Three respondents favoured taking the child's views into account,[383] but the Queensland Council for Civil Liberties did not consider that the child's wishes should be determinative.[384] Families, Youth and Community Care

374 See pp 68-70 of this Report.

375 Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (SLC 125, 1990) at 7.

376 Submission 40.

377 Submission 32.

378 Submission 32.

379 Submissions 2, 20, 21, 31, 32, 33, 44.

380 Submission 31.

381 Submission 32.

382 See pp 76-77 of this Report.

383 Submissions 19, 40, 49.

384 Submission 40.

Queensland also had concerns about giving young children the right to choose their own support person:[385]

> If the child chose someone who other adults and professionals, involved in the prosecution of the matter and in supporting and counselling the child, considered was clearly unsuitable and that decision was vetoed, the child would be further disempowered.

(iii) Location of the support person

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission have recommended that a support person should be permitted to sit next to a child witness while the child gives evidence.[386] They observed:[387]

> Provisions permitting court companions will not assist child witnesses effectively unless those court companions can sit close enough to the child to lend real and productive emotional support.

Several of the respondents to the Discussion Paper recognised the desirability of allowing the support person to be in close physical proximity to a child witness to enable the support person to provide comfort and emotional reassurance.[388] Three of those respondents were of the view that the child's right to the close physical presence of his or her support person should be specified in legislation.[389]

However, three respondents were opposed to the suggestion that there should be a specific legislative provision permitting the support person to be near the witness.[390] The former Director of Public Prosecutions expressed the view that the child might be more comfortable if the support person were in view but at some distance rather than nearby.[391] The Queensland Council for Civil Liberties considered that the issue should be left to the exercise of judicial discretion.[392]

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385 Submission 49.

386 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 107 at 340.

387 Id at para 14.101.

388 Submissions 20, 21, 27, 31, 33, 44, 45, 49.

389 Submissions 20, 21, 49.

390 Submissions 19, 32, 40.

391 Submission 32.

392 Submission 40.

(iv) The role of a support person

A. The scope of the role

Most of the submissions which discussed the issue of support persons demonstrated an appreciation of the limitations of the role, and recognised that the purpose of having a support person present with a child witness was to provide the child with emotional reassurance and comfort. Respondents referred to the importance of not assisting the witness,[393] and of not interfering in the proceedings by reinterpreting questions, prompting the child or intervening in the legal process on the child's behalf.[394] Only the Queensland Council for Civil Liberties expressed concern that a support person might exceed the boundaries of the role by giving a child cues in respect of particular questions or issues or, during adjournments in the proceeding, by giving the child advice on how to handle certain lines of cross-examination.[395]

Several respondents were of the view that, in addition to providing comfort and reassurance to the child witness, the support person should be able to alert the court to any problems that the child might be experiencing.[396]

B. The need for guidance

A number of respondents agreed that it would be desirable for support persons to be given guidance, preferably in written form, about the scope of their role.[397] The need for the role of the support person to be clarified was recognised as being particularly important when the support person had not received any training.[398]

One respondent, a PACT volunteer, commented on varying approaches adopted by different judges and magistrates as to exactly what the support person is permitted to do - for example, as to whether physical contact is allowed between the child and the support person - and stressed that the parameters of the role should be clearly established in each particular case.[399] The former Director of Public Prosecutions favoured a requirement that the judge or magistrate instruct the support person about the limitation of the role,

393 Submission 5.

394 Submission 31.

395 Submission 40.

396 Submissions 12, 27, 29, 33.

397 Submissions 19, 20, 21, 29, 31, 32, 44.

398 Submission 31.

399 Submission 12.

with emphasis being placed on an instruction that the support person must not in any way attempt to assist the child in the giving of answers to questions.[400]

(v) Determining issues relating to a support person

There are a number of matters which may need to be determined in relation to a support person for a child who is a witness in a proceeding. These matters include:

- if the presence of a support person is a matter of discretion for the court, whether a support person should be present;
- if there is a legislative entitlement to the presence of a support person, whether the child wishes to refuse to have a support person present while he or she gives evidence;
- who should act as the support person; and
- what the support person will be permitted to do.

The submissions which considered this issue generally agreed that questions relating to the presence of a support person should be determined at a preliminary hearing.[401] The Queensland Council for Civil Liberties noted that if, for example, the suitability of a support person is not determined in advance, the hearing may be delayed while a suitable person is found.[402] However, the former Director of Public Prosecutions cautioned that, occasionally, the person approved at a preliminary hearing may later be prevented from acting as support person, so that there should be sufficient flexibility to allow a new order to made where circumstances require.[403]

Families, Youth and Community Care Queensland was of the view that support persons should be made available at a much earlier stage than at pre-trial hearing and that it is not necessary for the court to "appoint" or choose the support person.[404]

(vi) Swearing the support person

One of the respondents to the Discussion Paper proposed that:[405]

400 Submission 32.

401 Submissions 19, 20, 21, 32, 40.

402 Submission 40.

403 Submission 32.

404 Submission 49.

405 Submission 40.

> The support person should be sworn and the regulation of their behaviour both in and out of court, particularly during breaks in cross examination, should be supervised by the court under specified direction to them that if they discuss any aspect of the evidence at all with the child contempt of court proceedings will follow.

4. THE COMMISSION'S VIEW

(a) Court familiarisation and preparation

The Commission recognises that the provision of court familiarisation and preparation programs is not strictly a matter of law reform, but rather one of access to services within the justice system.

However, the Commission strongly believes that it is essential, both for the welfare of the children involved and for the interests of justice, that child witnesses are adequately prepared to appear in court. Without such preparation, children are unlikely to understand the process of a court case and the role of the various participants. As a result, many of them may find giving evidence a confusing and distressing experience, and they are unlikely to be able to give evidence effectively or to present as credible witnesses.

The Commission also believes there is a need for greater co-ordination of cases involving child witnesses, to ensure that the child and family remain informed of the progress of the case and that, in a criminal matter, the prosecution is aware of the child's needs.

The Commission acknowledges the work done by PACT in preparing children for the experience of giving evidence. Nonetheless, in the view of the Commission, there is an important role for a service based within the justice system to implement an educational program and to facilitate contact between the various agencies involved and communication between those agencies and the child and his or her family.

(b) Support in court

(i) Entitlement to a support person

In the light of the research indicating the positive effect which the presence of a support person may have, not only on the emotional well-being of a child witness but also on the accuracy of the child's evidence and the child's ability to testify effectively under cross-examination, the Commission is of the view that it is desirable for a child witness to be accompanied by a support person while he or she gives evidence.

A. A legislative entitlement

The Commission is persuaded by those submissions which advocated that, rather than the existing situation under section 21A(2)(d) of the *Evidence Act 1977* (Qld) which gives the court a discretion to allow certain child witnesses to have a support person present in court while they give evidence, the legislation should confer an entitlement to the presence of a support person.

In the view of the Commission, it is important that courts adopt a consistent approach to matters involving child witnesses, so that a child witness can be informed with certainty about the circumstances under which his or her evidence will be taken. The Commission also considers it undesirable that some child witnesses who may need the reassurance of the presence of a support person to be able to give their evidence should, as a result of the exercise of a judicial discretion, be denied the opportunity to testify as effectively as possible. Further, the Commission believes that, in criminal proceedings involving a child complainant or where a child is a significant prosecution witness, it would be fairer to the defence if the presence of a support person for the child was a routine occurrence.

B. The age of the witness

The Commission agrees with the submissions to the effect that the present age limit of 12 years (or 16 years if there are specified circumstances which put the witness at a disadvantage) for the presence of a support person is too low. It acknowledges that witnesses between the ages of 12 and 16 do not generally have the experience that would be expected of an adult witness, and therefore considers it unreasonable that they should be expected to give evidence on the same terms as adults.

In this Report, the Commission has recommended that the age at which child witnesses should be able to access certain protections and facilities to assist them to give evidence should be raised from 12 to 16 years.[406] Consistently with these recommendations, the Commission is of the view that child witnesses under the age of 16 years should be entitled to the presence of a support person while they give evidence.

Further, the Commission recognises that some witnesses may be at a disadvantage in giving evidence, even though they have reached 16 or 17 years of age. The Commission is therefore of the view that the court should have a discretion to allow a support person for a witness aged 16 or 17 years who would satisfy the criteria for a "special witness" under section 21A of the *Evidence Act 1977* (Qld).

406 See for example Chapters 8 and 10 of this Report.

The Commission has given consideration to the proposal by the former Director of Public Prosecutions that there should be a legislative requirement for a court, in exercising its discretion to determine whether the presence of a support person should be allowed, to have regard to certain specified factors.[407] Although the Commission agrees that the factors suggested by the former Director of Public Prosecutions are all relevant to the issue of the need for a support person, it is concerned to ensure that the legislation does not become overly prescriptive. It is also concerned that any attempt to formulate a list of factors that a court should be required to take into consideration might result in the omission of other, equally relevant, factors.

C. Types of proceeding

In this Report, the Commission has recommended that measures to facilitate the giving of evidence by a child witness should apply to proceedings for sexual offences or for offences of violence and to certain civil proceedings arising from the commission of such offences.[408] Consistently with this approach, the Commission is of the view that the provisions relating to the presence of a support person for a child witness should apply to proceedings involving charges for sexual offences or offences of violence, to civil proceedings arising from the commission of such offences or a proceeding for a domestic violence order.

The Commission acknowledges that there may be other circumstances where the process of taking the evidence of a child witness may be assisted by the presence of a support person to provide reassurance and emotional support for the child. The Commission is therefore of the view that, in proceedings other than those specified in the preceding paragraph, the court should have a discretion to allow the presence of a support person while a child witness gives evidence.

D. Right to refuse support

The Commission accepts that there may be child witnesses who feel able to testify without having a support person present and that, in some cases, the ability to handle the situation on their own would create a sense of empowerment for these witnesses. The Commission agrees that a witness who wishes to give evidence on his or her own should be able to do so. It is of the view that, in such a situation, the witness should be able to refuse the presence of a support person.

However, the Commission is concerned that any right to waive the legislative entitlement to a support person might result, in some circumstances, in

407 See p 72 of this Report.

408 See for example Chapters 10 and 14 of this Report.

pressure on a child witness to testify on his or her own when he or she does not really wish to do so.

The Commission is therefore of the view that, although a child witness should be entitled to refuse the presence of a support person, that right should be subject to a judicial discretion to override the wishes of the child if, in the opinion of the court, it is in the child's best interests to do so.

(ii) Identity of the support person

A. Suitability for the role

In the view of the Commission, the identity of the most appropriate support person for a child witness in any particular case will depend on the individual circumstances of that case. In some instances, there may be a family member who is available and willing to provide emotional support for the child while he or she gives his evidence, and whom the witness is happy to have acting in that role. In others, there may be a need for an alternative support person.

The Commission does not believe that it is necessary for a support person to have any particular professional qualifications. It considers that the most important factors in choosing a support person for a child witness are that the support person fully understands the limits of the role, and that the support person's presence is acceptable to the child. Both of these issues are discussed further below.

In the view of the Commission, the party proposing to call the child as a witness should be required to obtain court approval for a proposed support person, and opposing parties should be given the opportunity to object to the person nominated. Because of the wide variety of situations that are likely to arise, the Commission is not in favour of specifying in the legislation the factors to be taken into account by the court in determining whether a person is suitable to act as a support person for a child witness.

B. Ineligibility to act as a support person

The Commission agrees that it is generally undesirable for a person who is a party to or a witness in the proceeding to act as a support person for a child witness. However, the Commission acknowledges that situations may arise where such a person is the most, and perhaps only, appropriate support person. In the view of the Commission it should be possible to arrange the order in which witnesses give their evidence so as to avoid the risk that the support person's evidence might be contaminated as a result of hearing the child testify. The Commission is therefore not persuaded that there should be a legislative prohibition on a person who is a party to or a witness in the proceeding acting as a support person.

The Commission has considered the other categories of ineligibility proposed in the submissions. While the Commission acknowledges that there may be the potential for a jury to be swayed in favour of believing a child's evidence if the child is supported by a respected public figure, the Commission is of the view that the extent to which this is likely to happen in the circumstances of the particular case is a factor which the court could take into account in approving the identity of the support person and that, accordingly, there is no need for a legislative prohibition against a "respected public figure" acting as a support person.

The Commission is further of the view that the proposed prohibition against a support person "who has discussed the details of the case with the child" is too wide, and would exclude, for example, family members of the child who may, in the normal course of events, have taken part in conversations with the child about what the child observed or experienced. The Commission considers that, in such a situation, effective education about the role of the support person would be more appropriate than a prohibition of the scope suggested. However, the Commission considers that, if a child witness has been receiving counselling or some similar form of therapy, it would be inappropriate, because of the nature of the relationship which is likely to have developed between the child and the therapist and the extent to which the events which the child observed or experienced may have been discussed in therapy sessions, for the therapist to provide support for the child while he or she gives evidence.

C. The child's right to choose

In the view of the Commission, it is essential that the proposed support person is acceptable to the child. The purpose of allowing a support person to be present with the child is to provide emotional reassurance to the child so that the child feels sufficiently confident to give his or her evidence. The presence of a support person who is not acceptable to the child would therefore defeat the purpose of the entitlement to support.

On the other hand, the Commission recognises that a child may - for a variety of reasons - nominate a support person who is not considered suitable to fulfil the role. It may be, for example, that the person chosen by the child is too emotionally involved with the child to provide support without giving rise to the perception that the child's evidence may be contaminated by the person's presence or, alternatively, that the person lacks sufficient maturity and experience to undertake the role.

The Commission is therefore of the view that the child should be involved in the process of selecting the person to be nominated as support person for the child. However, because the identity of the support person must be approved by the court, the court will retain a discretion not to approve a person whom it considers to be unsuitable for the task. The Commission does not believe that a child would find this process disempowering, provided that the child had

been adequately informed about the role of the support person and the need for the court's approval.

(iii) Location of the support person

In the view of the Commission, the purpose of providing emotional reassurance to a child who is giving evidence will be largely defeated if the child's support person is so situated that the child is not aware of the person's presence.

In order to overcome problems that have, in the past, reportedly been experienced by some child witnesses in locating their support person, the Commission is of the view that the legislation should provide that the support person is to be located within reasonable physical proximity to the child who is giving evidence.

(iv) The role of a support person

A. The scope of the role

The Commission believes that it is important, in the interests of certainty, for courts to adopt a consistent approach to the role of a support person. It regards the present situation in Queensland, which depends on the attitude adopted by the presiding judicial officer, as unsatisfactory. In the view of the Commission, it is unfair to a child witness and, in a criminal trial, to the accused, that the role of the support person is not clearly spelt out.

However, as the circumstances under which different proceedings are heard will vary considerably, depending on factors such as the facilities available and the layout of the courtroom, the Commission does not consider it practicable to achieve the desired level of consistency through legislative prescription. Rather, the Commission believes that guidelines should be developed by the courts in consultation with relevant interested parties, indicating clearly what a support person will, or will not, be permitted to do in undertaking the role. These guidelines could deal with issues such as appropriate seating arrangements to ensure that the support person is in close physical proximity to the child, the extent of physical contact and verbal communication allowed between the support person and the child, particularly during breaks in the child's evidence, and the explanation to be given to the jury, if any, about the support person's role. It will be important for the guidelines to focus on the need to ensure that the child's evidence is not compromised by the presence of the support person while the child is testifying, and that any perception of contamination is also avoided.

B. The need for guidance

The Commission has already expressed the view that it should not be necessary for support persons to have any particular training or qualifications

before they are able to undertake the role. However, the Commission regards it as essential that support persons are made aware of the expectations of how they are to behave and of the limitations of their role.

The Commission is therefore of the view that an information kit should be developed for persons who are to act as support persons, informing them of the scope of their role according to the guidelines discussed above.

(v) Determining issues relating to a support person

The Commission is of the view that it would facilitate the efficiency of the justice system for matters concerning a support person for a child witness to be determined, wherever possible, at a preliminary hearing. In this Report, the Commission has recommended that legislative provision be made for preliminary hearings to be held where necessary before both committal and trial.[409] The Commission believes that this would overcome the concern expressed by Families, Youth and Community Care Queensland that a support person should be made available at a much earlier stage than a pre-trial hearing.

The use of a preliminary hearing to dispose of such issues would not only save court time, but would have the added advantage of reassuring a child witness in advance of the actual proceeding about the presence and identity of his or her support person.

However, the Commission recognises that situations will arise where it is not possible to determine conclusively at a preliminary hearing all the issues relating to the support person for a child witness. The Commission therefore agrees that there should be sufficient flexibility to allow such issues to be dealt with at the actual proceeding if necessary.

(vi) Swearing the support person

The Commission does not consider it appropriate for a support person to be sworn. In the view of the Commission, concerns about possible contamination of the evidence of a child witness as a result of the presence of a support person can be more effectively dealt with by the development of guidelines as to the role of the support person and the provision of adequate information to support persons about the limitations of their role.

409 See Chapter 11 of this Report for a discussion of the use of preliminary hearings in trials involving child witnesses. Preliminary hearings prior to committal are discussed in Chapter 12 of this Report.

5. RECOMMENDATIONS

The Commission recommends that:

5.1 Consideration be given to establishing a service within the justice system to provide educational programs for child witnesses, to facilitate contact between various agencies involved in the proceeding and to enhance communication between those agencies and the child and his or her family.

5.2 To the extent that it applies to child witnesses, section 21A(2)(d) of the *Evidence Act 1977* (Qld) should be repealed.

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

(a) in a proceeding for a charge of a sexual offence or an offence of violence, or in a civil proceeding arising from the commission of such an offence, or in a proceeding for a domestic violence order, a child witness who is under the age of 16 years is entitled to the presence of a support person while he or she gives evidence;

(b) in any other proceeding where a child under the age of 16 years is to give evidence, the court may order that a support person is to be present while the child gives evidence;

(c) in any proceeding where a young person aged 16 or 17 years who is, in the opinion of the court, a "special witness" under section 21A(1) of the *Evidence Act 1977* (Qld) is to give evidence, the court may order that a support person is to be present while the young person gives evidence;

(d) a child who is entitled to the presence of a support person while giving evidence may waive the entitlement unless, in the opinion of the court, it is not in the child's best interests to waive the entitlement;

(e) a party proposing to call a child witness must apply to the court for approval of the proposed support person;

(f) a person who has provided professional therapy or counselling to a child who is to be called as a witness is ineligible to act as a support person for that child; and

(g) a support person for a child who is giving evidence is to be permitted to be within reasonable physical proximity of the child.

5.4 The courts, in consultation with relevant interested parties, should develop guidelines setting out the scope of the support person's role.

5.5 An information kit should be developed to inform support persons of the content of the guidelines and the scope of their role.

5.6 Wherever possible, issues relating to the presence of a support person for a child witness should be determined at a preliminary hearing.

CHAPTER 6

TREATMENT BEFORE COMMITTAL OR TRIAL

1. INTRODUCTION

A child who has been sexually abused may need psychological or psychiatric treatment in order to deal effectively with the abuse and its ramifications. Usually, it will be in the child's best interests for treatment to commence as soon as possible. If the child is a complainant in a sexual assault case, any delay in bringing the case to trial may mean that the child should receive treatment before the matter comes to court.

However, the need for early intervention and treatment for children suspected of having been abused gives rise to two concerns - namely, the possible effect which the treatment may have on the quality of the child's evidence, and the use which may be made of treatment records for evidentiary purposes.

2. THE EFFECT OF TREATMENT ON THE CHILD'S EVIDENCE

Concerns have been expressed that certain treatment methods may affect the reliability of a child's evidence. These concerns stem from a belief that a child witness may be susceptible to suggestion, and that the child's evidence may therefore be tainted if counselling or other treatment takes place before the child has testified.

According to the Bar Association of Queensland:[410]

> … it will be potentially inimical to the integrity of the child's evidence for there to be intervention which has or may be seen as having an effect of reinforcing the commission of the offence or suggestion as to the content of, or how the content of, that child's evidence might be presented.

At least two factors contribute to this concern. First, studies into the reliability of children's memories have shown that, although the accuracy of the information provided by young children questioned in an open-ended format is the same as for adults and older children, young children spontaneously provide less information.[411] Research indicates that completeness of recall increases with age and with the level

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410 Submission 53.

411 Bussey K, "Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations and False Denials" (1995) 7 *Current Issues in Criminal Justice* 176 at 181; Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 154; Oates RK, "Children as Witnesses" (1990) 64 *Australian Law Journal* 129 at 130.

of prompting used.[412] It has been suggested that the reason for this is that younger children depend more on questions to guide their recall because they have not yet learned the conventional framework for recounting the past.[413] Second, research also shows that children, including older children, are embarrassed about disclosing information of a sexual nature:[414]

> In sum, for younger children, less information is spontaneously reported when asked under conditions of free recall, and for many older children who have been abused the nature of the material they are reporting will serve to inhibit disclosure.

Because children may be unable or reluctant to disclose certain information without more detailed prompting, there is a fear that counsellors, in providing therapy, may unwittingly cast doubt on the reliability of the child's account by the use of leading or suggestive questions.

Opinions are divided on the extent to which children's memories are susceptible to suggestion:[415]

> Spencer and Flin have expressed the view that children can be susceptible to suggestion. … Oates has reached the conclusion that children are no more susceptible to leading questions than adults. Cohen and Harnick have reached the opposite conclusion. Dunning expressed the view that the susceptibility of younger children to misleading information is greater than older children. Perry and Wrightsman have noted that the studies with respect to this issue 'offer mixed findings' with some studies supporting and others rejecting the view that 'young children are no more susceptible than adults'. Indeed, one study has concluded that normal children are unlikely to make false allegations of abuse as a response to suggestive questioning whereas another study has concluded on the basis of a review of the literature that children 'can indeed be led to make false or inaccurate reports about very crucial, personally experienced, central events'. Batterman-Faunce and Goodman have concluded that situational variables can affect the extent to which children are likely to be susceptible to suggestion. [notes omitted]

There is, however, some common ground amongst researchers:[416]

> Even though eminent empiricists have difficulty reconciling every finding and interpretation of these suggestibility studies, some patterns of agreement can be discerned. There is agreement that beginning around age twelve, adolescents are no more vulnerable to suggestion than adults. Some empiricists fix this point as early as seven years of age. In contrast, all studies that included children younger than five

412 Dent H, "The Effects of Age and Intelligence on Eyewitnessing Ability" in Dent H and Flin RH (eds), *Children as Witnesses* (1992) at 9.

413 Bull R, "Innovative Techniques for the Questioning of Child Witnesses, Especially Those Who Are Young and Those With Learning Disability" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 179, citing Hudson J and Fivush R, *Knowing and Remembering in Young Children* (1990).

414 Bussey K, "Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations and False Denials" (1995) 7 *Current Issues in Criminal Justice* 176 at 182.

415 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 155-156.

416 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 67.

> have found that they were highly likely to accept misleading information given by their interviewers. [notes omitted]

Although it is beyond the scope of this reference to comment on this debate, it is important to recognise that there may be, or may be perceived to be, a tension between the need of a child witness for immediate therapy and the need to preserve the reliability of the child's account until the child has given evidence:[417]

> One the one hand, complainants who have in fact been sexually abused are entitled to the benefit of counselling. On the other hand, accused persons are entitled to put before a jury evidence which may indicate that a particular allegation has been influenced either as to detail or nuance by counselling.

This tension appears to have given rise to a perception that, where court proceedings are pending, in order to avoid allegations that the child's evidence has been contaminated by suggestion or "coaching", counselling should be deferred until after those proceedings are complete. A number of respondents to the Commission's Discussion Paper[418] referred to such a view.[419] Queensland Health observed:[420]

> Historically, many generalist therapy services with a responsibility for children and families have been reluctant to work with children who are required to give evidence before the courts due to a perception that allegations of contamination of evidence may be raised within the court, potentially compromising the legal process.

A submission co-ordinated by the Children's Commission on behalf of a number of non-government organisations and other interested parties, noted:[421]

> Twelve of the fifteen organisations who work closely with abused children were particularly concerned about the tension that exists between the need for these children to receive treatment and legal considerations regarding the integrity of the child's evidence. They reported that, in Queensland, counselling for child abuse victims is commonly postponed until after the trial, with the lengthy court delays some children experience exacerbating the problem.

Those organisations referred to a number of instances of delayed counselling, as did a psychologist.[422] The Director of the Social Work Department at the Royal Children's Hospital reported that allegations that children have been coached during

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417 Submission 40.

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

419 Submissions 12, 25, 30, 33, 39, 47, 53.

420 Submission 30.

421 Submission 33.

422 Submission 25.

counselling contributes to a reluctance amongst most practitioners to offer a counselling service where there is still ongoing court action.[423]

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, in their inquiry into matters relating to young people and the legal process, also received submissions to the effect that therapy for children alleged to have been abused is often postponed until after the trial in order to avoid accusations that the child's evidence has been contaminated.[424]

However, this approach is clearly not in the best interests of children who have been abused and who are in need of therapy. Several respondents to the Discussion Paper referred to the desirability of early intervention.[425] According to one submission received by the Commission:[426]

> Delay in providing counselling and other treatments could lead to worsening of behavioural and emotional disturbances, sometimes with consequences seriously harmful to the child.

The Director of the Social Work Department at the Royal Children's Hospital submitted that pre- and post-trial counselling are essential to the child's rehabilitation and to address the short and long term sequelae of child abuse.[427]

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission also received many submissions which favoured children having access to counselling when they need it rather than when the trial dictates.[428]

On the other hand, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission received a number of submissions concerned about trial results and cross-examination in those circumstances.[429] However, only one respondent to this Commission's Discussion Paper suggested that, where possible, treatment should be delayed until after the trial.[430] Rather, the former Director of Public Prosecutions emphasised that prosecutors do not seek to achieve "wins at any cost".[431]

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423 Submission 47.

424 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.53.

425 Submissions 27, 33, 39, 47.

426 Submission 39.

427 Submission 47.

428 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.54.

429 Ibid.

430 Submission 8.

431 Submission 32.

3. AVOIDING CONTAMINATION OF EVIDENCE DURING TREATMENT

It has been observed that, if a child witness is not exposed to misleading information, the problem of evidence tainted by suggestion cannot arise.[432]

The Commission is aware of one counselling service which adopts this approach by undertaking a form of therapy which does not involve discussing details of the case.[433] The former Director of Public Prosecutions was also in favour of treatment which does not involve questions in relation to the details of the case.[434]

However, not all counsellors agree that this is the best approach and a range of other treatment options is also available.[435] Where the treatment does involve discussion of the actual abuse, it is desirable that this be done in such a way as to avoid potential contamination of the child's evidence. The role of the interviewer has been described as "pivotal" in determining whether the child's memory is reliable:[436]

> Any assessment of the accuracy of a child's account derived through questioning of the child depends on the skill of the interviewer and his or her sensitivity to children's special vulnerabilities to questioning and to inadvertent suggestion as well as to purposeful manipulation.

A number of commentators have focused on the need to improve techniques for interviewing child complainants to avoid the possibility of suggestion:[437]

> … the urgent goal of future research is to develop better interviewing strategies that do not influence children's memory of their experience either wittingly or unwittingly.

In response to this need, a protocol has been developed in the United Kingdom on conducting interviews so that children can give as full an account as possible without undue influence taking place. The aim of the protocol is to assist interviewers to "obtain a truthful account from the child, in a way which is fair and in the child's interests and acceptable to the courts".[438]

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432 Stephens KD, *Voir Dire Law: Determining the admissibility of disputed evidence* (1997) at 156.

433 Meeting between representatives of the Commission and Dr Richard Roylance, President of PACT (Protect All Children Today), 24 April 1998.

434 Submission 32.

435 Submission 33.

436 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 71.

437 Bussey K, "Allegations of Child Sexual Abuse: Accurate and Truthful Disclosures, False Allegations and False Denials" (1995) 7 *Current Issues in Criminal Justice* 176 at 192.

438 Home Office, *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (1992) cited in Bull R, "Innovative Techniques for the Questioning of Child Witnesses, Especially Those Who Are Young and Those With Learning Disability" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 180-182.

One of the submissions received in response to the Discussion Paper advocated the development and implementation of a clear process to be followed across professions likely to hear evidence, together with the videotaping of initial/all sessions held with child complainants.[439] Another recommended:[440]

> That procedures designed to minimise the risk of prejudicing the child's evidence be developed for the counselling of child victims, including making therapists aware of the importance of maintaining the integrity of the child's evidence and related matters.

A number of submissions also proposed that therapy sessions be recorded on audio or videotape in order to avoid allegations that the child's evidence has been contaminated by the treatment.[441]

4. USE OF TREATMENT RECORDS

A further concern resulting from the provision, prior to trial, of counselling to a child who is alleged to have been abused, is the potential use of treatment records as evidence.

A number of submissions received by the Commission in response to the Discussion Paper referred to this issue.[442]

Queensland Health identified two concerns arising from the possibility that involvement with child abuse cases prior to court proceedings may result in the worker (and records) being subject to subpoena:[443]

- that intimate information communicated to the therapist in the course of clinical activity may be demanded by the court (especially at the instigation of defence counsel) without the express permission of the client/patient (that is, concerns related to the client/patient - therapist relationship); and

- that scant resources in time and personnel may be diverted from the provision of direct clinical service to resourcing the legal process.

The Director of the Social Work Department at the Royal Children's Hospital also identified concerns about lack of protection of patient confidentiality as a contributing factor to the reluctance of practitioners to offer a counselling service where there is ongoing court action. This respondent also noted that therapeutic services to

439 Submission 25.

440 Submission 33.

441 Submissions 25, 27, 40.

442 Submissions 30, 32, 33, 37, 39, 40, 41, 42, 47, 53.

443 Submission 30.

abused children are generally a scarce and inadequate commodity and that the few practitioners who do provide treatment prior to trial can ill afford the time and pecuniary costs of extended court commitments.[444]

In New South Wales, legislation has been enacted limiting the extent to which records of therapeutic records can be used as evidence in cases involving allegations that a sexual assault offence has been committed.[445] Under this legislation, a person cannot be required (whether by subpoena or any other procedure) to produce a document recording a "protected confidence" in, or in connection with, a committal proceeding.[446] Evidence is not to be adduced at a committal if it would disclose a protected confidence or the contents of a document recording a protected confidence.[447] A person cannot be required to produce a document recording a protected confidence for inspection by a party in, or in connection with, any criminal proceedings[448] unless the court, having inspected the document, is satisfied that:

- the contents of the document will, either by themselves or having regard to other evidence adduced or to be adduced by the party seeking production of the document, have substantial probative value;
- other evidence of the protected confidence or contents of the document is not available; and
- the public interest in preserving confidentiality of protected confidences and protecting the victim or the alleged victim of a sexual assault offence from

444 Submission 47.

445 *Criminal Procedure Act 1986* (NSW) Part 7.

446 *Criminal Procedure Act 1986* (NSW) ss 147(1) (definition of "preliminary criminal proceedings"), 149(1). Section 148 of the Act defines a "protected confidence" as a "counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence" and "counselling communication" as a communication:

> (a) made in confidence by a person (the ***counselled person***) to another person (the ***counsellor***) in the course of a relationship in which the counsellor is counselling, giving therapy to or treating the counselled person for any emotional or psychological condition, or
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> (b) made in confidence to or about the counselled person by the counsellor in the course of that relationship, or
>
> (c) made in confidence about the counselled person by a counsellor or parent, carer or other supportive person who is present to facilitate communication between the counselled person and the counsellor or to otherwise further the counselling process, or
>
> (d) made in confidence by or to the counsellor by another counsellor or by a person who is or has counselled or otherwise treated the counselled person for any emotional or psychological condition of that person.

447 *Criminal Procedure Act 1986* (NSW) s 149(2).

448 "Criminal proceedings" means proceedings (other than committal proceedings or proceedings relating to bail) relating to the trial or sentencing of a person for an offence (whether or not a sexual offence) and certain proceedings under the *Crimes Act 1900* (NSW) relating to apprehended violence: *Criminal Procedure Act 1986* (NSW) s 147(1).

harm[449] is substantially outweighed by the public interest in allowing inspection of the document.[450]

Evidence that would disclose a protected confidence or the contents of a document recording a protected confidence may not be adduced in any criminal proceedings without the leave of the court. The court may give leave for such evidence to be adduced only if it is satisfied of the three factors set out above.[451] Further, if evidence is found to be privileged in a criminal proceeding by virtue of these provisions, it may not be adduced in a civil proceeding in which substantially the same acts are in issue.[452]

In 1997, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended that the *Evidence Act 1995* (Cth) be amended to include provisions equivalent to those in New South Wales and that all Australian States and Territories should be encouraged to introduce similar legislation.[453] Since then, legislation has been enacted in both Victoria and South Australia to confer immunity on therapeutic communications. The Victorian provisions are similar in effect to those in New South Wales.[454] The South Australian legislation is significantly wider.[455] It is expressed to apply to the discovery of documents,[456] which has been held to be outside the ambit of the protection of the New South Wales provisions.[457] Evidence of a protected communication is entirely inadmissible at committal proceedings, and can be admitted in other proceedings only with the leave of the court.[458] In deciding whether to grant leave, the court is to weigh against each other two competing public interests - the public interest in preserving the confidentiality of protected communications, and the public interest in preventing a miscarriage of justice that might arise from the suppression of relevant evidence.[459] In so doing, the court is to have regard to:[460]

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449 "Harm" includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm such as shame, humiliation or fear: *Criminal Procedure Act 1986* (NSW) s 147(1).

450 *Criminal Procedure Act 1986* (NSW) s 150(1).

451 *Criminal Procedure Act 1986* (NSW) s 150(3), (4).

452 *Evidence Act 1995* (NSW) s 126H, inserted by the *Criminal Procedure Amendment (Sexual Assault Communications Privilege) Act 1999* (NSW).

453 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 97 at 321.

454 *Evidence Act 1958* (Vic) ss 32B-32G.

455 *Evidence Act 1929* (SA) ss 67D-67F.

456 *Evidence Act 1929* (SA) s 67F(1)(c).

457 *R v Young* (1999) 107 A Crim R 1.

458 *Evidence Act 1929* (SA) s 67F(1)(a), (b).

459 *Evidence Act 1929* (SA) s 67F(5).

460 *Evidence Act 1929* (SA) s 67F(6).

- the need to encourage victims of sexual offences to seek psychiatric or psychological therapy and the extent to which the effectiveness of such therapy is dependent on the maintenance of confidentiality between the counsellor or therapist and the victim;

- the probative value of the evidence and whether its exclusion may lead to a miscarriage of justice;

- the attitude of the alleged victim to whom the communication relates to the admission of the evidence;

- whether admission of the evidence is being sought on the basis of a discriminatory belief or bias;

- the extent to which the admission of the evidence would infringe a reasonable expectation of privacy and the potential prejudice to any person who would otherwise be protected by public interest immunity.

The protection conferred by the legislation cannot be waived by the counsellor or therapist, a party to the protected communication, the alleged victim of the offence or a guardian of the alleged victim.[461]

Of the submissions received in response to the Discussion Paper which considered the issue of privileged communications between a child alleged to have been abused and the child's therapist, the majority favoured the enactment of legislation similar to that in New South Wales.[462] However, one respondent considered that the privilege should not be able to be overridden in any circumstances.[463] The former Director of Public Prosecutions expressed the view that there is no valid reason to distinguish between children and adults who receive counselling and that any rule of privilege attaching to children's therapeutic communications should apply equally to anyone not a child.[464]

One respondent, the Queensland Branch of the International Commission of Jurists, recognised that:[465]

> This issue of access to records is currently a vital issue and one which Queensland must address. The fundamental right to privacy would suggest that children should be protected from having medical and such records pored over in court.

461 *Evidence Act 1929* (SA) s 67E(3).

462 Submissions 32, 33, 39, 41, 42.

463 Submission 33.

464 Submission 32.

465 Submission 37.

However, it also acknowledged that to deny an accused person access to a complainant's records of treatment would result in "the loss of certain features that are traditionally fundamental to a fair trial". It concluded that the issue involved:[466]

> … the balance that must be struck between the accused's right to a fair trial and the possibility that children's evidence will not be heard.

Two respondents strongly opposed the introduction of privilege for therapeutic communications. The Queensland Council for Civil Liberties submitted that "accused persons are entitled to put before a jury evidence which may indicate that a particular allegation has been influenced either as to detail or nuance by counselling". It proposed that tape recordings of counselling sessions:[467]

> … ought to be available to a court and the parties so that any suggestion of contamination can be placed before a jury for their consideration.

The Bar Association of Queensland was also of the view that there should not be any legal privilege attaching to therapeutic communications between a child and his or her counsellor.[468] The Association observed that any perceived need for such a privilege would be lessened if treatment were designed so as not to impinge upon the integrity and reliability of the child's evidence. The Association also submitted that, if recognition were to be given to the kind of privilege under consideration, the court should have a discretion to allow the privilege to be overridden. In the view of the Association, the criteria contained in the New South Wales legislation[469] and recommended for adoption by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission[470] are far too restrictive, and do not give sufficient weight to the interests of the accused person. The Association proposed as an alternative model the test in section 4 of the *Criminal Law (Sexual Offences) Act 1978* (Qld), which it considered appeared to work well in practice in an area of related sensitivity. That test requires the court, before giving leave for cross-examination as to certain matters to take place, to be satisfied that the evidence sought to be elicited has substantial relevance to the facts in issue or is a proper matter for cross-examination as to credit.[471]

The majority of the members of the Taskforce on Women and the Criminal Code agreed that there should be no change to the present position.[472]

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466 Ibid.

467 Submission 40.

468 Submission 53.

469 See pp 96-97 of this Report.

470 See p 97 of this Report.

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

472 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 300.

5. THE COMMISSION'S VIEW

In the view of the Commission, it is highly desirable that a child who needs counselling or other psychological or psychiatric treatment is not denied access to that treatment because of concerns about the possibility of impending litigation. Equally, it is desirable that the treatment be carried out in such a way as to ensure to the greatest extent possible that the child's evidence is not contaminated by the techniques used by the therapist.

The Commission notes the development in the United Kingdom of a protocol concerning the conduct of interviews with child witnesses.[473] Although this protocol is directed primarily at members of investigative teams in order to ensure that the results of the interview are acceptable in criminal proceedings, the Commission believes that a similar concept would be useful for therapists to raise awareness of the need to preserve the integrity of the child's evidence by using techniques which will not lend themselves to allegations of contamination by suggestion or coaching. Adherence to such a protocol may protect treatment providers from subsequent allegations that they had, either wittingly or unwittingly, behaved improperly. It would also benefit children who need treatment, by reassuring treatment providers and those involved in investigating and prosecuting the commission of an alleged offence that the treatment can be given without risk of prejudicing the acceptance of the child's evidence. It would also be in the interests of fairness to persons accused of child abuse by ensuring that, as far as possible, evidence received from the child has not been affected by any treatment received by the child in accordance with the protocol.

The Commission is therefore of the view that a protocol should be developed in consultation with relevant stakeholders to assist therapists to provide treatment to children suspected of having been abused, without giving rise to concerns that the quality of the child's evidence may have been compromised.

The Commission is not in favour of the suggestion put forward in some of the submissions that there should be a requirement for therapy sessions for children who are complainants in cases where abuse has been alleged to be video or tape recorded as a form of insurance against contamination of the child's evidence. The Commission considers that such a requirement would constitute an unreasonable invasion of privacy and is concerned that it may deter children or their parents from seeking treatment.

The Commission acknowledges concerns expressed by a number of respondents, particularly in relation to reluctance by therapists to provide treatment because of the possibility that they and their records may be subject to subpoena. It recognises that therapists may feel uncomfortable about revealing details of matters they regard as confidential, and that they may be unwilling to submit to aggressive cross-

473 See p 94 of this Report.

examination. It also recognises that counsellors are not agents of the criminal justice system and that the purpose of therapy is not to investigate the facts in issue in a trial.[474]

However, the Commission does not believe that the solution to this situation is to confer on the treatment records of children suspected of having been abused a privilege against production in court. There are a number of reasons for this view.

First, there may be a legitimate reason for the defence to require production of the documents. There may be reasonable grounds for a belief that the treatment records contain material which would assist the defence and which, in the interests of fairness, ought to be available for the court to take into consideration in making its decision.

Second, there may be individuals who are not professional therapists who provide counselling to children or discuss their allegations of abuse with them. Communications between a potential child witness and people such as school counsellors or religious advisers may be equally as likely to affect the child's evidence. In the view of the Commission, it would be inconsistent to protect communications between the child and the therapist, but not communications of a similar nature which take place in other environments.

Third, the Commission is of the view that such a measure should be undertaken only in the context of a wider review of the law of privilege. The common law, which applies in Queensland, does not generally recognise a privilege against disclosure of a patient's communication with a medical practitioner. This situation has been modified by statute in some Australian jurisdictions. For example, there is legislation in Victoria, Tasmania and the Northern Territory protecting certain communications made in a doctor/patient relationship.[475] The Commission does not favour piecemeal changes to the law to deal with particular situations.

Although the Commission is not in favour of the introduction of statutory privilege for communications between a child witness and his or her therapist in cases involving allegations of child abuse, it believes that there are steps that could be taken to remedy the existing situation. For example, it is of the view that the promotion of and adherence to a protocol developed in consultation with relevant stakeholders for use in therapy sessions with children who are likely to be required to give evidence would assist in reducing the level of suspicion with which therapists appear to be regarded by defence counsel. A greater degree of confidence that intervention is unlikely to contaminate the child's evidence may have a significant effect on the frequency with which therapists are asked to produce treatment records.

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474 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 291.

475 *Evidence Act* (NT) s 12; *Evidence Act 1958* (Vic) s 28; *Evidence Act 1910* (Tas) s 96. These provisions apply only in civil proceedings.

6. RECOMMENDATION

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

CHAPTER 7

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.[476] 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.[477] 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:[478]

> … 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.

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

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476 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.

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

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

next".[479]

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.[480]

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 make it more relevant to contemporary society:[481]

> 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.[482] However, this provision has been criticised for failing to achieve its stated objective[483] and is to be repealed.[484]

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 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

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

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

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

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

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

484 *Youth Justice and Criminal Evidence Act 1999* s 67(3), Sch 6. As at 13 October 2000, the paragraph in Sch 6 that will repeal s 33A of the *Criminal Justice Act 1988* had not commenced.

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.[485]

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.[486] 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.[487] 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.[488] 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.[489]

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.[490] 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".[491]

485 As at 13 October 2000, these provisions had not commenced.

486 *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.

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

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

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

490 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.

491 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.[492]

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:[493]

> … 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)

At present, section 9 of the *Evidence Act 1977* (Qld) makes specific provision for children to give unsworn evidence if they are not sufficiently competent to

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492 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.

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

take the oath.[494] It states:

> **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 has sufficient intelligence to give reliable evidence.[495]

(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,

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494 However, when s 44 of the *Criminal Law Amendment Act 2000* (Qld) comes into operation, s 9 of the *Evidence Act 1977* (Qld) will be repealed and replaced with a provision which will apply to a witness of any age who does not understand the nature of an oath. The test of competence to give unsworn evidence will remain unchanged. The *Criminal Law Amendment Act 2000* (Qld) received Royal Assent on 13 October 2000.

495 *Evidence Act 1977* (Qld) s 9A. When the provisions of the *Criminal Law Amendment Act 2000* (Qld) come into operation, s 44 of that Act will repeal s 9A of *the Evidence Act 1977* (Qld) and replace it with a provision that will apply if the evidence of a child less than 12 years is admitted or if the court is deciding whether a person over the age of 12 years who does not understand the nature of an oath has sufficient intelligence to give reliable evidence. The *Criminal Law Amendment Act 2000* (Qld) received Royal Assent on 13 October 2000.

that he or she will not tell lies in the proceeding.[496] 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.[497] 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 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.[498] In Tasmania[499] and in Western Australia,[500] 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.[501]

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

496 *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.

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

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

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

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

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

example - children under a certain age may not give evidence on oath in criminal proceedings.[502]

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:[503]

- 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:[504]

> 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),[505] all children should be presumed *prima facie* competent to give sworn evidence.[506]

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.[507]

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502 See p 104 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.

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

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

505 See p 105 of this Report.

506 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.

507 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.

(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 some children who have sufficient intelligence to give coherent evidence being declared incompetent to give sworn evidence because they lack awareness of the implications of the oath. This may be particularly significant if the child is the only witness:[508]

> 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[509] commented:[510]

> 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, in practice, 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:[511]

> … 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

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

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

510 Submission 37.

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

> 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:[512]

> 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.

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:[513]

> 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:[514]

> 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.

One commentator has criticised the traditional test of competency to take an oath 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:[515]

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

513 Submission 54.

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

515 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.

> 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.

A further criticism of the oath understanding test is that it is not always taken seriously.[516] 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 an 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.
>
> 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.

(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.[517] The Commission considered that there should

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

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

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.[518] 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.[519] The Commission's recommendation was implemented by section 106B(2) of the *Evidence Act 1906* (WA).

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.[520] 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.[521] 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".[522]

(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).[523] Other Australian jurisdictions also impose a test of competency to give unsworn evidence.[524]

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518 Id at para 2.14.

519 Id at para 2.15.

520 *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.

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

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

523 See pp 106-107 of this Report. Although the existing s 9 of the *Evidence Act 1977* (Qld) will be repealed and replaced by a new provision when the *Criminal Law Amendment Act 2000* (Qld) comes into operation, the new s 9 will continue to apply to child witnesses who do not understand the nature of an oath, and the criteria for the admissibility of the unsworn evidence of a child witness will remain unchanged: see *Criminal Law Amendment Act 2000* (Qld) s 44.

524 See pp 107-108 of this Report.

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:[525]

> 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:[526]

> If a child is too immature to understand the difference between truth and falsehood, or to explain it, common sense suggests that we should be cautious in believing anything that 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:[527]

> 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.

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

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

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

> It follows that we believe the competence requirement which is applied to potential child witnesses should be dispensed with and that it should not be replaced.

The 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.[528] 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.[529] 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.[530]

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.[531] 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.[532]

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".[533] 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.[534]

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

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

529 Id at 16.

530 Id at 2-3.

531 Ibid.

532 Id at 13.

533 Id at 16.

534 Ibid.

evidence in order to determine the weight to be given to the evidence,[535] 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.[536] 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 the fact-finder's assessment of credibility and reliability is made in the light of the increased amount of relevant evidence.[537] 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,[538] 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.[539]

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.[540] 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.[541] It observed:[542]

> … 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".[543]

However, this approach has also been subject to criticism.

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535 Id at 17.

536 Id at 15.

537 Id at 12-13, 17.

538 Id at 15.

539 Id at 17.

540 Id at 13.

541 Ibid.

542 Id at 10.

543 Id at 13.

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".[544] She concludes that unreliable child witnesses are a "much more predictable phenomenon" than "the occasional inefficiency created by the unreliable adult witness".[545] Secondly, she considers that abolition of the competency test for child witnesses makes questionable assumptions about the adversarial system of justice:[546]

> 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:[547]

> 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 "wholesale rejection" of the concept.[548]

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,[549] that Commission foresaw practical difficulties in an assumption that all children are competent to give evidence:[550]

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

545 Id at 108.

546 Ibid.

547 Ibid.

548 Ibid.

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

550 Id at para 5.13.

> 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.

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.[551] It recommended that:[552]

> … 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".[553] 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:[554]

> 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

551 Ibid.

552 Id at para 5.18.

553 Id at para 5.15.

554 Id at para 5.17.

capable of giving an intelligible account of events which are relevant to those proceedings".[555]

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 give an intelligible and accurate account of events even though they may not understand the difference between abstract concepts such as truth and lies.[556] It recommended that "a child under 12 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".[557] This recommendation was implemented by section 106C of the *Evidence Act 1906* (WA).

In its Discussion Paper,[558] this Commission sought submissions as to whether there should be a test of competency for child witnesses to give unsworn evidence.[559] The majority of respondents who addressed this issue favoured the retention of a competency requirement.[560] However, two respondents opposed a competency requirement.[561] One of these respondents commented:[562]

> 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

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555 *Criminal Evidence Act 1992* (Ireland) s 27(1), (3) <http://www.bailii.org> (21 November 2000).

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

557 Id at para 2.35.

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

559 Id at 58.

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

561 Submissions 2, 7.

562 Submission 2.

the truth, the child has sufficient intelligence to give reliable evidence.[563]

The majority of submissions received by the Commission on the 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.[564] The then Acting Director of Public Prosecutions in Western Australia observed:[565]

> 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.[566] In the view of the former Queensland Director of Public Prosecutions:[567]

> 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 person who was deaf and mute could not testify.[568]

However, that case was decided in 1866. Since then there have been significant developments in technologies which assist people with communication difficulties.

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563 *Evidence Act 1977* (Qld) s 9(1). Although the existing s 9 of the *Evidence Act 1977* (Qld) will be repealed and replaced by a new provision when the *Criminal Law Amendment Act 2000* (Qld) comes into operation, the test of competency to give unsworn evidence will remain unchanged in the new s 9: see *Criminal Law Amendment Act 2000* (Qld) s 44. The *Criminal Law Amendment Act 2000* (Qld) received Royal Assent on 13 October 2000.

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

565 Submission 18.

566 Submissions 32, 40.

567 Submission 32.

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

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.[569]

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 former Queensland Director of Public Prosecutions commented, with respect to the legislative provisions relating to the evidence of children in Queensland:[570]

> 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.[571] 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.[572]

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.

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569 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.

570 Submission 32.

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

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

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".[573]

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.[574]

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 continue to 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.[575] 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

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573 As at 13 October 2000, this provision had not commenced.

574 See p 109 of this Report.

575 See pp 110-112 of this Report.

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 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),[576] 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),[577] 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

576 See p 106 of this Report.

577 See p 107 of this Report.

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 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.[578]

7. RECOMMENDATIONS

The Commission recommends that:

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

7.2 The test of competency for a child witness to give evidence on oath should be whether the child:

(a) understands that the giving of evidence is a serious matter, and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the truth; and

578 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.

(b) is capable of giving a rational answer to a question about a fact in issue.

7.3 A child witness who is not competent to give evidence on oath should be able to give unsworn evidence if the child is able to give an intelligible account of events which he or she has observed or experienced.

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

CHAPTER 8

OUT-OF-COURT STATEMENTS

1. INTRODUCTION

There are several potential advantages in allowing the evidence of a child, particularly a complainant of alleged abuse, to be given in the form of a statement made by the child prior to the court proceeding. The earlier statement may be more reliable because it is less likely to be adversely affected by loss of memory, and less likely to be tainted by repeated or suggestive questioning. For the child, acceptance of out-of-court statements may also help to minimise the effects of having to appear in court and, if the child is the complainant or a prosecution witness in a criminal proceeding, of having to confront the accused.[579]

However, the rule against hearsay generally precludes a statement (whether written or oral) made by a person from being admitted as evidence of any fact or opinion contained in the statement, unless the statement was actually made by the person as a witness in court.[580]

Various reasons have been put forward to explain the rule against hearsay.[581] In the context of the admissibility of statements made previously by a child, perhaps the most important reason for the rule is the absence of opportunity to test the child's credibility and the reliability of his or her evidence by cross-examination.

The rule against hearsay is subject to numerous exceptions, both common law and statutory. Determining the extent to which the out-of-court statements of a child witness should be admissible as an exception to the rule involves balancing the importance of ensuring that a child witness is able to give his or her evidence as effectively as possible against the rights of other parties to a fair hearing.

2. EXAMPLES OF EXISTING LEGISLATION

(a) Queensland

Section 93A of the *Evidence Act 1977* (Qld) allows for the admission of out-of-court statements in certain circumstances. It applies to a statement made by a child under

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579 Studies have shown that child witnesses find confrontation with the accused one of the most difficult aspects of giving evidence. See note 1255 of this Report.

580 Riordan JA (ed), *The Laws of Australia* (looseleaf) Vol 16.4 at para 66.

581 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 31020.

the age of 12 years or a by person who is "intellectually impaired".[582] In relation to child witnesses, section 93A is therefore available to all children under the age of 12, and to other children or young people under the age of 18 years who have a relevant disability.

To be admissible, the statement must be contained in a document,[583] and must have been made either soon after the occurrence of the fact which the evidence is intended to prove or to a person investigating the matter to which the proceeding relates. The child must have had personal knowledge of the matters dealt with by the statement. The child must also be available to give evidence in the proceeding. If the statement is admitted, the party seeking to tender it must, if required to do so by any other party to the proceeding, also call the person who recorded it.

There is no requirement in the legislation for an opposing party to be given a copy of the child's statement or details of its contents prior to the proceeding.

Although section 93A has a narrow application in that it applies only to a child who is under the age of 12 or to an older child who has a disability of the kind described, in other ways it is very broad. It is not restricted to any particular kind of proceedings, and it would encompass a wide range of "statements", including drawings made by the child, written notes of what the child said to another person - for example, a social worker - or the record of a statement made by the child to police. If the statement was made to a person investigating the subject matter of the proceeding, there is no requirement that the statement was made soon after the occurrence of the facts to which it relates.

Section 93A does not itself expressly confer a discretion on the court in relation to the admission of a child's out-of-court statement. There are, however, other provisions of the *Evidence Act 1977* (Qld) which do confer such a discretion.[584]

Section 93A, while facilitating the admission of a child's out-of-court statement, requires the child to be available to give evidence in the proceeding. From the child's point of view, there may be a concern that the provision "does not assist children who are unable to testify and does not address concerns about trauma to

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582 A person is "intellectually impaired" if he or she has a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these, resulting in substantial reduction of the person's capacity for communication, social interaction or learning and in the need for support: *Evidence Act 1977* (Qld) s 93A(5). When the provisions of the *Criminal Law Amendment Act 2000* (Qld) come into operation, this definition will be relocated to s 3 of the *Evidence Act 1977* (Qld): see *Criminal Law Amendment Act 2000* (Qld) ss 43, 49. The *Criminal Law Amendment Act 2000* (Qld) received Royal Assent on 13 October 2000.

583 Section 3 of the *Evidence Act 1977* (Qld) defines the word "document" in broad terms. It includes parts of documents, written documents, photographs, audiotapes and "any other record of information whatever". Section 92(4) of the *Evidence Act 1977* (Qld) provides that a statement contained in a document is made by a person if:

> (a) it was … dictated or otherwise produced by the person; or
>
> (b) it was recorded with the person's knowledge.

584 *Evidence Act 1977* (Qld) ss 98, 130.

children arising from appearing at committals and trials and being subject to cross-examination in the formal court setting".[585]

However, even though section 93A requires the child to be available to give evidence, it does not guarantee that there can be any meaningful cross-examination of the child. It may be, for example, that by the time the matter comes to court, the child is not able to recall the details of an alleged offence. The Queensland Court of Criminal Appeal held that, where a child cannot remember the incident, the child's statement should not automatically be excluded on the basis that the child is unable to give evidence relevant to some issue in the proceeding. In the view of the Court, the child would be able to testify that the statement had been made, but that he or she was unable to recall anything further.[586] In such a situation, if the statement is admitted, the weight to be attached to it may, of course, be affected by the fact that the child could not be effectively cross-examined about it. However, the former President of the Court of Appeal expressed the view that, in deciding whether it would be unfair to an accused to admit a child's out-of-court statement, a trial judge should have regard to whether and, if so, how adequately it would be possible to test the child's evidence by cross-examination.[587]

(b) Western Australia

In Western Australia, section 106H of the *Evidence Act 1906* (WA) provides:[588]

> **Admission of child's statement in proceeding for sexual offences etc**
>
> (1) In any Schedule 7 proceeding, a relevant statement may, at the discretion of the Judge, be admitted into evidence if -
>
> (a) there has been given to the defendant -
>
> (i) a copy of the statement; or
>
> (ii) if the statement is not recorded in writing or electronically, details of the statement; and
>
> (b) the defendant is given the opportunity to cross-examine the affected child.
>
> …

585 Submission 49.

586 *R v Cowie, ex parte Attorney-General* [1994] 1 Qd R 326.

587 *R v FAR* [1996] 2 Qd R 49 per Fitzgerald P at 55.

588 Section 106H of the *Evidence Act 1906* (WA) will be affected by the *Acts Amendment (Evidence) Bill 1999* (WA). Clause 19 of the Bill deletes the existing s 106H(2) and inserts new subsections (2), (2a), (2b), and (2c). Subsection (2) provides that, if a statement is to be admitted, evidence of the making and content of the statement shall be given by the person to whom the child made the statement. Subsection (2c) provides that a statement recorded on videotape is admissible to the same extent as if it were given orally in the proceeding in accordance with the usual rules and practice of the court concerned. The Bill has passed both Houses of Parliament but, because of an amendment made in the Legislative Council, had to be referred back to the Legislative Assembly. As of 13 October 2000, it had not been considered further by the Legislative Assembly.

(3) In subsection (1) "relevant statement" means a statement that -

(a) relates to any matter in issue in the proceeding; and

(b) was made by the affected child to another person before the proceeding was commenced,

whether the statement is recorded in writing or electronically or not.

A "Schedule 7 proceeding" is one where the affected child was under 16 years of age at the date the complaint was made and which involves certain sexual offences or other violent offences under the *Criminal Code* (WA).

The Western Australian provision differs from its Queensland counterpart in several important respects.

Firstly, it significantly extends the age range of the children who may benefit from it. Secondly, it does not require that a statement made to anyone other than a person investigating the alleged offence be made within a specified time after the occurrence of the alleged offence. Thirdly, it applies only to certain offences. Fourthly, it requires that the defence be given notice of the contents of the statement.

It is similar to the Queensland provision in that it requires the child to be available for cross-examination. However, under the Western Australian Act, it is mandatory for closed-circuit television, or removable screens (where closed-circuit television is not available) to be used when a child is giving evidence unless the child chooses not to use these facilities.[589]

(c) New South Wales

The *Evidence (Children) Act 1997* (NSW), which was based on recommendations made by the Children's Evidence Taskforce convened by the New South Wales Attorney-General, allows certain out-of-court statements made by child witnesses to be admitted as evidence.[590] The Act generally applies, unless a contrary intention is shown, to a child who is under the age of 16 years at the time the evidence is given.[591]

The relevant provisions of the Act apply only to statements made by a child in the course of an interview during which the child is questioned by an investigating official in connection with the investigation of the commission or possible commission of an offence.[592] In any criminal proceeding, a child may give evidence-in-chief of such a

589 *Evidence Act 1906* (WA) s 106N. See Chapter 10 of this Report for a discussion of the use of closed-circuit television and screens.

590 Although this Act was passed in 1997, it did not come into operation until 1 August 1999.

591 *Evidence (Children) Act 1997* (NSW) s 6.

592 *Evidence (Children) Act 1997* (NSW) s 7.

previous statement wholly or partly in the form of a "recording" made by an investigating official of the interview in the course of which the statement was made.[593] "Recording" is defined to mean an audio recording, a video recording or a video recording accompanied by a separately but contemporaneously recorded audio recording.[594]

If the evidence-in-chief of an eligible child witness is given in the form of a recording which is heard and/or viewed by the court, the child must be available for cross-examination or re-examination.[595] However, this requirement does not apply to a child who is the accused person in the proceeding.[596]

A recording of a statement made by a child witness who is not the accused person is not admissible in evidence unless it is proved that the accused and his or her lawyer (if any) were given a reasonable opportunity to listen to and, in the case of a videorecording, view the recording.[597] Further, the court has power to rule inadmissible the whole or any part of the contents of any recording sought to be admitted under these provisions.[598]

These provisions also differ in a number of respects from the existing section 93A of the *Evidence Act 1977* (Qld). They are more restricted in that they apply only in criminal proceedings. They also apply only to statements in the form of a "recording". The Taskforce upon whose recommendations the legislation is based noted, particularly in relation to children whose verbal skills may not be fully developed, the importance of ensuring that details such as gestures, the degree of emotion in the child's voice, and any pauses a child may make in responding to a question are captured so that the overall accuracy of the child's statement is not affected by omission or misinterpretation.[599] However, the New South Wales provisions are available to children in a wider age group than the Queensland legislation permits. The New South Wales provisions also expressly require that an accused person be given access to the statement.

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593 *Evidence (Children) Act 1997* (NSW) ss 9(1)(a), 11(1).

594 *Evidence (Children) Act 1997* (NSW) s 3(1).

595 *Evidence (Children) Act 1997* (NSW) s 11(2).

596 *Evidence (Children) Act 1997* (NSW) s 11(2). The position of child witnesses who have been accused of committing criminal offences will be discussed in Part 3 of this Report, to be published in 2001.

597 *Evidence (Children) Act 1997* (NSW) s 12(2).

598 *Evidence (Children) Act 1997* (NSW) s 11(3).

599 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce: Audio and Videotaping of Children's Out-of-Court Statements* (June 1997) at 11-13.

(d) Canada

The Canadian *Criminal Code* allows for the admission of out-of-court statements in certain circumstances. Section 715.1 provides:

> In any proceeding relating to [certain specified offences involving child molestation and sexual assault], in which the complainant or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness, while testifying, adopts the contents of the video tape.

The Canadian provision is, in some ways, narrower than the existing Queensland provision. It is limited to a statement which has been recorded on videotape, and applies only to proceedings for particular offences. It also requires the statement to have been made within "a reasonable time" of the alleged offence. However, it applies to a greater age range and attempts to address the problem of being unable to cross-examine on the contents of the statement a witness who, by the time of the trial, is no longer able to remember the events which constitute the alleged offence. In interpreting section 715.1 of the *Criminal Code*, the Canadian Supreme Court has held that the section itself provides sufficient guarantee of the reliability of the contents of the videotaped statement to compensate for any inability to effectively cross-examine the witness, and that, in any event, the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was being made.[600]

(e) England

The *Youth Justice and Criminal Evidence Act 1999* makes provision for special measures for the giving of evidence by vulnerable and intimidated witnesses in criminal proceedings.[601] A special measures direction may be made in favour of a witness who is under the age of 17 years or who has a specified disability that the court considers to be likely to diminish the quality of the evidence given by the witness.[602] A special measures direction may also be made in favour of a witness of any age if the court considers that the quality of the evidence given by the witness is likely to be diminished because the witness will be affected by fear or distress in connection with giving evidence.[603]

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600 *R v F(CC)* (1997) 120 CCC (3d) 225 per Cory J at 241. See further the discussion at pp 142-143 of this Report.

601 As at 13 October 2000, the relevant provisions of the *Youth Justice and Criminal Evidence Act 1999* had not commenced operation. When they come into effect they will repeal s 32A of the *Criminal Justice Act 1988.*

602 *Youth Justice and Criminal Evidence Act 1999* s 16.

603 *Youth Justice and Criminal Evidence Act 1999* s 17(1). The factors which the court is to take into account in determining whether the quality of the evidence is likely to be affected by fear or distress on the part of the witness are set out in s 17(2).

These special measures may include allowing a videorecording of an interview with the witness to be admitted as the evidence-in-chief of the witness.[604] However, a videorecorded interview may not be admitted if the court is of the opinion that it would not be in the interests of justice to do so.[605] In determining whether a recording should be excluded on this basis, the court must consider whether any prejudice which might result to the accused from the admission of the recording is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.[606]

Admissibility of the videotaped interview depends on the availability of the witness for cross-examination (unless the parties have agreed that there is no need for the witness to be available) and on compliance with any court rules requiring disclosure of the circumstances in which the recording was made.[607] If the recorded interview is admitted, the witness may not give evidence-in-chief otherwise than by means of the recording on matters which, in the opinion of the court, have been dealt with adequately in the recording. Evidence-in-chief on any other matter dealt with in the recording may not be given without the permission of the court.[608] The court may give permission either of its own motion or, if there has been a material change in circumstances, on an application by a party to the proceeding.[609]

Where leave to admit a videorecording is to be sought at trial, the videorecording may be considered by a magistrate's court conducting committal proceedings even though the witness is not called at committal.[610]

3. ISSUES FOR CONSIDERATION

The differences revealed by a comparative analysis of the existing provisions outlined above give rise to the following issues for consideration in relation to legislation facilitating the admission of an out-of-court statement made by a child witness:

- whether the operation of the legislation should be restricted to children of a certain age;
- whether the legislation should apply only to certain types of statements;

604 *Youth Justice and Criminal Evidence Act 1999* s 27(1).

605 *Youth Justice and Criminal Evidence Act 1999* s 27(2).

606 *Youth Justice and Criminal Evidence Act 1999* s 27(3).

607 *Youth Justice and Criminal Evidence Act 1999* s 27(4).

608 *Youth Justice and Criminal Evidence Act 1999* s 27(5)(b).

609 *Youth Justice and Criminal Evidence Act 1999* s 27(7).

610 *Youth Justice and Criminal Evidence Act 1999* s 27(10).

- whether the statement should be required to have been made within a particular time limit;

- whether the statement should be admissible only in proceedings involving particular offences;

- whether the child must be available for cross-examination;

- whether the child should be required to adopt the statement;

- whether the legislation should require that a copy of the statement or, where the statement is not recorded, details of its contents be given to the defence prior to the commencement of proceedings; and

- whether the provision facilitating the admission of the out-of-court statement of a child witness should expressly confer a discretion on the court to exclude the statement and, if so, on what grounds.

A further issue, identified in some submissions, concerns the question of whether, if an out-of-court-statement made by a child witness is admitted in evidence in a criminal trial which is heard before a jury, the jury should have access to the statement.

(a) The age of the child

Each of the pieces of legislation described above applies to a different age group:

- a child under the age of 12 years, or a child over the age of 12 years who is intellectually impaired at the time of making the statement (*Evidence Act 1977* (Qld) section 93A);

- a child under the age of 16 years at the date the complaint was made (*Evidence Act 1906* (WA) section 106H, Schedule 7);

- a child under the age of 16 years at the time of giving evidence (*Evidence (Children) Act 1997* (NSW) section 6);

- a child under the age of 17 at the time of the hearing, or a person of any age the quality of whose evidence is likely to be diminished as a result of disability or of fear or distress on the part of the witness in connection with testifying in the proceeding (*Youth Justice and Criminal Evidence Act 1999* sections 16, 17);[611]

611 As at 13 October 2000, these provisions had not commenced.

- a child who was under the age of 18 years at the time when the offence was alleged to have been committed (*Criminal Code* (Canada) section 715.1).

In the Discussion Paper, the Commission sought submissions on the question of whether the admissibility of out-of-court statements should be restricted to child witnesses of a particular age.[612]

Eight respondents specifically addressed this issue.[613] Seven of these respondents agreed that the age limit in section 93A was too low. Two respondents considered that there should not be any age limit,[614] but one added that factors such as the complainant's intellectual attainment, mental capacity and emotional maturity should be taken into account.[615] Another proposed that there should not be any age restriction except a lower limit of under 3 years of age developmentally.[616] Another respondent submitted that the provision should apply to children under the age of 17.[617] The three remaining respondents favoured extending the age limit to at least 16,[618] or even 18,[619] particularly in cases of a sexual offence against or an intra-familial assault on a child.[620]

The Children's Commission noted that:[621]

> Children between 12 and 16 years are still developmentally and socially disadvantaged compared with adult witnesses and generally experience unacceptable levels of stress when they are required to give evidence without concessions …

The former Director of Public Prosecutions observed:[622]

> Is there a logical or sensible basis for restricting the admissibility of a statement to a person under the age of 12? Is it considered that a child not yet 12 is a child of *"tender years"*, but the statement of a child of 13 or 14, or 15 is not in need of the same preservation. Surely there is even greater reason for allowing a … statement

612 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 141.

613 Submissions 19, 20, 31, 32, 33, 39, 49, 53.

614 Submissions 19, 33.

615 Submission 19.

616 Submission 39.

617 Submission 20.

618 Submission 31.

619 Submission 32.

620 Submission 49.

621 Submission 31.

622 Submission 32.

> taken from a person over the age of 12 to be made evidence of the truth of the facts asserted than from one under 12.
>
> I … venture the suggestion that it is safer to admit statements … as evidence of the truth of asserted facts where the child is over the age of 12 because by about that age they have full cognitive development, their recall is likely to be more organised because of development of concepts such as time, space and distance, recall is less likely to decline with time than would be the case for children under 12, and they would be less vulnerable to leading questions … and less suggestive.

The same respondent also suggested that there may be a basis for drawing a distinction in respect of age between a child complainant and a child witness in other kinds of proceedings, although he acknowledged that this could also be a matter of discretion to be left to the court to exclude the statement and require a mere witness to give evidence in person.[623]

Other submissions generally suggested that out-of-court statements should be more widely accepted, but did not refer to any particular age limits.[624]

The Bar Association of Queensland, on the other hand, favoured retaining the existing age limit of twelve years. The Association noted that the ability to recall and recount evidence as a witness will obviously vary from child to child, and that it could generally be expected that, as any child matures, these abilities will become more developed:[625]

> A cut-off should therefore be drawn somewhere and the present demarcation at age 12 appears a sensible one having regard to the fact that the law otherwise recognises an additional seriousness in offences committed against persons below that age, because of their special immaturity and it is also the age at which most children can be expected to be completing their primary education and moving to secondary education.

(b) Types of statement

The existing Queensland provision, which enables the admission of a "statement in a document",[626] allows a considerable range of hearsay material to be admitted. In Canada, on the other hand, only a videotaped recording of a child's statement is admissible. In New South Wales a statement in the form of a video or audio recording of an interview conducted by an investigating official in connection with the investigation of the commission or possible commission of an offence may be admitted.[627] Neither the Canadian nor the New South Wales legislation would permit

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623 Ibid.

624 Submissions 27, 30, 38.

625 Submission 53.

626 *Evidence Act 1977* (Qld) s 93A(1). See p 127 of this Report.

627 *Evidence (Children) Act 1997* (NSW) s 11(1).

the admission of items such as drawings made by the child or notes of an interview with the child.

In the Discussion Paper, the Commission sought submissions on the types of children's hearsay evidence which should be admissible.[628]

The former Director of Public Prosecutions was firmly of the opinion that the admissibility of out-of-court statements should be restricted to videotaped recordings of the child making the statement:[629]

> The statement is, after all, evidence of the truth of the facts recorded and should be a word for word accounting by the witness. Nothing less should be made to do where we are permitting an out of court statement to be allowed as evidence of the truth of the facts.

He considered that videorecording was the best guarantee of the reliability of the statement:[630]

> The video taped recording allows the trier or triers of fact to observe the demeanour of the child, to appreciate the intellectual level of the child's advancement, the manner of the questioning and the responsiveness of the child to the questioning. Has there been any leading of the child, has there been contamination? These and other issues will be better resolved by having access to a video recording than any other substitute method of recording the questioning.

However, two submissions referred to the poor quality of some videotaped statements.[631] A District Court Judge noted:[632]

> The voice of the interviewing police officer is clear but not that of the child. The camera is so far away that it is not possible to see sketches or other items referred to in the interview or important hand gestures and body language.

Both that judge and the President of the Childrens Court[633] stressed the need for skilful interviewing to avoid the need for editing which may cause delays and affect both the technical quality and the probative value of the statement. The International Commission of Jurists (Queensland Branch) also pointed to "the need for guidelines for police about the nature of their task in gathering videorecorded records of interview".[634]

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628 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 140.

629 Submission 32.

630 Ibid.

631 Submissions 17, 20.

632 Submission 17.

633 Submission 45.

634 Submission 37.

The present Director of Public Prosecutions, while of the view that the existence of section 93A encourages the videorecording of children's statements, does not agree that other forms of out-of-court statements made by child witnesses should be inadmissible. She considers that, if a statement of a child witness could be admitted only in videorecorded form, compelling evidence could be excluded or lost. For example, if the video equipment malfunctioned during the recording of the statement, the statement would not be able to be used as evidence, even though the child's voice had been captured on audiotape. Alternatively, a child may have made a statement in circumstances - such as in a hospital - where there was no access to videorecording equipment. Some children may not feel sufficiently comfortable to articulate what they have seen or experienced in a way that can be recorded on videotape, but may be willing and able to write about it or to make a drawing. A statement made by a child and recorded by some other person - for example, by a doctor in a medical report - may be the start of the evidentiary trail, and it may be important for jury members to be aware of such a statement to enable them to see how the complaint unfolds. The Director of Public Prosecutions notes that, in each of these situations, the child's statement would be inadmissible if there were a requirement for out-of-court statements to be videorecorded.[635]

Six respondents to the Discussion Paper expressed the view that any statement of a child (including, for example, drawings and conversations with others) should be admissible.[636] Another generally supported greater recognition and use of out-of-court statements.[637] The Bar Association of Queensland favoured retaining the present position.[638] One respondent, while supporting the use of out-of-court statements, had concerns about the admissibility of drawings, since "there are very few professionals competent to provide accurate interpretations".[639]

The Queensland Council for Civil Liberties warned that the admission of out-of-court statements could lead to miscarriages of justice, if questioning of the child by police and others prior to the conduct of the video interview is not put to the jury. It referred to a case in which a young boy gave a statement to police alleging that his father (who had recently separated from his mother) was sexually interfering with him on access visits:[640]

> Despite the fact that the police and the prosector knew that the child's mother had made a tape-recording of her questioning of the child which pre-dated his interview with the police, that tape-recording was not revealed by the prosecution and only emerged as the result of strenuous cross-examination and the issue of subpoenas.

635 Meeting between Ms Leanne Clare, Director of Public Prosecutions, and a representative of the Commission, 25 October 2000.

636 Submissions 12, 19, 20, 33, 38, 39.

637 Submission 30.

638 Submission 53.

639 Submission 49.

640 Submission 40.

> As a result of the mother's tape-recording, which was in the possession of the police, being produced to the court, the apparently convincing and credible allegations as contained in the video interview conducted by the police with the child were put in an entirely different light.
>
> … [the child's] apparently spontaneous and credible video interview was placed in a radically different light when the cajoling tape-recording between the mother and the child, where the mother pushed the child to make a complaint, eventually came to light.

The submission proposed that all government agencies such as Families, Youth and Community Care Queensland and the Queensland Police Service, as well as sexual assault referral centres, be required to tape-record discussions with a complainant from point of first contact.

However, the Director of Public Prosecutions believes that the court's general power to exclude unduly prejudicial evidence is sufficient protection for an accused and that, ultimately, the question of the admissibility of an out-of-court statement made by a child witness should be a matter for judicial discretion. She also considers that, once a statement has been admitted, it is for the jury to determine the weight that should be given to it.[641]

(c) Time limits

The existing Queensland legislation requires that, to be admissible, the child's statement must have been made soon after the occurrence of the facts which the statement is intended to prove or to a person investigating the matter to which the proceedings relate.[642] The New South Wales provision, which applies only to interviews with an investigating official in connection with the investigation of the commission or possible commission of an offence, has no requirement of contemporaneity.[643] The Western Australian provision, which applies only in proceedings for certain types of offence, requires merely that the statement be made before the commencement of the proceedings.[644] In Canada, however, the child's statement will be admitted only if it was made "within a reasonable time" of the offence to which the proceedings relate.[645]

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641 Meeting between Ms Leanne Clare, Director of Public Prosecutions, and a representative of the Commission, 25 October 2000.

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

643 *Evidence (Children) Act 1997* (NSW) s 11(1).

644 *Evidence Act 1906* (WA) s 106H(3)(b).

645 *Criminal Code* (Canada) s 715.1.

In the Discussion Paper, the Commission sought submissions on whether the admissibility of an out-of-court statement made by a child witness should be subject to the statement having been made within a particular time limit.[646]

The President of the Childrens Court saw no reason "to extend admissibility to statements not made soon after the occurrence of the event or to a person investigating the matter".[647]

Two respondents emphasised that, to be admissible, a statement should have been made soon[648] or within a reasonable time after the alleged occurrence.[649] The former Director of Public Prosecutions argued that such a requirement was necessary in the interests of justice, since the statement would then be made while the child's recollection of the alleged events was fresh and therefore likely to be more reliable than if the statement were recorded at a later time when the child's memory of the events was not as detailed and so clear.[650]

However, the present Director of Public Prosecutions considers that contemporaneity is not necessarily an indicator of reliability. She acknowledges that a statement made by a child witness at a later date may not be as complete as one made soon after the events in question, but disagrees that a time-lapse inevitably results in inaccuracy. She also points out that, given that it is recognised that many complaints of abuse are not made for some time after the abuse allegedly took place, the requirement of a temporal link between a statement made by a child and the events in question would exclude evidence which may be both cogent and reliable. She considers that the interests of justice are adequately catered for by the existence of the court's general discretion to exclude evidence which is unduly prejudicial and, if the statement is admitted, by the power of the trial judge to warn the jury of the possible effect of the child's delay in making the statement.[651]

Five respondents to the Discussion Paper were of the view that there should not be any time limit for making the statement.[652] One submission, forwarded on behalf of almost twenty non-government organisations, observed:[653]

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646 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 140.

647 Submission 45.

648 Submission 40.

649 Submission 32.

650 Ibid.

651 Meeting between Ms Leanne Clare, Director of Public Prosecutions, and a representative of the Commission, 25 October 2000.

652 Submissions 20, 33, 38, 39, 49.

653 Submission 33.

It was explained that "Children do not give evidence within the rigid, structured thought processes that adults expect or would like them to", and that many children take a significant time before they are able to speak of their experience.

(d) Particular offences

The existing Queensland provision does not restrict the admissibility of out-of-court statements of child witnesses to any particular type of proceeding.[654] However, the legislation in some other jurisdictions is more limited. The English legislation[655] allows a special measures direction to provide for a videorecording of an interview of an eligible witness to be admitted as the evidence-in-chief of the witness in criminal proceedings generally.[656] For a child under the age of 17 years, there is a rebuttable presumption that the child's evidence-in-chief in any criminal proceeding will be admitted in the form of a videorecorded interview.[657] The presumption may not be rebutted in relation to a child witness in a proceeding for certain specified offences, including sexual offences or offences of violence.[658] In New South Wales, the child's statement may be admitted in any criminal proceeding.[659] The Western Australian provision applies only to sexual offences, care and protection proceedings and specified offences of violence or neglect in an intrafamilial setting.[660] The Canadian provision is even more limited, applying only to certain listed offences of child molestation and sexual assault.[661]

In the Discussion Paper, the Commission sought submissions on whether the admissibility of out-of-court statements made by child witnesses should be restricted to proceedings involving particular, and, if so, what offences.[662]

Three submissions considered that the admissibility of a child's out-of-court statement should not be restricted to proceedings for particular offences.[663] A PACT volunteer favoured admissibility "in all offences in relation to a child".[664] Families,

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654 *Evidence Act 1977* (Qld) s 93A.

655 As at 13 October 2000, the relevant provisions of the *Youth Justice and Criminal Evidence Act 1999* had not commenced.

656 *Youth Justice and Criminal Evidence Act 1999* ss 16, 17, 19, 27.

657 *Youth Justice and Criminal Evidence Act 1999* ss 16, 19, 21(1)(a), (3)(a), (4)(c).

658 *Youth Justice and Criminal Evidence Act 1999* ss 21(1)(b), (5), 35(3).

659 *Evidence (Children) Act 1997* (NSW) s 9.

660 *Evidence Act 1906* (WA) s 106H, Schedule 7.

661 *Criminal Code* (Canada) s 715.1.

662 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 141.

663 Submissions 19, 39, 53.

664 Submission 20.

Youth and Community Care Queensland submitted the provision should cover, at the very least, cases of a sexual assault against, or intrafamilial assault on, a child under 18.[665] The Queensland Council for Civil Liberties expressed the view that a statement should be admissible only in proceedings for sexual offences.[666] The former Director of Public Prosecutions suggested that admissibility should be restricted to "offences of abduction of a child, sexual offences against a child including procuring or attempting to procure a child to do any indecent or offensive act, bestiality where the allegation is that the offender procured a child to commit the offence or committed the offence in the child's presence, the making of a child pornography or the commission of an indecent act in front of a child, procuring of a person not an adult to engage in prostitution, taking a child for immoral purposes, permitting abuse of children on certain premises and of course sexual offences in relation to mentally disadvantaged people".[667]

(e) Availability for cross-examination

Generally, subject only to certain limited exceptions, all witnesses who give evidence in a proceeding are liable to be cross-examined[668] and, within the rules of admissibility, may be asked any question which is relevant to the issue.[669] Cross-examination of an opposing party's witnesses has traditionally been regarded as a fundamental feature of the adversarial system of justice. Its importance has been explained in the following terms:[670]

> The object of cross-examination is twofold: 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.

The lack of opportunity to challenge an out-of-court statement by contemporaneous cross-examination is one of the main arguments against the admission of evidence of this kind. To meet this objection, each of the legislative provisions under consideration requires, as a condition of admissibility of the out-of-court statement of a child witness, that the child be available to give evidence in the proceedings.[671]

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665 Submission 49.

666 Submission 40.

667 Submission 32.

668 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 17470.

669 Id at paras 17430, 17500.

670 Id at para 17430. See Chapter 13 of this Report for a discussion of the power of a court to restrict inappropriate cross-examination of a child witness.

671 In New South Wales the requirement applies only if the child is not the accused person in the proceeding: *Evidence (Children) Act 1997* s 11(2).

In Canada, section 715.1 of the Canadian *Criminal Code* was challenged on the basis that, because the statement of the child witness could not be tested by cross-examination at the time it was made, an accused person was denied the right to a fair trial. The Supreme Court of Canada unanimously rejected this proposition.

In the leading judgment, Justice L'Heureux-Dubé observed:[672]

> … the concerns with respect to the potential problems associated with hearsay and reliability of evidence are not significant when videotaped testimony is involved. Under s.715.1, the manner of questioning, the reaction, the responses and the entire circumstances of the taking of the evidence are before the court through the medium of videotaping.

Justice L'Heureux-Dubé expressed the view that section 715.1 was designed "to preserve an early account of the child's complaint in order to assist in the discovery of truth".[673] She concluded that the provision enabled the court to hear a more accurate account of what the child was saying about the incident at the time it first came to light.[674]

However, the requirement that a child whose out-of-court statement is admitted be available to give evidence in the proceedings does not necessarily guarantee that any effective cross-examination will be able to take place. If, by the time the matter is heard in court, the child is unable to clearly remember the events in question, the defence may not be able to conduct a meaningful cross-examination of the child on the contents of the child's statement.

The Supreme Court of Canada has held that this situation does not impinge on the accused's right to a fair trial.

Firstly, the Court noted that "fairness" is not an absolute concept. It has pointed out that, in a case of alleged child abuse, what is fair to the accused must be determined in the context of the rights and capabilities of children and that it may be necessary for the criminal justice system to treat children differently "in order that it may provide them with the protections to which they are rightly entitled and which they deserve".[675] It has also observed that the right to a fair hearing does not guarantee an accused "the most favourable procedures that could possibly be imagined".[676]

672 *R v L(DO)* (1993) 85 CCC (3d) 289 per L'Heureux-Dubé J at 316-317.

673 Id at 305.

674 Id at 309.

675 Id at 312.

676 *R v Lyons* (1987) 37 CCC (3d) 1 per La Forest J at 46.

Secondly, the Court reasoned that, while the purpose of cross-examination is to test the reliability of the child's statement, cross-examination is not the only means by which this can be done:[677]

> … cross-examination is not the only guarantee of reliability. There are several factors present in s. 715.1 which provide the requisite reliability of the videotaped statement. They include: (a) the requirement that the statement be made within a reasonable time; (b) the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanor, and assess the personality and intelligence of the child; (c) the requirement that the child attest that she was attempting to be truthful at the time that the statement was made. As well, the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made. These *indicia* provide enough guarantees of reliability to compensate for the inability to cross-examine as to the forgotten events.

Similarly, in Australia, it has been held that the inability to conduct an effective cross-examination of a child witness does not render a trial unfair to the accused, provided that the trial judge warns the jury that, in determining the weight to be given to the child's evidence, it should take into account the fact that the defence has not been able to properly test the reliability and accuracy of the child's version of the events in question.[678]

However, there is a concern that a requirement for a child witness to be available for cross-examination at trial is inconsistent with the objective of reducing the stress of testifying for the child.[679] It is at least arguable that cross-examination is one of the most traumatic aspects of giving evidence. A Canadian Supreme Court judge has observed that there is "little point in sparing the child the need to testify in chief, only to have him or her grilled in cross-examination".[680] In the United Kingdom, judges voiced similar views to the English Law Commission:[681]

> … because there is no examination in chief the child, once called to give evidence, is thrust immediately into a hostile cross-examination, and this experience gives the witness the impression that the court is against him or her. It is ironical that a child is able to give his or her own story in examination in chief in an atmosphere less formal and pressured than that prevailing in the court, yet he or she has to endure the much more traumatic and fraught experience of being cross-examined in the formal court atmosphere. [note omitted]

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677 *R v F(CC)* (1997) 120 CCC (3d) 225 per Cory J at 241.

678 *R v NRC* [1999] 3 VR 537 per Winneke P at 554.

679 Palmer A, "Child Sexual Abuse Prosecutions and the Presentation of the Child's Story" (1997) 23 *Monash University Law Review* 171 at 197.

680 *R v Khan* (1990) 59 CCC (3d) 92 at 105.

681 Law Commission, Consultation Paper, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (LC CP138, 1995) at para 13.23.

In the Discussion Paper, the Commission sought submissions as to whether the admissibility of a child's out-of-court statement should be conditional upon the child's availability for cross-examination at committal or at trial.[682]

Six respondents addressed this issue.[683] All agreed that the child should be available for cross-examination at trial.[684]

(f) Adoption of the statement

In Canada, section 715.1 of the Canadian *Criminal Code* requires that for the child's previous statement to be admissible the child, while testifying, must "adopt" the contents of the statement. The child "adopts" the statement within the meaning of the section if he or she recalls making the statement and testifies that he or she was, at the time the statement was made, attempting to be honest and truthful.[685] The child may adopt the statement, and the statement may be admitted, whether or not the child, at the time of trial, has an independent present memory of the events recorded in the statement.[686] It has been held that the effect of this provision is that the videotaped evidence, once adopted by the child, would no longer be strictly hearsay.[687]

One submission, from the former Director of Public Prosecutions, urged that a similar provision should be implemented in Queensland.[688]

(g) Notice to the accused

The Western Australian legislation requires that a copy of a child's out-of-court statement must be given to the defendant or, if the statement is not recorded in writing or electronically, that the defendant be provided with details of the statement.[689] In New South Wales, the recording of the child's statement will not be admitted unless it is proved that the accused person and his or her lawyer, if any,

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682 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 140-141.

683 Submissions 12, 19, 20, 32, 33, 39.

684 The issue of whether child witnesses should be available for cross-examination in committal proceedings is discussed in Chapter 12 of this Report.

685 *R v F(CC)* (1997) 120 CCC (3d) 225.

686 Ibid.

687 *R v L(DO)* (1993) 85 CCC (3d) 289 per L'Heureux-Dubé J at 314.

688 Submission 32.

689 *Evidence Act 1906* (WA) s 106H(1).

were given a reasonable opportunity to listen to and, in the case of a videorecording, view the recording.[690]

Unlike these provisions, section 93A of the *Evidence Act 1977* (Qld) does not require the contents of a statement which it is sought to admit under that section to be disclosed to an opposing party. Nor is there an absolute right at common law for a person accused of committing a criminal offence to obtain discovery of the prosecution evidence.[691] However, the common law imposes a duty on the prosecution to advise an accused person of the evidence to be led against the person,[692] and the court has an inherent power to order that, where the interests of justice require it, the prosecution produce to the defence for inspection documents or things in the possession of the prosecution.[693] In addition, the Director of Public Prosecution's Guidelines instruct prosecutors to fully disclose the Crown's case to the defence at the earliest possible opportunity.[694] The Queensland *Criminal Code* also authorises a court to give a direction about the provision of a statement or a proof of evidence,[695] but such a ruling can be made only after the presentation of an indictment and would therefore not apply to the production of a section 93A statement prior to a committal proceeding.

In the Discussion Paper, the Commission sought submissions on whether the legislation should impose, as a condition of admissibility of a section 93A statement in a criminal proceeding, a requirement that a copy of the statement or, where the statement is not recorded, details of the statement be made available to the accused.[696]

Seven submissions addressed this issue.[697] The former Director of Public Prosecutions advised the Commission that, in practice, the absence of a legislative requirement to disclose the statement is not a problem because the situation is provided for in prosecution guidelines.[698] Nonetheless, he supported the proposition that, for an out-of-court statement to be admissible, a copy of the statement must be

690 *Evidence (Children) Act 1997* (NSW) s 12(2). This provision does not apply if the child is the accused person in the proceeding. The position of child witnesses who have been accused of committing criminal offences will be discussed in Part 3 of this Report, to be published in 2001.

691 *R v Charlton* [1972] VR 758; *Sobh v Police Force (Vic)* [1994] 1 VR 41.

692 *Barton v The Queen* (1980) 147 CLR 75.

693 *Sobh v Police Force (Vic)* [1994] 1 VR 41 per Brooking J at 47.

694 Director of Public Prosecutions, *Guidelines to the Crown Prosecutors, the Solicitor for Prosecutions and Legal Staff Concerned with the Prosecution of Offences* at 21.

695 *Criminal Code* (Qld) s 592A(2)(c).

696 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 141.

697 Submissions 12, 19, 20, 32, 39, 45, 49.

698 Submission 32.

provided to the defence. Only one respondent opposed the suggestion that the accused should be given notice of the contents of the statement.[699]

(h) Judicial discretion to exclude

At present, section 93A of the *Evidence Act 1977* (Qld) does not confer on the court a discretion to exclude the out-of-court statement of a child if it is otherwise admissible under that section. However, the court may refuse to admit the statement, even though the criteria for admissibility set out in section 93A have been met, if it would be inexpedient in the interests of justice to admit it,[700] or if, in a criminal trial, the court is satisfied that it would be unfair to the person charged to admit it.[701]

In New South Wales, the court may order that a child is not to give evidence by means of a recording,[702] but the court may only do so if it is satisfied that it is not in the interests of justice for the child's evidence to be given in this way.[703] The Western Australian provision enabling admission of a child's out-of-court statement allows the statement to be admitted "at the discretion of the Judge".[704] In Canada, the Supreme Court of Canada has held that the wording of the equivalent Canadian provision "supports the interpretation that such a provision accommodates traditional rules of evidence and judicial discretion",[705] and has enumerated a number of factors which a court could take into account in exercising its discretion, in order to ensure a fair trial for the accused, to exclude a videotaped statement. Those factors include:[706]

- the form of questions used by any other person appearing in the videotaped statement;
- the quality of the video and audio reproduction;
- the presence or absence of inadmissible material in the statement;
- the ability to eliminate inappropriate material by editing the tape;

699 Submission 19.

700 *Evidence Act 1977* (Qld) s 98.

701 *Evidence Act 1977* (Qld) s 130.

702 *Evidence (Children) Act 1997* (NSW) s 15(1).

703 *Evidence (Children) Act 1997* (NSW) s 15(2).

704 *Evidence Act 1906* (WA) s 106H(1).

705 *R v L(DO)* (1993) 85 CCC (3d) 289 per L'Heureux-Dubé J at 318.

706 Id at 319-320.

- whether other out-of-court statements by the complainant have been admitted;

- whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);

- the amount of time which has elapsed since the making of the tape and the present ability of the witness to effectively relate to the events described.

In the Discussion Paper, the Commission sought submissions on the question of whether the legislation should expressly confer a discretion to exclude a child's out-of-court statement if, in the opinion of the court, the statement would cause unfair prejudice to the accused.[707]

Five submissions agreed that the out-of-court statement of a child witness should not be admitted if its admission would unfairly prejudice the accused.[708]

The Bar Association of Queensland observed:[709]

> Such a discretion should be retained in order to allow for all of the various circumstances which may attend the obtaining of such evidence and the need to balance the interests of securing a fair trial of the relevant issues.

Only one submission opposed a discretion to exclude the statement.[710]

(i) Jury access to the statement

Some submissions raised the issue of whether, in a criminal trial, the out-of-court statement of a child witness should be able to be taken into the jury room as are other exhibits.[711]

The concern is that, since the members of the jury have only their own memory of oral testimony presented at trial, they may place disproportionate weight on a pre-trial statement if they are allowed to take the actual statement into the jury room. It is possible that if, during its deliberations, the jury has access to the evidence-in-chief of a child witness in the form of the statement but does not have the child's cross-examination and re-examination to refresh their memories, the jury's consideration of the child's evidence will lack balance. The potential for injustice is even greater if the

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707 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 141.

708 Submissions 32, 39, 40, 45, 53.

709 Submission 53.

710 Submission 20.

711 Submissions 17, 32, 37.

statement is in the form of a videotape which may be replayed a number of times. One respondent suggested that:[712]

> … if only part of the evidence is recorded, there will be a risk of overemphasis if the jury has only that part replayed or takes it to the jury room.

The former Director of Public Prosecutions submitted that an out-of-court statement should not go into the jury room like other exhibits unless the judge so permits in the interests of a fair trial for the accused.[713]

Section 99 of the *Evidence Act 1977* (Qld) confers on the judge in a jury trial discretion to withhold from the jury during their deliberations any out-of-court statement admitted as evidence under section 93A, if the judge considers that the members of the jury might give the statement undue weight if they were to have the statement with them in the jury room.

The Queensland Court of Appeal has recently held that, as a general rule, videotaped evidence tendered under section 93A should not, at least in the absence of the consent of both the prosecution and the defence, be permitted to go into the jury room during deliberations.[714] This decision is consistent with the view taken by courts in England,[715] New Zealand[716] and Canada.[717]

One possible solution to the problem would be to provide that, when a statement is admitted under section 93A, the contents of the statement are to be transcribed by the court reporters into the transcript of the proceedings. In this way, the contents of the statement would become part of the record of evidence at the trial. If the members of the jury wished to be reminded of the child's evidence, the transcribed statement could be read back to them in court, which is what presently happens with direct testimony which the jury wishes to hear again. Where the statement admitted under section 93A is in the form of a videorecorded interview, transcription of the contents of the statement would also avoid the need to replay the video in court at the request of the jury. If the trial judge considered that repetition of the contents of the child's statement would give undue emphasis to the child's evidence, the transcript of the accused's evidence, if any, could also be read, and the jury would rehear the evidence of both witnesses in the same form.

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712 Submission 37.

713 Submission 32.

714 *R v H* [1999] 2 Qd R 283.

715 *R v Rawlings and Broadbent* [1995] 2 Crim App R 222; *R v Welstead* [1996] 1 Crim App R 59.

716 *R v O* [1996] 3 NZLR 295.

717 *R v Kilabuk* (1990) 60 CCC (3d) 413.

4. THE COMMISSION'S VIEW

(a) The age of the child

The age at which a child witness should be able to make an out-of-court statement which is admissible in subsequent proceedings depends on what it is sought to achieve by the admission of the statement.

In the view of the Commission, the admission of the evidence of a child witness in the form of an out-of-court statement can serve two purposes. One purpose is to preserve the child's account of the alleged incident at the earliest possible opportunity, while the events giving rise to the statement are still clear in the child's mind. The second purpose is, by controlling the conditions under which the child's evidence is given and by attempting to minimise the number of occasions on which the child is required to repeat his or her evidence, to reduce the distress which may be caused to the child by having to testify directly.

In its current form, section 93A of the *Evidence Act 1977* (Qld) appears to be primarily an attempt to address the first of these concerns. It applies only to a witness who is under the age of 12 at the time the statement is made, unless the witness is a person who has an intellectual impairment as defined by the section. The provision is therefore directed towards those child witnesses who are likely to be most susceptible to memory fade and for whom it is most important to have a record of their account while it is still relatively fresh in their minds. This interpretation of section 93A is reinforced by the requirement that, to be admissible, an out-of-court statement made to someone other than a person investigating the matter to which the proceedings relate, must have been made soon after the occurrence of the fact which the evidence is intended to prove.

However, in this Report, the Commission recommends that the existing need for contemporaneity as a condition for admissibility of an out-of-court statement made by a child witness should be removed.[718] In the view of the Commission, implementation of this recommendation would have the result that section 93A would no longer be directed towards very young witnesses to the same extent as it is at present.

Admission of the evidence-in-chief of a child witness in the form of a section 93A statement may also make giving evidence less stressful for a child witness. The Commission considers that the importance of ensuring that the child suffers as little distress as possible is a relevant consideration in determining the age of child witnesses who should be entitled to give evidence in this way. In the view of the Commission, there would be many children above the age of 11 years who do not have an intellectual impairment as defined by the section, and to whom section 93A therefore does not presently apply, who would find the process of testifying less

718 See p 152 of this Report. In relation to committal proceedings, see Chapter 12 of this Report.

traumatic if their evidence-in-chief could be presented as a statement made previously and admitted under section 93A.

Taking the above factors into account, the Commission is of the view that the age limit currently imposed by section 93A is too restrictive and that section 93A should be amended to apply to a child under the age of 16 years or an intellectually impaired person. The effect of this would be that, provided the other requirements of the section were met, an out-of-court statement made by any child under the age of 16 would be admissible, as would an out-of-court statement made by an intellectually impaired young person aged 16 or 17 years.

The situation may arise, however, where an out-of-court statement is not made until the witness is 16 or 17 years old. Even in this age group, some young people who do not have an intellectual impairment as defined by the section may have particular difficulty in giving direct testimony, particularly in relation to sexual offences. Indeed, the *Evidence Act 1977* (Qld) currently recognises that, for a variety of reasons, some witnesses other than young children and people with an intellectual disability may have difficulty giving their evidence. Section 21A of the Act creates a category of "special witness", and permits certain arrangements to be made to facilitate the giving of their evidence. A "special witness" is defined to include a person who, if required to give evidence in accordance with the usual rules and practices of the court, would be likely to:[719]

- suffer severe emotional trauma;
- be disadvantaged as a witness because of cultural differences; or
- be so intimated as to be disadvantaged as a witness.

The Commission believes that a young person aged 16 or 17 years who satisfies the definition of "special witness" in section 21A of the *Evidence Act 1977* (Qld) should also be able to give evidence-in-chief in the form of a previously recorded out-of-court statement, and that section 93A of the Act should be amended accordingly.

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719 *Evidence Act 1977* (Qld) s 21A(1)(b). Section 21A of the *Evidence Act 1977* (Qld) is amended by s 46 of the *Criminal Law Amendment Act 2000* (Qld), which received Royal Assent on 13 October 2000. Section 21A(1)(b), in its amended form, defines a "special witness", other than a child under the age of 12, as:

> a person who, in the court's opinion -
>
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
>
> if required to give evidence in accordance with the usual rules and practice of the court.

"Relevant matter" is defined in s 21A(1) as "the person's age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant".

(b) Types of statement

The Commission has given careful consideration to the difference between the present Queensland legislation, which allows the court to admit the previous statement of a child witness if the statement is contained in a document,[720] and the models in other jurisdictions which permit the admission of such a statement only if it is recorded on videotape.

The Commission is not persuaded that the range of material which is presently admissible under section 93A of the *Evidence Act 1977* (Qld) should be limited. In particular, notwithstanding the view expressed by the former Director of Public Prosecutions,[721] the Commission is unable to agree that only videorecorded statements of a child witness should be admissible. The Commission is concerned that, despite the advantages of preserving the child's statement on videotape, in many instances the facilities to videorecord the statement may not be available and that consequently the statement, which may be the only evidence which the child is able to give in any effective way, would be lost.

The Commission acknowledges concerns expressed in the submissions that evidence given outside the courtroom may be susceptible to abuse. Nonetheless, in the view of the Commission, the essential question is whether the potential for prejudicing the fairness of a trial is sufficiently great to outweigh the importance of facilitating the reception of evidence which may otherwise be unavailable. In this Report, the Commission recommends measures such as a requirement for the child who made the statement to be available for cross-examination at trial[722] and an express judicial discretion to exclude a statement which may be unduly prejudicial.[723] In the view of the Commission, these measures would sufficiently protect the integrity of out-of-court statements to ensure that, on balance, their admission would not result in the court receiving evidence which was unreliable or unfair.

In many cases, particularly those involving allegations of abuse against a child complainant, the statement which is sought to be admitted is likely to be a record of interview between the child and an investigating police officer. The Commission recognises the need to ensure, to the greatest extent possible, that interviews are conducted in such a way as to elicit relevant information without tainting the child's account by leading or suggestive questions or by repeated questioning. The Commission is therefore of the view that guidelines should be developed to assist in obtaining statements which will be acceptable in court proceedings.[724] Adherence to the guidelines would enhance the likelihood that the statement would be admissible,

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720 *Evidence Act 1977* (Qld) s 93A. See note 583 of this Report for the definition of "document".

721 See p 136 of this Report.

722 See pp 153-154 of this Report.

723 See p 156 of this Report.

724 See, for example, Home Office and Department of Health (UK), *Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings* (1992).

but should not override any prejudice to the defendant which may arise from other factors. The development of the guidelines is beyond the expertise of the Commission and should be undertaken by those with appropriate qualifications and experience.

In the view of the Commission, the proposal that all government agencies, as well as sexual assault referral centres, be required to record discussions with a complainant from the point of first contact would be impractical to implement and would, in many cases, constitute an unwarranted intrusion of privacy. It does, however, highlight the desirability, if a recorded interview is to be relied on in subsequent proceedings, of making the recording at the earliest possible time so as to prevent potential contamination of the evidence. It also highlights the importance of the allocation of adequate resources to facilitate this process.

(c) Time limits

The Commission considered whether the admissibility of the out-of-court statement of a child witness should depend on the length of time between the occurrence of the facts which the statement is intended to prove and the date when the statement was made. Under the existing Queensland legislation, it is necessary for the statement, in order to be admissible, to be made "soon after" the events in question, unless it was made to a person investigating the matter to which the proceedings relate.[725]

The Commission is not persuaded that the admissibility of statements made by child witnesses in the course of a criminal investigation should be subject to a time limit. The Commission is concerned that a requirement that the statement be made within a "reasonable time" of the alleged offence may give rise to uncertainty of interpretation in cases where, as not infrequently happens, a considerable period of years may elapse before a child who has been abused feels able to disclose the experience. The Commission also notes that the existence of a judicial discretion to exclude evidence which is unfairly prejudicial would allow the court, if it considered it in the interests of justice to do so, to refuse to admit an out-of-court statement on the basis of the interval of time between the occurrence of the alleged offence and the making of the statement.

The Commission also considered the existing requirement that a statement other than one made to a person investigating the matter to which the proceeding relates must be made soon after the occurrence of the facts which the statement is intended to prove. In the view of the Commission, although it is obviously desirable for statements to be taken at the earliest possible opportunity, the existence of a discretion to exclude an unduly prejudicial statement means that the requirement is unnecessary.

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

(d) Particular offences

The Commission considered whether out-of-court statements made by child witnesses should be admissible only in certain types of proceedings, as is the case in jurisdictions such as Western Australia and Canada.

At present, section 93A of the *Evidence Act 1977* (Qld) applies to a proceeding of any kind. In the absence of any suggestion that this aspect of section 93A has caused any problems, the Commission does not see any need to change the existing situation.

Further, the Commission is of the view that, if out-of-court statements are admissible in proceedings for alleged criminal offences, where conviction on the basis of the statement may result in the imposition of a term of imprisonment, there is no reason why they should not be admissible in other proceedings where the possible outcome does not include a custodial sentence.

(e) Availability for cross-examination

The Commission recognises that cross-examination is rarely a pleasant experience for any witness. However, it believes that it is important, in the interests of a fair trial, that a child witness be available at trial for cross-examination about an out-of-court statement made by the child that has been admitted as evidence. In many cases, particularly those involving sexual offences, cross-examination may afford the only means of testing the reliability of the child's evidence-in-chief.

In some jurisdictions, if a pre-recorded interview with a child witness is admitted into evidence, the child is not to give evidence-in-chief otherwise than by the videorecording. For example, in England, the child may be called to give evidence, but generally may not be examined in chief on any matter dealt with in the videotape.[726] Provisions of this kind have given rise to a concern that, at trial, the child will be thrown immediately into the hostile environment of cross-examination.[727] However, in Queensland this situation is avoided because section 93A of the *Evidence Act 1977* (Qld) requires that the party tendering an out-of-court statement call the child who made the statement as a witness if required to do so by any other party to the proceeding.[728] As it is the party who calls the child as a witness who questions the child first, the child need not be immediately exposed to cross-examination.

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726 See for example *Youth Justice and Criminal Evidence Act 1999* s 27.

727 See p 143 of this Report.

728 *Evidence Act 1977* (Qld) s 93A(3).

Further, in Part 1 of this Report,[729] the Commission recommended that the *Evidence Act 1977* (Qld) be amended by the insertion of a provision giving a court power to restrict inappropriate cross-examination of a child witness.[730] The Commission's recommendation has been taken into account in section 45 of the *Criminal Law Amendment Act 2000* (Qld).

The Commission also believes that its recommendations about the way in which a child may give evidence[731] and about related matters such as appropriate methods of communicating with a child witness[732] and awareness of the special needs of child witnesses[733] will go a long way towards eliminating the unnecessary trauma to which it appears that some child witnesses may have been subjected in cross-examination.

(f) Adoption of the statement

The Commission considered the Canadian requirement that a child's out-of-court statement, to be admissible, must be adopted by the child who must testify that, at the time the statement was made, the child was attempting to be truthful.[734]

It has been held in Canada that, once adopted, the out-of-court statement is no longer strictly hearsay.[735] This view is consistent with common law principles which, under certain circumstances, allow a witness to refer, while giving evidence, to a statement made while the facts were still fresh in his or her memory, for the purpose of refreshing his or her memory about the facts recorded in the statement.

However, the Canadian provision extends the common law relating to the admissibility of such statements. The common law distinguishes between the situation where reference to the previous statement successfully revives the memory (present recollection) and that where reference to the previous statement fails to bring back an actual recollection (past recollection). In the former situation, where there is a present recollection revived by referring to the statement, the statement itself is not admissible, and it does not become part of the evidence-in-chief.[736] In Canada, on the other hand, the statement is admissible whether or not the child has a present recollection of the facts recorded in the statement. If the child has little or no memory of the events in question, the statement is admissible to preserve an

729 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000).

730 Id at 8. Those recommendations are set out at p 270 of this Report.

731 See Chapters 9 and 10 of this Report.

732 See Chapter 4 of this Report.

733 See Chapter 20 of this Report.

734 See pp 131, 144 of this Report.

735 *R v L(DO)* (1993) 85 CCC (3d) 289 per L'Heureux-Dubé J at 314.

736 *Gregory v Tavernor* (1833) 6 Car & P 280.

early account of the incident and to prevent further injury to vulnerable children as a result of their involvement in the criminal process.[737] Even where the child does have a present recollection, the statement is admissible because "a very early account can be of more probative value than present testimony, particularly if the present memory is faulty or it is difficult for the witness to articulate it in court,"[738] and a prior statement, together with the child's in-court testimony, may provide a more complete version of the child's evidence.[739]

The former Director of Public Prosecutions described the common law distinction as "anomalous" and proposed that the Canadian provision should be adopted.[740]

However, under section 93A of the *Evidence Act 1977* (Qld), there is no suggestion that the statement will not be admissible if the child has some present recollection of the events in question. Provided the requirements of the section are satisfied, the statement may be admitted whether or not the child has a present recollection.[741]

The Commission is therefore not persuaded that it is necessary to introduce a requirement that the witness "adopt" the statement.

(g) Notice to the accused

The Commission agrees that it is important for a person accused of having committed a criminal offence to be given adequate notice of the case against him or her in order to decide whether to plead guilty and, if not, to prepare a defence. In the view of the Commission, this would entail, where the evidence of a complainant or other prosecution witness who is a child is to be given by means of a statement admitted under section 93A of the *Evidence Act 1977* (Qld), ensuring that the defence has access to a copy of the statement or, if the statement is not recorded in writing or electronically, details of its contents.

The Commission is further of the view that section 93A should be amended to specifically provide for this. An accused person should not have to rely on the practices within the Office of the Director of Public Prosecutions, or to bring a court application to gain access to the child's statement. In addition to the question of ensuring that the accused person is treated fairly, giving access to the statement may also facilitate the administration of justice if the information contained in the statement is sufficiently strong to persuade the accused to plead guilty.

737 *R v F(CC)* (1997) 120 CCC (3d) 225 per Cory J at 239-240.

738 Id at 238-239.

739 Id at 240.

740 Submission 32.

741 *R v Cowie, ex parte Attorney-General* [1994] 1 Qd R 326.

(h) Judicial discretion to exclude

The Commission acknowledges that an out-of-court statement which complies with the requirements for admissibility under section 93A of the *Evidence Act 1977* (Qld) may nonetheless be in some way unfairly prejudicial to another party to the proceeding. It may, for example, contain material which is inadmissible. The Commission is strongly of the view that, particularly in a criminal proceeding, the existence of a judicial discretion to exclude the evidence in such a situation is crucial.

The Commission therefore considers that the legislative provision allowing for the admissibility of the out-of-court statement of a child witness should be expressed in discretionary terms. However, the provision should not include specific grounds for refusing to admit the statement, but should cross-refer to the existing provisions which enable the court to refuse to admit evidence in certain circumstances.[742]

(i) Jury access to the statement

The Commission agrees that allowing the jury to take a child's out-of-court statement into the jury room, particularly where the statement is contained in a videotaped recording, could be unfairly prejudicial to the defendant in a criminal trial.

The Commission endorses the decision of the Court of Appeal in *R v H*[743] that, as a general rule, videotaped evidence tendered under section 93A of the *Evidence Act 1977* (Qld) should not be permitted to go into the jury room during deliberations. It also endorses the guidelines set out in that case for dealing with a request from the jury to rehear the child's evidence.

5. RECOMMENDATIONS

The Commission makes the following recommendations in relation to the admissibility of an out-of-court statement made by a child witness:

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

- **apply to all children under 16 years of age;**
- **apply to young persons aged 16 or 17 years who qualify as a "special witness" under section 21A of the *Evidence Act 1977* (Qld);**

742 *Evidence Act 1977* (Qld) ss 98, 130.

743 *R v H* [1999] 2 Qd R 283.

- **remove the requirement that a statement not made to a person investigating the facts to which the proceeding relates be made "soon after" the occurrence of those events;**

- **provide, where the child is a complainant or prosecution witness in a criminal proceeding, for notification of the contents of the statement to be given to the accused;**

- **confer on the court a discretion to exclude an out-of-court statement which otherwise complies with the requirements of the section;**

- **provide that, in a criminal trial heard before a jury, the contents of an out-of-court statement made by a child witness be transcribed and incorporated into the record of evidence given in the proceeding;**

- **give statutory expression to the decision of the Court of Appeal in *R v H* to the effect that, in a criminal trial, the jury may not take the statement into the jury room during their deliberations.**

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

- **to ensure that the evidence is taken at the earliest possible opportunity;**

- **to assist in minimising any likelihood that the child's evidence will be tainted by interviewing techniques;**

- **to ensure that, where the evidence is recorded on video or audio tape, the recording is of sufficient quality to enable it to give an accurate representation of the child's evidence.**

CHAPTER 9

PRE-RECORDED EVIDENCE

1. INTRODUCTION

Some jurisdictions have enacted legislation enabling the whole or part of the evidence of a child witness to be recorded on videotape. The videotape is then replayed at the court hearing.

These provisions differ from those discussed in the previous chapter in that they are concerned with answers given by the child for evidentiary purposes in response to questioning by the legal representatives of the various parties under conditions controlled by the court, rather than with a statement which the child has made outside the court to another person and which is not necessarily made for the purpose of being used as evidence.

There are a number of existing models for the admission in certain circumstances of pre-recorded evidence of a child witness. These models provide for the admission of:

- a videorecording of the child's evidence-in-chief, with cross-examination and re-examination to take place at the court hearing;

- a videorecording of the child's evidence-in-chief, cross-examination and re-examination.

2. EXAMPLES OF EXISTING LEGISLATION

(a) Queensland

Section 21A of the *Evidence Act 1977* (Qld) makes provision for "special witnesses". A "special witness" is a child under the age of 12 years or a person who, in the opinion of the court, would be likely to be disadvantaged as a witness because of one of a number of specified factors, or would be likely to suffer emotional trauma or

to be so intimidated as to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court.[744]

Section 21A(2) enables the court to make an order:

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

In making such an order, the court may also order that all persons other than those specified by the court be excluded from the room in which the special witness is giving evidence.[745] However, any person entitled to cross-examine the special witness must be given reasonable opportunity to view any portion of the videotape of the evidence relevant to the conduct of the cross-examination.[746] An order to videotape the evidence of a special witness is not to be made if the making of the order would unfairly prejudice any party to the proceeding or, in a criminal proceeding, the person charged or the prosecution.[747]

The terms of section 21A(2)(e) would seem sufficiently wide to allow the evidence of a child witness to be videorecorded in its entirety or alternatively, for a videotape to be made of only the child's evidence-in-chief. However, the former Director of Public Prosecutions informed the Commission that, in practice, section 21A is rarely used.[748]

There are a number of issues that are not addressed by the existing legislation. Section 21A does not provide a mechanism for determining whether - and, if so, to

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744 *Evidence Act 1977* (Qld) s 21A(1). Section 21A of the *Evidence Act 1977* (Qld) was amended by s 46 of the *Criminal Law Amendment Act 2000* (Qld), which received Royal Assent on 13 October 2000. Section 21A(1)(b), in its amended form, defines a "special witness", other than a child under the age of 12, as:

> a person who, in the court's opinion -
>
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
>
> if required to give evidence in accordance with the usual rules and practice of the court.

"Relevant matter" is defined in s 21A(1) as the person's "age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant".

745 *Evidence Act 1977* (Qld) s 21A(5).

746 *Evidence Act 1977* (Qld) s 21A(5A).

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

748 Submission 32.

what extent - the evidence of a child should be recorded on videotape.[749] Nor does it specify the procedure to be followed during the videotaping of a child's evidence. For example, it does not identify the people who may be present when the recording is made, or provide for the examination of the child to be presided over by a judge. Further, it is not clear from the wording of section 21A when the videorecording is to be made.

(b) Western Australia

The *Evidence Act 1906* (WA) includes a number of provisions relating to pre-recording the evidence of a child witness.[750]

Section 106I(1)(a) of the Act provides that, where a Schedule 7 proceeding has been commenced,[751] the prosecutor may apply to the court for an order directing that the evidence-in-chief of a child complainant under the age of 16 years be taken, in whole or in part, and presented to the court in the form of a videotaped recording of oral evidence given by the child.[752] The accused person is to be served with a copy of, and is entitled to be heard on, an application.[753]

The judge who hears the application may make such orders as the judge thinks fit, including directions about the procedure to be followed in taking the evidence, the presentation of the recording and the excision of material from it, and the manner in which any subsequent cross-examination or re-examination of the child is to be conducted.[754] The order is to include directions, with or without conditions, as to the persons or classes of persons who are authorised to have possession of the videotaped recording of the evidence, and may also include directions and conditions as to the giving up of possession and the playing, copying or erasure of

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749 See Chapter 11 of this Report in relation to preliminary hearings to determine issues concerning the giving of evidence by a child witness. Although both the Uniform Civil Procedure Rules and the *Criminal Code* enable a court to make, in advance, binding directions about the conduct of a civil proceeding and a criminal trial respectively, neither refers to the procedure to be adopted for taking oral evidence. See *Uniform Civil Procedure Rules 1999* (Qld) rr 366, 367 and *Criminal Code* (Qld) s 592A.

750 A number of these provisions will be affected by the *Acts Amendment (Evidence) Bill 1999* (WA). The Bill has passed both Houses of Parliament but, because of an amendment made in the Legislative Council, had to be referred back to the Legislative Assembly. As of 13 October 2000, it had not been considered further by the Legislative Assembly. Where relevant, the changes that will result from implementation of the amendments have been noted.

751 A "Schedule 7 proceeding" is a proceeding involving certain sexual offences or other violent offences under the *Criminal Code* (WA): *Evidence Act 1906* (WA) Schedule 7 Part A cl 1(a).

752 *Evidence Act 1906* (WA) s 106A (definition of "affected child"); s 106I(1)(a); Schedule 7 Part A cl 1(b). Clause 28 of the *Acts Amendment (Evidence) Bill 1999* (WA) will insert s 106T(3) into the Act, enabling a judge of a court before which it is proposed to adduce videotaped evidence of a child witness to order that the child attend the court for the purposes of giving further evidence in clarification of that evidence.

753 *Evidence Act 1906* (WA) s 106I(2).

754 *Evidence Act 1906* (WA) s 106J(1).

the recording.[755] The order may be varied or revoked by the judge who made it, or by a judge who has jurisdiction co-extensive with that judge.[756]

The evidence-in-chief of a child witness which is pre-recorded on videotape under these provisions is admissible as if the evidence were given orally in the proceeding in accordance with the usual rules and practice of the court.[757]

The Western Australian legislation is based on the recommendations of the Law Reform Commission of Western Australia in its 1991 *Report on Evidence of Children and Other Vulnerable Witnesses*. That Commission recommended:[758]

> In a case of an alleged sexual offence against or intra-familial assault on or abuse of a child under 16 at the time the proceedings are initiated, the court should have power to direct that the prosecution should be permitted to present a child's evidence in video-recorded form at trial in lieu of evidence-in-chief. The child would be available for cross-examination and re-examination by counsel.

In Western Australia there are judicial guidelines for the operation of the special procedures available for the taking of children's evidence.[759] These guidelines envisage that the procedure under section 106I(1)(a) is one that should be used only in exceptional circumstances:[760]

> It might arise if there was good reason for a prosecutor to want a child's evidence-in-chief at a very early stage while it is fresh in the child's mind.

In addition to section 106I(1)(a), section 106I(1)(b) of the *Evidence Act 1906* (WA) provides that, in a Schedule 7 proceeding,[761] where a child was under 16 years of age at the date the complaint was made, the prosecutor may apply to the court for an order directing that the whole of the child's evidence may be taken at a pre-trial hearing.[762] The accused person is to be served with a copy of, and is entitled to be heard on, an application.[763]

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755 *Evidence Act 1906* (WA) s 106J(1), (1)(a).

756 *Evidence Act 1906* (WA) s 106J(2).

757 *Evidence Act 1906* (WA) s 106L. Section 106L will be repealed by cl 23 of the *Acts Amendment (Evidence) Bill 1999* (WA) and replaced by s 106T(1), inserted by cl 28 of the Bill. This amendment will not cause any substantive change to the law.

758 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 4.29.

759 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (May 1998).

760 Id at 5.

761 See note 751 of this Report.

762 The amendments to the *Evidence Act 1906* (WA) introduced by the *Acts Amendment (Evidence) Bill 1999* (WA) refer to a "special hearing" rather than a "pre-trial hearing".

763 *Evidence Act 1906* (WA) s 106I(2).

Section 106K(1) authorises the judge who hears an application under section 106I(1)(b) to make such order as the judge thinks fit. If the judge grants the order for a pre-trial hearing, the hearing is to be recorded on videotape,[764] which is to be used to present the child's evidence at trial.[765] The child need not be present at the trial.[766] If necessary, more than one pre-trial hearing may be held for the purpose of taking the child's evidence.[767] The videorecording of the child's evidence is admissible as if the evidence were given orally in the proceeding in accordance with the court's usual rules and practice.[768] The court may make orders about the possession of the videorecording of the child's evidence, and about the playing, copying or erasure of the recording.[769] The original recording of videotaped evidence made at a pre-trial hearing is not to be edited or altered in any way without court approval before it is presented.[770]

These provisions were also based on recommendations made by the Law Reform Commission of Western Australia, which observed that there will be cases in which children will be unable to testify in court and should therefore, in appropriate cases, be able to give their evidence at a special out-of-court hearing, thus making it unnecessary for the child to appear in court.[771]

The judicial guidelines for the use of closed-circuit television and videotaped evidence note that, although each application for the use of the pre-trial hearing facility should be considered on its merits, certain factors should be taken into account, namely:[772]

764 *Evidence Act 1906* (WA) s 106K(3)(d). Section 106K(3) will be repealed by cl 22(2) of the *Acts Amendment (Evidence) Bill 1999* (WA), and replaced by a new s 106I(1)(b), inserted by cl 20 of the Bill. This amendment will not cause any substantive change to the law.

765 *Evidence Act 1906* (WA) s 106K(4). Section 106K(4) will be repealed by cl 22(3) of the *Acts Amendment (Evidence) Bill 1999* (WA), and replaced by a new s 106I(1)(b), inserted by cl 20 of the Bill. This amendment will not cause any substantive change to the law.

766 *Evidence Act 1906* (WA) s 106K(4). Section 106K(4) will be repealed by cl 22(3) of the *Acts Amendment (Evidence) Bill 1999* (WA), and replaced by a new s 106I(1)(b), inserted by cl 20 of the Bill. Clause 28 of the Bill inserts a new provision, s 106T, into the *Evidence Act 1906* (WA). Section 106T(3) will provide that a judge of a court before which it is proposed to adduce videotaped evidence under s 106K "may order that the affected child … attend the Court for the purposes of giving further evidence in clarification of the video-taped evidence".

767 *Evidence Act 1906* (WA) s 106K(5).

768 *Evidence Act 1906* (WA) s 106L. Section 106L will be repealed by cl 23 of the *Acts Amendment (Evidence) Bill 1999* (WA) and replaced by s 106T(1), inserted by cl 28 of the Bill. This amendment will not cause any substantive change to the law.

769 *Evidence Act 1906* (WA) s 106K(1)(b).

770 *Evidence Act 1906* (WA) s 106M.

771 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 4.39.

772 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (May 1998) at 16.

(i) The twin aims of the Act which are -

(a) to enable the child witnesses who would not otherwise be able to give evidence effectively, or at all, to do so; and

(b) to avoid undue trauma to child witnesses arising from such features of the traditional trial process as confrontation with the accused person and the need to tell a distressing story in a daunting public environment.

(ii) The child's age. Where the child is very young - say, under the age of 8 or 10 years - the Court should lean towards allowing the procedure. A very young child may have difficulty in giving evidence in another way.

(iii) The length of time likely to elapse before the matter comes to trial. Here the Judge needs to take into account the fact that a period of more than six months before trial will, in general, impact more on a very young witness's recall than on a mature person's. In addition, it may be more difficult for a young witness to recover from the traumatic events while the prospect of going to court remains and while he/she is not permitted to discuss the events with anyone.

(iv) The availability of CCTV facilities to enable the witness to give evidence from a Remote Room.

(v) Any special circumstances applicable to the case or to the child witness. These may include personal factors (such as intellectual delay or physical or intellectual handicap) and family circumstances, cultural factors which may make it more than usually difficult for the witness to talk in front of people, and evidentiary issues.

The procedure to be followed when the evidence of a child witness is pre-recorded is set out in the judicial guidelines.[773] Where possible, the hearing at which the child's evidence is recorded is held in a normal courtroom which is equipped for the purpose of giving evidence by closed-circuit television. Otherwise, it takes place in a room specially equipped for the purpose, with the child giving evidence in the room and the accused viewing proceedings by closed-circuit television from another room. The guidelines provide that the former method should be preferred because it avoids the stress of physical proximity to judge and counsel, particularly defence counsel during cross-examination, and because, for the jury, there is very little difference from the situation where the child gives evidence "live" by closed-circuit television.[774]

The Commission understands that, in Western Australia, in almost all sexual offence cases involving child complainants the evidence of the child complainant is recorded on video before trial.[775] This is usually in respect not only of examination-in-chief, but also of cross-examination and re-examination.[776] As a matter of practice, the

773 Id at 3.1.

774 Id at 17. See also cl 22(3) of the *Acts Amendment (Evidence) Bill 1*999 (WA).

775 Kennedy Her Honour Judge A, *Vulnerable Witnesses in Western Australia* (Paper presented at the Annual Conference of the Judges of the District Court of Queensland, April 2000) at 7.

776 Submission 54.

pre-recorded evidence is also used, with the consent of the defence, if it is necessary for a retrial to be held,[777] although the legislation does not at present expressly provide for this. A Bill presently before the Western Australian Parliament will, when enacted, make the pre-recorded evidence of a child witness, which is otherwise admissible, automatically admissible on a retrial.[778]

(c) New Zealand

In New Zealand, in any committal involving a sexual offence upon a child under 17 years of age, the child's videotaped evidence may be admitted if the court is satisfied that the videotape has been made, and is identified, in the prescribed manner and form.[779]

Where the videotape of the child's evidence has been shown at committal, the trial judge may direct that the videotape be admitted at trial.[780] The judge may view the tape before it is shown to the jury and may order that any evidence be deleted which would, but for the use of the videotape, be excluded.[781] Counsel for the accused retains the right to cross-examine the child.[782]

(d) England

In England in 1989 the *Report of the Advisory Group on Video Evidence* (the Pigot Report) recommended legislative reform to allow child complainants in sexual assault matters to give their evidence by means of a pre-recorded videotape.[783] The Pigot Report proposals, which were instrumental in the formulation of the recommendations of the Law Reform Commission of Western Australia on which the Western Australian provisions referred to above are based, were not adopted in England until 1999.

The *Youth Justice and Criminal Evidence Act 1999* makes provision for special measures for the giving of evidence by vulnerable and intimidated witnesses in

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777 Ibid.

778 Clause 28 of the *Acts Amendment (Evidence) Bill 1*999 (WA) inserts a new provision, s 106T, into the *Evidence Act 1906* (WA). Section 106T(1) will provide that "Evidence of an affected child recorded on video-tape … in relation to a Schedule 7 proceeding is admissible in any hearing in relation to that proceeding to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the Court concerned." "Hearing" will include "a retrial or rehearing of the proceeding": s 106T(5)(c), to be inserted by cl 28(5) of the Bill. A "Schedule 7 proceeding" is a proceeding involving certain sexual offences or other violent offences under the *Criminal Code* (WA): *Evidence Act 1906* (WA) Schedule 7 Part A cl 1(a).

779 *Summary Proceedings Act 1957* (NZ) s 185CA(1).

780 *Evidence Act 1908* (NZ) s 23E(1)(a).

781 *Evidence Act 1908* (NZ) s 23E(2).

782 *Evidence Act 1908* (NZ) s 23F(2).

783 Home Office (UK), *Report of the Advisory Group on Video Evidence* (The Pigot Committee, 1989) at paras 2.25-2.39.

criminal proceedings.[784] A special measures direction may be made in favour of a witness who is under the age of 17 years or who has a specified disability that the court considers to be likely to diminish the quality of the evidence given by the witness.[785] A special measures direction may also be made in favour of a witness of any age if the court considers that the quality of the evidence given by the witness is likely to be diminished because the witness will be affected by fear or distress in connection with giving evidence.[786]

The Act provides that, where a pre-recorded interview with a child witness is admitted as the child's evidence-in-chief,[787] any cross-examination and re-examination of the witness may be recorded by means of a videorecording and admitted as the evidence of the witness.[788] The recording is to be made in the absence of the accused, but in circumstances in which the accused is able to see and hear the cross-examination or re-examination of the witness and, if legally represented, to communicate with the legal representative.[789] The members of the court and the legal representatives acting in the proceeding must be able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made.[790]

If such a recording has been made, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by the witness in the proceeding, whether in a videotaped interview or otherwise, unless the court orders.[791] An order for further cross-examination or re-examination may be made only if the court considers that a party to the proceeding has become aware, since the original cross-examination took place, of a matter which could not with reasonable diligence have been ascertained at that time, or that, for any other reason, further cross-examination and re-examination is in the interests of justice.[792]

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784 As at 13 October 2000, these provisions had not commenced.

785 *Youth Justice and Criminal Evidence Act 1999* s 16.

786 *Youth Justice and Criminal Evidence Act 1999* s 17(1). The factors which the court is to take into account in determining whether the quality of the evidence is likely to be affected by fear or distress on the part of the witness are set out in s 17(2).

787 See p 132 of this Report.

788 *Youth Justice and Criminal Evidence Act 1999* s 28(1).

789 *Youth Justice and Criminal Evidence Act 1999* s 28(2).

790 *Youth Justice and Criminal Evidence Act 1999* s 28(2)(a).

791 *Youth Justice and Criminal Evidence Act 1999* s 28(5).

792 *Youth Justice and Criminal Evidence Act 1999* s 28(6).

(e) Other models

In some jurisdictions, models similar to those described above have been rejected, or recommendations for reform have been made but not implemented.

(i) New South Wales

In New South Wales, the Children's Evidence Taskforce convened by the Attorney-General of that State did not favour the inclusion of an option which would allow for a child witness to give evidence at a separate time and location to the trial and for that evidence to be videotaped for presentation to the court at the time of trial.[793] The Taskforce was of the view that any assistance such an option could give to a child witness could equally be provided by the use of closed-circuit television facilities.[794] The Taskforce concluded:[795]

> In addition, it was considered problematic to arrange for the same prosecutor and defence counsel to be available at a separate occasion to undertake such questioning given the likely commitments these practitioners would have in other cases. Concern was also expressed that such a procedure may result in a number of different people examining the child on a number of separate occasions which would be undesirable.

(ii) Tasmania

In 1990 the Law Reform Commissioner of Tasmania recommended:[796]

> That, in an appropriate case, a police officer may on notice to the person charged apply to a Children's Magistrate for the evidence of a child to be taken prior to committal proceedings. The magistrate may, if satisfied that such a course is appropriate, convene a hearing in a suitable place at which the examination-in-chief, cross-examination and re-examination will proceed. The dress of all parties should be informal, and the proceedings should be recorded electronically. I recommend that subject to the other rules of evidence, the video tape of the hearing be admissible on the trial of the accused; and that the child not be called as a witness unless the presiding judicial officer considers that there are exceptional circumstances which require his recall in the interests of justice. I envisage that, without any change in the law, the video tape would be subject to scrutiny in the trial court, and that any parts of it which offended against the laws of evidence, or which a judicial officer considered, in the exercise of his discretion, should be excluded, could be edited out.

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793 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce: Audio and Videotaping of Children's Out-of-Court Statements* (June 1997) Recommendation 9.

794 Id at 23. See Chapter 10 of this Report for a discussion of the use of closed-circuit television by child witnesses.

795 Id at 23-24.

796 Law Reform Commissioner of Tasmania, Report, *Child Witnesses* (Report 62, 1990) Recommendations 4, 5 at 5.

> That a similar procedure be implemented whereby, after committal proceedings have been completed, a Judge can authorise a judicial officer to preside at a special hearing in advance of trial during which the child's evidence may be taken … with the same provisions as to admissibility of the video tape.

These recommendations were excluded from the 1993 amendments to the *Evidence Act 1910* (Tas) which implemented a number of other recommendations of the Law Reform Commissioner relating to children's evidence.

3. ISSUES FOR CONSIDERATION

Provisions such as those set out above, enabling the evidence-in-chief or the entirety of the evidence of a child witness to be pre-recorded on videotape which is then replayed in court, give rise to a number of issues for consideration.

(a) Admissibility of pre-recorded evidence

In the Discussion Paper, the Commission sought submissions as to whether the *Evidence Act 1977* (Qld) should specifically enable a court to order the videorecording of the child's evidence-in-chief, in advance of the court hearing, for use in place of the child's direct testimony[797] and, further, whether the court should have specific power to order the pre-trial recording of the child's evidence-in-chief, cross-examination and re-examination.[798]

Five submissions agreed that the videorecorded evidence-in-chief of a child witness should be admissible at trial.[799] The Bar Association of Queensland expressed the view that there was no need for a specific provision, as section 21A(2)(e) "is already an adequate provision to achieve such an outcome".[800] The Bar Association was concerned, however, by an approach that thrust the child, once called to give evidence, immediately into a potentially hostile cross-examination.

Similarly, the Bar Association did not consider a specific provision necessary to authorise the pre-trial recording of the child's evidence-in-chief, cross-examination and re-examination, as section 21A(2)(e) "appears to already provide such authorisation".[801]

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797 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 141.

798 Id at 143.

799 Submissions 19, 20, 32, 33, 39.

800 Submission 53.

801 Ibid.

Five submissions favoured the inclusion of a provision enabling the videorecording of the entirety of the child's evidence before the trial.[802] The International Commission of Jurists (Queensland Branch) observed:[803]

> Such recording would enable the child to be heard and would alleviate any later need for further cross-examination or re-examination if a jury called for evidence to be heard again or a lawyer sought further answers. They could first be sought from the recording and it would be incumbent upon counsel to cross-examine with a view that no further information could be solicited from the child that was not contained on the videorecording. In this way the child is heard, as is their right, but not subject to the endless rigours of cross-examination and re-examination.

According to Families, Youth and Community Care Queensland, the videorecording of all children's evidence would avoid problems associated with:[804]

- delay between any pre-trial procedure and hearing, and the retractions which often occur at this stage;
- re-traumatising children by subjecting them to cross-examination and by requiring them to confront the accused at committal and trial; and
- the exercise by the accused of his or her right to test the evidence.

A District Court Judge from Western Australia identified the following advantages of pre-recording a child's evidence:[805]

> It may increase the number of pleas of guilty; both sides know the child's evidence before the trial "proper" begins; it saves the child having to be further available and no exclusion of the public is generally necessary. The pre-recording is made available on appeals and by consent on retrials. It is understood that a Bill is presently in preparation to allow the evidence to be used automatically on a retrial.

However, the Judge cautioned that:[806]

> … there is a defence view that the defence can be disadvantaged when evidence is pre-recorded; that prosecutors should provide particulars that they are bound by at the time of pre-recording and that there is a need for the rules concerning this to be formalised.

802 Submissions 20, 32, 37, 49, 54.

803 Submission 37.

804 Submission 49.

805 Submission 54.

806 Ibid.

Another Judge of the same Court has observed, in relation to pre-recording the evidence of child witnesses:[807]

> It is far more clinical; it enables everyone to maintain a far greater degree of objectivity; the witnesses are far less likely to break down and need intermission to regather themselves; the family of the complainant tend not to sit in court and glare at the accused, or the judge for that matter; …
>
> The other advantages are that we have lost less time in that if the child does not come up to proof in a pre-recording then it is a lot cheaper and quicker to discover that at a pre-recording than after a jury has been sworn in, and it is also a lot less stressful to an accused person. Furthermore, it is possible to edit the tapes to take out any inadmissible material. The pre-trial videotaping, of course, means that if the trial aborts or there is a re-hearing for any reason other than the video, the witness does not have to give evidence again.

The Queensland Director of Public Prosecutions, while expressing some reservations about whether very young children appreciate the seriousness of giving evidence if it is recorded on videotape in a location separate from the courtroom, is nonetheless in favour of measures which may reduce the number of times a child witness has to testify. She also recognises the advantage of avoiding possible prejudice to the accused by being able to have inadmissible material deleted from the tape prior to the trial so that it is not heard by the jury.[808]

The Queensland Council for Civil Liberties was opposed to the videorecording of any of the child's evidence:[809]

> The videorecording of a child's examination-in-chief (as opposed to their police interview) should not be permitted to be led in court. It is difficult enough for an accused person to obtain a fair trial where the child's video interview with the police is admitted into evidence.
>
> To have examination-in-chief of a child conducted at some point after the video recording of the police interview but before the committal hearing represents an unacceptable tilting of the scales against the accused.

(b) Availability for cross-examination and re-examination

In the Discussion Paper, the Commission sought submissions on whether, if the evidence-in-chief of a child witness is pre-recorded on videotape to be replayed in court, there should be a requirement for the child to be available for cross-examination in court.[810] One submission opposed a requirement for the child to be

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807 Kennedy Her Honour Judge A, *Vulnerable Witnesses in Western Australia* (Paper presented at the Annual Conference of the Judges of the District Court of Queensland, April 2000) at 15-16.

808 Meeting between Ms Leanne Clare, Director of Public Prosecutions, and a representative of the Commission, 25 October 2000.

809 Submission 40.

810 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 142.

available for either cross-examination or re-examination at trial.[811] One proposed that the child should be available for cross-examination and re-examination at trial.[812] One respondent suggested that, at trial, a video-recording of the child's cross-examination and re-examination at committal should be played and that there could be a requirement for the defence to make an application at a pre-trial hearing for leave to further cross-examine at trial.[813]

(c) Notification to the defence

In the Discussion Paper, the Commission sought submissions on whether the accused should be entitled to view the videotape prior to trial.[814] Five respondents addressed this issue.[815] One respondent opposed the suggestion.[816] However, the former Director of Public Prosecutions observed that, wherever a statement made by the witness exists, in the interests of fairness to the defendant he or she must be given a copy.[817]

(d) Directions as to manner of cross-examination and re-examination

In the Discussion Paper, the Commission sought submissions as to whether, if a child were to be required to be available in court for cross-examination and re-examination on pre-recorded evidence-in-chief, the magistrate or judge should be able to give such direction as he or she considers appropriate as to the manner of such cross-examination or re-examination.[818]

The four respondents who addressed this issue agreed that the court should be given power to make orders about the manner of cross-examination or re-examination.[819]

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811 Submission 20.

812 Submission 39.

813 Submission 32.

814 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 142.

815 Submissions 19, 20, 32, 37, 39.

816 Submission 19.

817 Submission 32.

818 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 142.

819 Submissions 19, 20, 32, 39.

(e) Age

In the Discussion Paper, the Commission sought submissions as to whether legislation enabling the pre-recording of a child witness's evidence should be restricted to witnesses of a particular age group.[820]

Two submissions agreed that there should not be an age limit.[821] One respondent considered that the provision should be restricted to a child under the age of 17 years,[822] while a fourth expressed the view that it should not apply to a child under the age of 3 years developmentally.[823]

Three respondents addressed the issue in terms of the age limit in section 21A of the *Evidence Act 1977* (Qld).[824] Two of these respondents recommended that the definition of "special witness" should be extended to include all child witnesses under the age of 16 years,[825] while the third expressed the view that all children under the age of 18 should be entitled to the benefit of the arrangements provided for special witnesses.[826]

(f) Particular offences

In the Discussion Paper, the Commission sought submissions as to whether the admissibility of videotaped evidence of a child witness should be limited to proceedings involving particular offences and, if so, what those offences should be.[827]

The four submissions which commented on this issue were all of the view that there should not be any such restriction.[828]

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820 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 142.

821 Submissions 19, 32.

822 Submission 20.

823 Submission 39.

824 Section 21A is discussed at pp 158-160 of this Report.

825 Submissions 31, 44.

826 Submission 33.

827 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 142.

828 Submissions 19, 20, 32, 39.

(g) Judicial discretion

In the Discussion Paper, the Commission sought submissions on whether, where the evidence of a child witness is videorecorded before trial, the trial judge should be able to view the videorecording prior to the trial to determine if any evidence should be deleted from the videorecording or if the use of the videorecording should be excluded.[829]

The submissions which addressed this issue were of the view that the judge should have such a power.[830]

(h) Conditions under which videorecorded evidence should be given

A number of submissions commented on the facilities which should be provided to assist a child to give evidence in videorecorded form.[831] The Bar Association of Queensland observed:[832]

> As this intervention is predicated on the intimidation of a child in the court surroundings, there needs to be a more "child friendly" environment. Effectively, what is required is an alternative and less intimidating courtroom where the evidence of the child can be taken and video recorded, in as close to the usual method as possible, but allowing for:
>
> (a) less formality (including no robes);[833]
>
> (b) the presence of the judge;
>
> (c) the accused to be absent from the room but able to monitor the proceedings and be in contact with his or her legal representatives through the use of technology;[834]
>
> (d) a support person might be allowed to be present to provide emotional support to the child;[835] and
>
> (e) the absence of all other persons except those whose presence is necessary.[836]

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829 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 142.

830 Submissions 19, 20, 32, 39.

831 Submissions 19, 20, 32, 53.

832 Submission 53.

833 See Chapter 2 of this Report.

834 See Chapter 10 of this Report.

835 See Chapter 5 of this Report.

836 See Chapter 2 of this Report.

4. THE COMMISSION'S VIEW

(a) Admissibility of pre-recorded evidence

The Commission believes that the legislation should be structured in such a way as to provide the court with the greatest possible degree of flexibility to decide the fairest and most appropriate method of hearing the evidence of a child witness in the circumstances of any particular case.

The Commission is therefore of the view that the legislation should specifically provide that the evidence-in-chief of a child witness may be videorecorded to be played in court in place of the child's oral testimony. The legislation should also enable the court to order, where appropriate, that the whole of the child's evidence be heard at a pre-trial hearing presided over by a judge and be videorecorded to be used at trial.

These options would allow the evidence of a child witness to be taken in less intimidating surroundings than a courtroom, and would help to reduce delays in taking the child's evidence. They would also allow the trial process to operate more smoothly, since issues concerning the child's evidence would have been determined prior to the trial itself. The evidence would be taken in a controlled environment which, in a criminal proceeding where the child was the complainant or a prosecution witness, would protect the interests of both the child and the accused. On the one hand, any cross-examination of the child witness would take place under the supervision of the presiding judge and, on the other, any unduly prejudicial or otherwise inadmissible material could be edited from the tape before it is played to the jury at the trial.

The Commission acknowledges that the taking of a complainant's evidence in this manner would constitute a significant departure from the current practice in criminal trials in Queensland.

If it is only the evidence-in-chief of the child which is pre-recorded, with the child to be available for cross-examination at trial, the ability of the defence to cross-examine the child at trial may be affected. It may happen that it is not possible for the defence to conduct any meaningful cross-examination at the later date. Such a situation could arise for a number of reasons, particularly if the child is very young. For example, when the matter comes to trial, the child may be unable to recall the details of the alleged incident, or may be so intimidated as to be unable to respond to questioning. In any event, where the child is a complainant or a witness for the prosecution, the result may be that the jury would be presented with an account which the defence would not be able to challenge effectively.

However, in the view of the Commission, the common law already adequately provides for this eventuality by imposing on the trial judge an obligation to take steps to avoid unfairness to the accused. In this context, it has been held that the appropriate course of action for the judge to take would be to remind the members of

the jury of any weaknesses in the child's pre-recorded evidence-in-chief which an adequate opportunity to cross-examine the child might have exposed and warn them that, in determining the weight to be given to the child's evidence, they should take into account the fact that the defence has not been able to properly test the reliability and accuracy of the child's version of the events in question.[837]

The Commission considers that, provided that the jury is appropriately warned about the weight to be given to the child's evidence in the absence of an adequate opportunity for the defence to cross-examine the child, the trial will not necessarily be unduly prejudicial to the accused. It agrees with common law authority to the effect that the balance of fairness can be sufficiently restored by appropriate directions to the jury to alert them to the potential unfairness to the accused as a result of being unable to test the credibility of the complainant's account of what he or she saw or experienced.[838]

If the defence were to be required to cross-examine a child complainant in advance of the actual trial, it is likely that the nature of the questions asked would put the accused in the position of revealing, at least in part, any argument which the accused proposes to put forward in his or her defence. At present an accused person does not generally have to disclose, prior to the completion of the prosecution case, whether he or she intends to call any evidence or on what ground of defence, if any, he or she intends to rely.[839] Pre-recording the child's evidence in its entirety would allow the prosecution to prepare for trial so as to meet the case disclosed by the cross-examination of the child witness and to prepare to cross-examine the accused on this basis, rather than, as now happens, having to anticipate the grounds of defence which may be raised at trial. Arguably, the prosecution would thereby gain some advantage which it does not presently have.

However, an accused person's general right of non-disclosure is not entirely unrestricted. Certain measures have already been adopted which may require the accused to reveal some aspects of his or her defence. For example, a person charged with committing an indictable offence must give notice of intention to adduce evidence at trial in support of an alibi.[840] Similarly, a party who proposes to call expert evidence about a fact in issue in a criminal trial must give notice of the party's intention and provide the other parties with a copy of the expert's report.[841] Section 592A of the Queensland *Criminal Code*, which is intended to provide a more streamlined and efficient criminal justice system, also enables pre-trial rulings or directions to be made in relation to matters such as:[842]

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837 *R v NRC* [1999] 3 VR 537 per Winneke P at 554.

838 Ibid.

839 *Criminal Code* (Qld) s 618.

840 *Criminal Code* (Qld) s 590A.

841 *Criminal Code* (Qld) s 590B.

842 *Criminal Code* (Qld) s 592A(2).

- the provision of a statement, report, proof of evidence or other information;
- noting of issues the parties agree are relevant to the trial;
- the exchange of medical, psychiatric and other expert reports; and
- encouraging the parties to narrow the issues.

The notion that an accused person's right of non-disclosure may be affected by the overall interests of justice is therefore not new. If an accused person may be required to divulge certain information in order to overcome the inefficiency of the prosecution anticipating, investigating and disproving matters which are not truly at issue, there may be other imperatives which equally justify some degree of disclosure by the accused person. The Commission considers it likely that there will be cases where the need to protect the vulnerability of a child witness may give rise to such a situation and where any potential disadvantage to the defence caused by a requirement to cross-examine a child witness at a pre-trial videotaping of the child's evidence would be outweighed by the importance of ensuring that the child is actually able to give evidence which may be presented and assessed by the jury at trial. Further, if the child's evidence had been pre-recorded, the accused would have the benefit of knowing in advance of the trial exactly what the child's evidence will be, and would be able to prepare his or her defence accordingly.

The Commission is therefore of the view that the legislation should provide for the evidence of a child witness to be videorecorded either in whole or in part prior to the trial and replayed to the jury. The legislation should enable the court, where the child's evidence-in-chief is to be pre-recorded, to make orders about matters such as the procedure to be followed in the taking of the evidence, the presentation of the recording and the excision of matters from it, as well as possession of the video-recording and the playing, copying or erasure of the recording. It should also enable the court to make orders about possession of a videotape of the entirety of a child's evidence, and about the playing, copying or erasure of the recording. In addition, it should provide that, where the whole of the child's evidence is pre-recorded, the original recording of the videotaped evidence is not to be edited or altered in any way without court approval before it is presented.

The Commission has given consideration to the legislation before the Western Australian Parliament providing for automatic admissibility on a retrial of the videorecorded evidence of a child witness in certain proceedings.[843] Throughout this Report, the Commission has focused on recommendations which, to the greatest possible extent, avoid the need for a child witness to have to give evidence on multiple occasions. It therefore recognises the benefit of being able to rely on pre-recorded evidence given by a child witness if there is a need for a retrial. Such a need could arise because, for example, the jury at the original trial is unable to come to a unanimous verdict or because the jury's guilty verdict is set aside on appeal.

843 See pp 163-164 of this Report.

The Commission also acknowledges that there will be many situations where the pre-recorded videotape of the child's evidence can be used without any risk of prejudice to the accused. However, the Commission is concerned that, in some cases, the use of pre-recorded evidence could cause injustice to an accused person. For example, at the retrial, the accused may be represented by a different counsel who wishes to conduct the defence in a different manner. Accordingly, the Commission is of the view that, in a proceeding where the evidence of a child witness is admissible in the form of a pre-recorded videotape, the court should have a discretion to allow the videotape to be admitted as the child's evidence on a retrial.

(b) Availability for cross-examination and re-examination

Consistently with its views on the availability for cross-examination and re-examination of a child witness whose evidence-in-chief is given in the form of an out-of-court statement made prior to the proceeding,[844] the Commission believes that where the child's evidence is videorecorded at a pre-trial hearing, the child should be available to give further evidence at trial if required.

The Commission notes that, in Western Australia, it is not necessary at present for a child whose evidence-in-chief, cross-examination and re-examination, if any, have been videorecorded at a pre-trial hearing to be present at the trial.[845] However, whilst acknowledging the importance of ensuring that a child witness does not have to give evidence on multiple occasions, the Commission has concluded that the court should be given a discretion to require, in the interests of justice, that the child be recalled at trial for the purpose of giving further evidence or of undergoing further cross-examination. This may be necessary, for example, if new evidence becomes available after the child's initial evidence has been recorded. Although the Western Australian legislation provides that more than one pre-trial hearing may be held for the purpose of recording the child's evidence,[846] there may be situations where, if there is a new development close to the trial date, it may be less traumatic for the child and more efficient administratively to allow the trial to continue with the child giving evidence at trial only on that issue, rather than adjourn the trial to allow a further pre-trial hearing to take place. However, the legislation should also expressly provide that the trial judge is authorised to restrict the nature of any further cross-examination.

(c) Notification to other parties

The Commission believes that, where an application is to be made to the court for an order that the evidence-in-chief or the whole of the evidence of a child witness be

844 See pp 153-154 of this Report.

845 *Evidence Act 1906* (WA) s 106K(4).

846 *Evidence Act 1906* (WA) s 106K(5).

taken and videorecorded at a pre-trial hearing, notice of the application must be given to any other party likely to be affected by such an order. This would enable a party who wished to oppose the granting of such an application to appear and to be heard. Where only the evidence-in-chief of a child witness is pre-recorded on videotape, with cross-examination and re-examination to take place at trial, a copy of the videorecording should be made available to an opposing party for the purpose of preparing the cross-examination.

(d) Directions as to manner of examination and cross-examination

In the view of the Commission, where it is only the evidence-in-chief of the child witness which is videorecorded, with cross-examination and re-examination to take place at trial, the court which authorises the videorecording should also have power to make such orders as it sees fit about the way in which the child is to give evidence at trial.

Where one of the parties makes a successful application for an order requiring the child to give further evidence at trial, the judge who grants the application should also have power to make such orders as the judge thinks fit about the way such further evidence is to be given.

(e) Age

Under section 21A of the *Evidence Act 1977* (Qld), for a videorecording of a child's evidence to be admissible at trial, the child must be under 12 years of age, or must come within one of the other categories of "special witness" defined in the section.[847]

The Commission has previously expressed the view that there would be many children above the age of 11 years who would be likely to be so distressed by the prospect of giving evidence in court that it would significantly affect their ability to testify.[848] However, at present, in order for the evidence of a child over the age of 11 years to be given by means of pre-recorded videotape, it would be necessary for the party calling the child as a witness to prove that the child qualified for assistance as a "special witness".

The Commission agrees with the respondents who submitted that a child witness under the age of 16 years should be automatically entitled to the facilities available to a special witness. The Commission therefore considers that a child under 16 years of age should be able to give evidence which is videorecorded at a pre-trial hearing to be played at trial, and that the court should have a discretion, in the circumstances specified in section 21A, to order that all or part of the evidence of a witness who is 16 or 17 years of age be pre-recorded on videotape.

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847 See note 744 of this Report for an explanation of the meaning of the term "special witness".

848 See pp 149-150 of this Report.

(f) Particular offences

The Commission considered whether a videorecording of the evidence given by a child witness at a pre-trial hearing should be admissible only in certain types of proceedings.

At present, the operation of section 21A of the *Evidence Act 1977* (Qld) is not limited to any particular proceedings. Consistently with its view in relation to the admissibility of out-of-court statements made by child witnesses,[849] the Commission does not believe that the admissibility of the videotaped evidence of a child witness should be restricted to proceedings for specified criminal offences.

(g) Judicial discretion

The Commission acknowledges that a videotaped recording of the evidence of a child witness may include material which would be unfairly prejudicial to an opposing party if replayed at the trial, or which is otherwise inadmissible. The Commission is therefore of the view that the legislation should provide for the excision of such material from the recording.

Where the videorecorded evidence consists only of the child's evidence-in-chief, the trial judge (or a judge of equivalent jurisdiction) should be able (on the court's own motion or on the application of an opposing party) to view the videorecording before the trial, and to order that any part of it be deleted, or that the videotape not be admitted at the trial.

If the entirety of the child's evidence, including cross-examination and re-examination, if any, is videorecorded before the trial, the judge who presides at the hearing at which the evidence is given should have power to order that any part of the evidence be deleted from the tape. The trial judge or any other judge of equivalent jurisdiction should also have power to order that any part of the pre-recorded evidence be excised before the videotape is played at the trial, or that the videotape not be admitted.

The trial judge should also be able, once the trial has commenced, to order the excision of material from the videotape or to refuse to admit the videotape.

The legislation should cross-refer to the existing sections of the *Evidence Act 1977* (Qld) conferring a discretion on the court to refuse to admit evidence which would otherwise be admissible.[850]

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849 See p 153 of this Report.

850 *Evidence Act 1977* (Qld) ss 98, 130.

(h) Conditions under which videorecorded evidence should be given

The Commission is of the view that any facilities which are made available to assist a child witness to give evidence at trial should be available if the child's evidence is videorecorded in advance of the court hearing.

5. RECOMMENDATIONS

The Commission makes the following recommendations in relation to the admissibility of a pre-recorded videotape of the evidence of a child witness at trial:[851]

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

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

- **in any trial where a child under the age of 16 is to give evidence,[852] the party proposing to call the child as a witness may apply to the court in which the trial is to be held for an order that the child's evidence-in-chief be taken, in whole or in part, and presented to the court in the form of a videotaped recording of oral evidence given by the child;**
- **the application to pre-record the child's evidence-in-chief may be made before the trial;[853]**
- **any opposing party be served with a copy of, and be entitled to be heard on, such an application;**
- **the judge who hears the application may make such order as the judge thinks fit, which may include directions as to -**

  (a) any facilities to be made available to assist the child;

  (b) the procedure to be followed in the taking of the evidence and the presentation of the recording and the excision of matters from it;

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851 The Commission's recommendations in relation to the admissibility of a pre-recorded videotape of the evidence of a child witness at committal are set out in Chapter 12 of this Report.

852 The position of child witnesses who have been accused of committing criminal offences will be discussed in Part 3 of this Report, to be published in 2001.

853 See Chapter 11 of this Report for a discussion of preliminary hearings.

(c) the manner in which any cross-examination or re-examination of the child is to be conducted at the trial;

(d) the persons, or classes of persons, who are authorised to have possession of the videotaped recording of the evidence; the conditions, if any, attached to such possession; and the giving up of possession; and

(e) the playing, copying or erasure of the recording;

- **the recommendations made by the Commission in Chapter 10 of this Report about the use of closed-circuit television and screens for the giving of evidence by a child witness apply to the pre-recording of the evidence-in-chief of a child witness;**
- **the child be available for cross-examination and re-examination at the trial;**
- **a copy of the videotape of the child's evidence-in-chief be made available to an opposing party for the purpose of preparing for cross-examination at trial;**
- **before the trial, the trial judge or a judge of equivalent jurisdiction may view the videotaped evidence and may order that any part of it be deleted or that the videotape not be admitted at the trial;**
- **the trial judge may, at the trial, order that any part of the videotape be deleted or that the videotape not be admitted at the trial;**[854]
- **if, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a trial is a person who would qualify as a "special witness" under section 21A of the *Evidence Act 1977* (Qld), the court may order that the child's evidence-in-chief be taken, in whole or in part, in the manner outlined above.**

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

- **in any trial where a child under the age of 16 is to give evidence, the party proposing to call the child as a witness may apply to the court in which the trial is to be held for an order that the child's evidence be taken at a pre-trial hearing;**

854 The legislation should cross-refer to the existing sections of the *Evidence Act 1977* (Qld) conferring a discretion on the court to refuse to admit evidence which would otherwise be admissible.

- **any opposing party be served with a copy of, and be entitled to be heard on, such an application;**

- **the judge who hears the application may make such order as the judge sees fit which may include directions as to -**

  (a) the persons who may be present at the pre-trial hearing;

  (b) the persons, or classes of persons, who are authorised to have possession of the videotaped recording of the evidence; the conditions, if any, attached to such possession; and the giving up of possession; and

  (c) the playing, copying or erasure of the recording;

- **no person other than a person authorised by the judge is to be present at the hearing;**

- **the recommendations made by the Commission in Chapter 10 of this Report about the use of closed-circuit television and screens for the giving of evidence by a child witness apply to a pre-trial hearing;**

- **the child is to give his or her evidence at the pre-trial hearing and to be cross-examined and re-examined subject to the control of the presiding judge;**

- **where necessary, more than one pre-trial hearing may be held for the purpose of taking the child's evidence;**

- **the pre-trial proceedings are to be recorded on videotape;**

- **the child's evidence at the trial may be given by the presentation to the court of the videorecording made at the pre-trial hearing or hearings;**

- **the trial judge or a judge of equivalent jurisdiction may view the videotaped evidence before the trial and may order that any part of it be deleted or that the videotape not be admitted at the trial;**

- **the trial judge may, at the trial, order that any part of the videotape be deleted or that the videotape not be admitted at the trial;**[855]

855 The legislation should cross-refer to the existing sections of the *Evidence Act 1977* (Qld) conferring a discretion on the court to refuse to admit evidence which would otherwise be admissible.

- **the original videotaped recording of the child's evidence is not to be edited or altered in any way without court approval before it is presented;**

- **the court has a discretion to order, in the interests of justice, that the child be present at the trial to give further evidence and, where the child has previously been cross-examined, to limit the extent of cross-examination allowed at trial;**

- **if, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a trial is a person who would qualify as a "special witness" under section 21A of the *Evidence Act 1977* (Qld), the court may order that the evidence of the child be given in the manner outlined above.**

9.4 A new provision should be inserted into the *Evidence Act 1977* (Qld) to provide that, where the whole or part of the evidence of a child has been given by means of a pre-recorded videotape, the party who called the child as a witness may apply for an order that the videotaped recording of the child's evidence be admitted at a rehearing or a retrial.

CHAPTER 10

CLOSED-CIRCUIT TELEVISION AND SCREENS

1. INTRODUCTION

In this Report, the Commission has made some recommendations which, if implemented, would reduce the need for children under the age of 16 or, in special circumstances, young people aged 16 or 17 to be present in the courtroom during a proceeding to give their evidence.[856] However, in some cases, it may still be necessary for the witness to attend for the court hearing.

Courtrooms are traditionally designed in such a way that, in a criminal trial, the accused is able to see the witness clearly and vice versa. The design is intended to give effect to the common law principle, dating from at least the sixteenth century,[857] that an accused person should generally be entitled to confront and challenge the witnesses against him or her.

However, for a child who is giving evidence against the accused, confrontation with the accused may adversely affect the child's ability to give evidence. The impact of this may be twofold.

Firstly, the child is likely to be very distressed at having to testify in the presence of the accused. The child may feel frightened or threatened, and seeing the accused may reactivate unpleasant memories. Studies have shown that child witnesses in criminal proceedings find confrontation with the accused one of the most difficult aspects of giving evidence.[858]

Secondly, in addition to the emotional effect on the child, there is a risk, particularly in cases involving allegations of sexual abuse, that the child may be so upset that his or her ability to give a coherent account of the alleged incident may be impaired.[859] In other words, the accused's presence may influence the content - in terms of accuracy and completeness - of the child's testimony. The majority of adults who sexually abuse children are related to or in a trusted relationship - for example a family friend, teacher or church leader - with the child.[860] An Australian survey

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856 See Chapters 8 and 9 of this Report.

857 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 160, citing Pollitt DH, "The Right of Confrontation: Its History and Modern Dress" (1959) 8 *J Pub L* 381 at 388.

858 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) 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* (1995) at 217.

859 Tobey AE et al, "Balancing the Rights of Children and Defendants" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 221.

860 Summit RC, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 *Child Abuse and Neglect* 177 at 179.

indicated that in more than half the incidents of abuse reported in the survey, the perpetrator was known to the child[861] and, in more than half of these, the perpetrator was a relative or family friend.[862] Similarly, in Queensland, in the offences reported to the Queensland Police Service in 1997-1998, the alleged offender was known to the complainant in at least some respect in a majority of the incidents. The relationship of the alleged offender to the complainant was most commonly that of "relative".[863] The child/abuser relationship creates an inherent imbalance of power. The child may, as a result of threats or emotional blackmail,[864] be too intimidated to testify truthfully in front of the accused or may be torn by mixed feelings of love, fear, shame and guilt. In a case where the child is a significant - and, since abuse is often conducted in secrecy, perhaps the only - witness against the accused, the child's inability to give evidence may mean that the prosecution is unable to proceed.

Even at common law, however, the right of the accused to confront the witnesses who gave evidence against him or her was not absolute:[865]

> If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.

Today, all Australian jurisdictions have legislation permitting the adoption of measures such as the use of closed-circuit television or screens to shield a child witness from the presence of an accused.[866]

2. EXISTING LEGISLATION

Although all jurisdictions have enacted legislation enabling the use of closed-circuit television or screens when a child witness gives evidence, the effect of the legislation, and hence the extent to which the facilities are used, differ between jurisdictions. In some jurisdictions, the use of special facilities is entirely at the discretion of the court, while in others, the facilities must be used unless the child chooses not to do so or the court orders otherwise.

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861 Patton W and Mannison M, "Unwanted sexual experiences during childhood: Australian continuum data" (1996) 21 *Children Australia* 5 at 10.

862 Id at 9.

863 Queensland Crime Commission and Queensland Police Service, *Child Sexual Abuse in Queensland: The Nature and Extent* (Project Axis Vol 1, June 2000) at 53-54.

864 Summit, RC, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 *Child Abuse and Neglect* 177 at 181. See also Sturgess DG, QC, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985) at 49.

865 *Smellie v R* (1919) 14 Cr App R 128 per Coleridge LJ at 130.

866 See *Evidence (Closed-Circuit Television) Act 1991 (*ACT) s 4A; *Evidence (Children) Act 1997* (NSW) s 18; *Evidence Act 1939* (NT) s 21C; *Evidence Act 1977* (Qld) s 21A; *Evidence Act 1929* (SA) s 13; *Evidence Act 1910* (Tas) ss 122G-122I; *Evidence Act 1958* (Vic) s 37C and Part 11A; *Evidence Act 1906* (WA) ss 106N-106Q.

The advantage of a discretionary power is that it allows the court flexibility to do what it considers most appropriate in each particular case. On the other hand, however, it also opens the door to the possibility of inconsistency, since different judges may place different emphasis on different circumstances. In its review of the law relating to the evidence of children in Western Australia, the Law Reform Commission of Western Australia was concerned that a completely discretionary approach to the use of closed-circuit television would create "the potential for prolonged legal argument, and appeals, on the question whether the discretion was properly exercised."[867] The Western Australian Commission considered it undesirable that a procedure designed to facilitate the giving of evidence by young children should itself generate delays, uncertainties and additional issues to be determined.[868] This view has subsequently been endorsed by the Australian Law Reform Commission, which concluded in relation to discretionary provisions which were then in operation in the Australian Capital Territory:[869]

> Some of the potential benefits to children of using closed circuit TV are lost because of the uncertainty and complexity of the current procedure by which courts make an order to use it. A procedure which gives rise to protracted legal argument, delay and the exposure of children to additional assessment defeats its purpose of making it easier for children to give evidence.

The view of the Australian Law Reform Commission was based on an evaluation of legislation introduced on a trial basis in the Australian Capital Territory and providing for the discretionary use of closed-circuit television in the ACT Magistrates Court, the ACT Children's Court and the ACT Coroner's Court. The evaluation found that the procedure by which the court made a decision to order closed-circuit television was neither straightforward nor consistent, and that there was considerable variation in both the source and type of evidence required by magistrates before they would grant an order.[870] This conclusion is supported by the findings of an evaluation of Scottish legislation providing for the discretionary use of closed-circuit television for some child witnesses. That study found that, in the majority of cases, the exercise of the discretion depended on expert evidence as to the possible effect on the child of giving evidence in the usual way, thus creating additional demands on children, families and on professional resources.[871]

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867 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.28.

868 Id at para 5.30.

869 Australian Law Reform Commission, Report, *Children's Evidence: Closed Circuit TV* (ALRC 63, 1992) at 6.

870 Id at 4.

871 See note 942 of this Report.

(a) Discretionary power to allow closed-circuit television and similar measures

(i) Queensland

Section 21A of the *Evidence Act 1977* (Qld) allows the court to authorise special arrangements to facilitate the evidence of "special" witnesses. A "special witness" is a child under the age of 12 years or a person who, in the opinion of the court, would be likely to be disadvantaged as a witness because of one of a number of specified factors, or would be likely to suffer emotional trauma or to be so intimidated as to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court.[872] The special arrangements authorised by the legislation include obscuring the accused from the view of the witness, excluding the accused from the courtroom while the witness testifies, excluding other persons from the court, permitting the witness to give evidence in another room, permitting the presence of another person to provide emotional support for the witness, and videotaping the evidence of the witness and presenting it in court in lieu of direct testimony from the witness. While not specifically referring to closed-circuit television or screens, the terms of the existing provision are sufficiently broad to enable the court to order the use of these facilities.[873]

Although the Act gives the court power to make special arrangements for taking the evidence of a child witness, the power is a discretionary one, which and the court may not order the use of special facilities if it considers that the making of the order would unfairly prejudice either the accused or the prosecution.[874]

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872 *Evidence Act 1977* (Qld) s 21A(1). Section 21A of the *Evidence Act 1977* (Qld) was amended by s 46 of the *Criminal Law Amendment Act 2000* (Qld), which received Royal Assent on 13 October 2000. Section 21A(1)(b), in its amended form, defines a "special witness", other than a child under the age of 12, as:

> a person who, in the court's opinion -
>
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
>
> if required to give evidence in accordance with the usual rules and practice of the court.

"Relevant matter" is defined in s 21A(1) as the person's "age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant".

873 Section 21A (4) provides that, in any criminal proceeding, the accused is not to be excluded from the room in which the special witness is giving evidence "unless provision is made, by means of an electronic device or otherwise, for [the accused] to see and hear the special witness while the special witness is giving evidence".

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

In the Discussion Paper,[875] the Commission observed that, at that time, it appeared from information provided by the then Administrator of the Supreme Court and the District Court that the discretion to order the use of special arrangements for child witnesses had not been widely exercised, although it was difficult to determine exact rates of usage for facilities such as closed-circuit television and screens as no statistics had been kept. The Court Administrator informed the Commission that in most Queensland courts, closed-circuit television facilities were not available or, if they were available, the equipment was outdated or not in working order.[876]

More recently, the Executive Officer of the Courts Division of the Department of Justice and Attorney-General has advised the Commission that, in the twelve months to September 2000, the vulnerable witness room with closed-circuit television links to Court 15 in the Supreme and District Courts Complex was used five times. During the same period, in about 50 trials in which closed-circuit television could have been used, screens were used in preference to relocating the trial to Court 15 for the hearing of a child's evidence. According to the Executive Officer, the decision to use screens in trials is largely brought about by logistical difficulties, which are being addressed, but the Office of the Director of Public Prosecutions plays a major part in their use. The Executive Officer confirmed that nine courts throughout Queensland have closed-circuit television equipment which is almost ten years old, is unreliable and is seldom used. These are the District Court at Cairns, Townsville, Rockhampton, Toowoomba, Maroochydore, Beenleigh, Southport and Ipswich, and the Brisbane Central Magistrates Court. Over one hundred trials involving a child or other vulnerable witness were heard in the District Court at these places in the twelve months to June 2000. Although no statistics are kept of the use of the old closed-circuit television equipment, it is understood that screens are preferred in most centres. Only the District Court at Ipswich and the Brisbane Central Magistrates Court use the closed-circuit television facilities with any frequency.[877]

Reasons put forward in submissions received by the Commission in response to the Discussion Paper for the low rate of use of closed-circuit television were:

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

876 Id at 146.

877 Memoranda from the Executive Officer to the Director of the Commission, 16 and 20 November 2000.

- reluctance by prosecutors to make an application for the use of special arrangements because of the view that the use of facilities such as closed-circuit television would discredit the evidence of the child;[878]

- reluctance on the part of courts to adopt the use of special facilities unless the child has demonstrated an incapacity to give evidence in the normal way, by which stage it is too late, as the child is too distressed to be an effective witness;[879]

- concern that the accused might be unfairly prejudiced by an adverse inference being drawn from the use of special facilities.[880]

However, since the publication of the Discussion Paper, funding has been made available for the installation of some closed-circuit television facilities in Queensland courts. In Brisbane, the main Law Courts Complex, which houses the Supreme Court and the District Court, now has two courtrooms with closed-circuit television facilities and there is a protected witness room from which a child or other vulnerable witness is able to give evidence by videolink without having to go into the courtroom. Use of these two courtrooms can be maximised by moving trials to other courtrooms when the evidence of the vulnerable witness is completed, so that, if necessary, a vulnerable witness in another trial is able to use the protected witness room. A new District Court in Gladstone has videolink facilities, as does the new Magistrates Court in Caboolture. Evidence can be transmitted from one court with these facilities to another. This would enable, for example, a child who is a witness in a trial being heard in the Supreme or District Courts in Brisbane to give his or her evidence from the protected witness room at the Caboolture court.[881]

The Commission understands that the Courts Division of the Department of Justice and Attorney-General is examining the feasibility of installing additional closed-circuit television facilities in the District Court at selected locations to enable child witnesses to give evidence in trials. The facilities could also be used to take evidence from children in committals provided the District Court room in question is not in use. Funding is being sought to have

878 Submission 49. An evaluation of discretionary legislation in the Australian Capital Territory also found that on some occasions closed-circuit television was not offered to child witnesses because, early in the process, police or prosecution staff made an informal decision that the child was strong enough to cope with giving evidence in the courtroom and so did not request the option of closed-circuit television for the child: Australian Law Reform Commission, Report, *Children's Evidence: Closed Circuit TV* (ALRC 63, 1992) at 4.

879 Submission 31.

880 Submission 2.

881 Information provided by Ms B Jolly, Court Administrator, Higher Courts, 21 September 2000.

equipment installed in courts with a high volume of trials involving children and other vulnerable witnesses.[882]

(ii) Victoria

In Victoria, the court may direct that alternative arrangements, including the use of closed-circuit television or screens, be made for the evidence of a witness of any age if the proceeding relates to a sexual offence. Closed-circuit television or screens may also be used for the evidence of a witness the court is satisfied is under the age of 18 years if the proceedings relate to a charge of an indictable offence involving an assault on, or injury or a threat of injury to, a person.[883]

(iii) Northern Territory

In the Northern Territory, the court may order that a vulnerable witness may give evidence by closed-circuit television or with the use of a screen. The definition of a vulnerable witness includes a child under the age of 16 years, a witness who suffers from an intellectual disability, a witness who, in the opinion of the court, is under a special disability because of the circumstances of the case or the circumstances of the witness, and a witness who is the alleged victim of a sexual offence to which the proceedings relate.[884]

(iv) South Australia

The South Australian provision, while still requiring the exercise of the court's discretion, is expressed in stronger terms than the discretionary powers which exist in Queensland, Victoria and the Northern Territory. In South Australia, the court should order the use of closed-circuit television or a screen if it is practicable or desirable to do so for taking evidence from a witness in order to protect the witness from embarrassment or distress, to protect the witness from being intimidated by the atmosphere of a courtroom, or for any other proper reason.[885] If the evidence is to be given in a criminal proceeding and the witness is under 16 years of age, suffers from an intellectual disability, is the alleged victim of a sexual offence to which the proceeding relates, or is at some special disadvantage because of the circumstances of the case or the circumstances of the witness, the court must determine whether an order for the use of special facilities should be made, even though no application has

882 Memorandum from the Executive Officer of the Courts Division to the Director of the Commission, 16 November 2000.

883 *Evidence Act 1958* (Vic) s 37C(2), (3).

884 *Evidence Act 1939* (NT) s 21A(1), (2).

885 *Evidence Act 1929* (SA) s 13(1).

been made by the witness or a party to the proceeding.[886] An order must not be made if it would prejudice any party to the proceeding.[887]

The South Australian Court of Criminal Appeal has held that, on an application for the use of closed-circuit television or a screen, the court should grant the order if it is "plausible and reasonable":[888]

> There will be many cases in which, in the light of the nature of the case and the circumstances of the witness, the application will be both plausible and reasonable, and in such cases, subject to any specific matters raised in opposition, the court should grant the application without further enquiry.

The Court concluded:[889]

> A request for special arrangements for taking evidence from a vulnerable witness will be granted if, having regard to the circumstances under which the evidence will be given, the nature of the evidence, the reason for the request and any other matter which the court considers to be relevant, the court considers that the reason for the request is plausible and is a sufficient reason to make special arrangements. In dealing with a request for special arrangements for the taking of evidence the court will give due weight to Parliament's statement that an order should be made when it is practicable and desirable to do so.

Although the legislation provides that the court must not grant an application if the order would prejudice any party to the proceedings, the Court of Criminal Appeal interpreted "prejudice" to mean prejudice beyond any disadvantage caused by the making of the order. In the view of the Court, the impact of the making of an order on the proceeding would be taken into account by the court as part of the process of considering whether it would be desirable to make the arrangements requested.[890]

(b) Mandatory use of CCTV and similar facilities in specified proceedings involving child witnesses

Legislation in the Australian Capital Territory, New South Wales, Tasmania and Western Australia makes mandatory provision for the use of closed-circuit television in certain specified situations.

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886 *Evidence Act 1929* (SA) s 13(9), (10).

887 *Evidence Act 1929* (SA) s 13(3).

888 *Question of Law Reserved (No 2 of 1997)* (1998) 196 LSJS 195 per Doyle CJ (with whom Cox and Williams JJ agreed) at 199. See also *R v WS* [2000] SASC 294 (13 September 2000).

889 *Question of Law Reserved (No 2 of 1997)* (1998) 196 LSJS 195 per Doyle CJ (with whom Cox and Williams JJ agreed) at 201.

890 Id at 200. See also *R v WS* [2000] SASC 294 (13 September 2000).

(i) Australian Capital Territory

In the Australian Capital Territory, if closed-circuit television facilities are available, a child witness must give evidence by means of those facilities in criminal proceedings in either the Supreme Court or the Magistrates Court, in domestic violence and criminal compensation proceedings, and in certain welfare proceedings and coronial inquiries, unless the court orders otherwise.[891]

However, a court is not to make an order displacing the use of closed-circuit television unless it is satisfied that the child would prefer to give evidence in the courtroom, or that, if the order were not made, the proceedings would be unreasonably delayed or there would be a substantial risk of the court being unable to ensure that the proceedings were conducted fairly.[892]

(ii) New South Wales

Under the *Evidence (Children) Act 1997* (NSW),[893] the courts are required to receive evidence by means of closed-circuit television facilities or by means of any other similar technology where the proceedings are of a specified kind[894] and involve children under 16 years of age at the time of giving evidence.[895] However, where the child is the accused or defendant in the relevant proceedings, the use of the prescribed technology is discretionary rather than mandatory.[896]

A child who is entitled to use closed-circuit television or other similar technology can choose not to give evidence by those means and a child must not give evidence by those means if the court orders that such means are not to be used. However, the court may make such an order only:[897]

> ... if it is satisfied that it is not in the interests of justice for the child's evidence to be given by such means or that the urgency of the matter makes their use inappropriate.

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891 *Evidence (Closed-Circuit Television) Act 1991* (ACT) ss 3A(1)(a), 4, 4A(1).

892 *Evidence (Closed-Circuit Television) Act 1991* (ACT) s 4A(2).

893 *Evidence (Children) Act 1997* (NSW) s 18.

894 Section 17 of the *Evidence (Children) Act 1997* (NSW) provides that the entitlement to use closed-circuit television or a similar technology applies in proceedings in which it is alleged that a person has committed a personal assault offence, a proceeding in relation to a complaint for an apprehended violence order, a civil proceeding arising from the commission of a personal assault offence and a proceeding before the Victims Compensation Tribunal in respect of the hearing of a matter arising from the commission of a personal assault offence that is the subject of an appeal or reference to it.

895 *Evidence (Children) Act 1997* (NSW) s 6.

896 *Evidence (Children) Act 1997* (NSW) s 19. The Commission will consider the position of child witnesses who are accused of having committed criminal offences in Part 3 of this Report, to be published in 2001.

897 *Evidence (Children) Act 1997* (NSW) s 18(2)-(4).

Where a child would otherwise be entitled to give evidence by closed-circuit television or other similar technology, but does not do so because closed-circuit television and similar facilities are not available, or the child chooses not to give evidence by those means, or the court orders that the child may not give evidence by those means, the court must make alternative arrangements for the giving of evidence by a child in order to restrict contact (including visual contact) between the child and any other persons.[898] Those arrangements may include: the use of screens; planned seating arrangements for people who have an interest in the proceedings (in which case regard may be had to the level at which they are seated and the people in the child's line of vision); and the adjournment of proceedings to other premises (which are deemed to be part of the court). Where a child chooses not to use such arrangements, the court must direct that the child be permitted to give evidence in the ordinary way.[899]

Closed-circuit television facilities or similar technology used for the giving of the evidence of a child are to be operated in such a manner that the persons who have an interest in the proceeding are able to see the child (and any person present with the child) on the same or another television monitor.[900]

In any criminal proceeding where the evidence of a child is given by means of closed-circuit television or other similar technology, the judge must inform the jury that it is standard procedure for children's evidence in such cases to be given by those means and must warn the jury not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the use of those facilities or that technology.[901]

(iii) Tasmania

In Tasmania, a child under the age of 17 years who is the subject of an application in certain proceedings under the *Child Protection Act 1974* (Tas) or is the complainant in proceedings for specified offences under the Tasmanian *Criminal Code* or under the *Police Offences Act 1935* (Tas), is to give evidence by closed-circuit television unless the court orders otherwise.[902]

The prosecutor may apply for an order that the child is not to use closed-circuit television, but the court may not grant the order unless it is satisfied that the child is able and wishes to give evidence in the presence of the defendant in the courtroom.[903]

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898 *Evidence (Children) Act 1997* (NSW) s 24.

899 *Evidence (Children) Act 1997* (NSW) s 24(4).

900 *Evidence (Children) Act 1997* (NSW) s 23.

901 *Evidence (Children) Act 1997* (NSW) s 25.

902 *Evidence Act 1910* (Tas) ss 122A, 122G.

903 *Evidence Act 1910* (Tas) s 122H.

(iv) Western Australia

Under the provisions of the *Evidence Act 1906* (WA), there is a legislative presumption in favour of the use of special procedures for child witnesses giving evidence about alleged sexual or violent offences committed against them,[904] unless the witness chooses not to use the facilities.[905] As a result, the use of closed-circuit television or screens has become the routine procedure in cases of this kind.

The Law Reform Commission of Western Australia, upon whose recommendations the provisions are based, noted the following arguments in favour of the mandatory use of closed-circuit television:[906]

> ... if the removal of a child witness from the court is potentially prejudicial to an accused, in that a jury may infer that the witness has cause to be frightened of the accused, then it would appear that a jury is less likely to be so influenced if the absence of the witness is routine. In such a situation the trial judge can instruct the jury that removal of the witness and the hearing of the witness's evidence by CCTV is routine for witnesses of a certain age and that no inference should be drawn from the mode in which the evidence is

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904 *Evidence Act 1906* (WA) s 106N provides:

> (2) Where the necessary facilities and equipment are available one of the following arrangements is to be made by the judge for the giving of evidence by the affected child -
>
> (a) he or she is to give evidence outside the courtroom but within the court precincts, and the evidence is to be transmitted to the courtroom by means of video link as defined by section 120; or
>
> (b) while he or she is giving evidence the defendant is to be held in a room apart from the courtroom and the evidence is to be transmitted to that room by means of video link as defined by section 120.
>
> (3) Where subsection (2)(b) applies the defendant is at all times to have the means of communicating with his or her counsel.
>
> (4) Where the necessary facilities and equipment referred to in subsection (2) are not available, a screen, one-way glass or other device is to be so placed in relation to the affected child while he or she is giving evidence that -
>
> (a) the affected child cannot see the defendant; but
>
> (b) the judge, the jury (in the case of proceedings on indictment), the defendant and his or her counsel can see the affected child.

Section 120 defines "video link" to mean "facilities (including closed circuit television) that enable, at the same time, a court at one place to see and hear a person giving evidence or making a submission at another place and vice versa".

Section 106N is to be amended by cl 25 of the *Acts Amendment (Evidence) Bill 1999* (WA). The Bill has passed both Houses of Parliament but, because of an amendment made in the Legislative Council, had to be referred back to the Legislative Assembly. As of 13 October 2000, it had not been considered further by the Legislative Assembly. Clause 25 will insert the following two new subsections into s 106N:

> (3a) Where arrangements are made under subsection 2(a) or (b) the affected child's evidence is to be recorded on video-tape.
>
> (5) Where arrangements are made under subsection 4 and where the necessary facilities are available to do so, the affected child's evidence is to be recorded on video-tape.

905 *Evidence Act 1906* (WA) s 106O.

906 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.26.

> taken. Where a discretion to allow the use of CCTV exists, it may be more difficult for a trial judge to persuade the jury that no adverse inference should be drawn from the witness's absence from the court.

However, the Commission recommended that the use of screens should be authorised in courts where closed-circuit television is not available and where the court is satisfied that the use of screens in a particular case is desirable "provided that the screen is so constructed as not to obstruct the accused's view of the witness while the witness is giving evidence".[907]

Judicial guidelines adopted in Western Australia warn that care must be taken to ensure that movements in and out of the courtroom do not allow the witness to be confronted by the accused and that the accused does not attempt to draw attention to himself or herself by, for example, sounds such as coughing.[908]

In order to ensure that an accused person is not unfairly prejudiced by the use of closed-circuit television or a screen, the judge is required to warn the jury that the use of these facilities is routine and that an adverse inference should not be drawn from it.[909]

3. CONCERNS ABOUT THE USE OF SEPARATE FACILITIES

(a) The right of the accused to confront the witness

A significant issue to be considered in relation to the use of closed-circuit television and screens is whether the use of such devices infringes what could be regarded as the accused's right to be in the presence of, or to confront, a witness testifying against him or her.

Under section 617 of the *Criminal Code* (Qld), no indictable offence can be heard in the absence of the accused unless he or she conducts himself or herself in such a way as to make the continuance of the proceedings impracticable. In such a case the court may order the accused to be removed and direct that the trial proceed in the absence of the accused. Apart from that provision there appears to be no legislative entitlement for an accused to be present in a Queensland court. Nor does there appear to be any legislative requirement that a witness against an accused must present his or her evidence within the hearing and sight of the accused.

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907 Id at paras 5.43-5.45.

908 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (May 1998) at 27-28.

909 *Evidence Act 1906* (WA) s 106P. A similar warning must be given under s 25 of the *Evidence (Children) Act 1997* (NSW).

The Law Reform Commission of Western Australia considered the equivalent provision in the Western Australian *Criminal Code* to Queensland's section 617, and noted that the use of closed-circuit television could not have been contemplated when the provision was enacted. The Commission did not see the provision as being an insuperable obstacle to the use of closed-circuit television since, although there would be a physical separation of the accused and the child when closed-circuit television is used, the accused and his or her counsel would be able to see and hear the child, and the remote room would be designated as part of the courtroom for the purposes of the proceedings.[910]

The common law has long recognised the right of an accused person to challenge the witnesses who testify against him or her.[911] However, even at common law, the right is not absolute. In *Smellie v R*,[912] the appellant had been convicted of assaulting, ill-treating and neglecting his eleven year old daughter. At the trial the judge was of the view that the child would be terrified by the presence of her father. He ordered that, while the girl gave evidence, the accused was to sit on the steps leading out of the dock, out of the sight of his daughter.

On appeal, it was argued that, at common law, an accused had a right to be within the sight and hearing of all the witnesses throughout the trial. It was further argued that there was a likely prejudicial effect on the jury of the removal of the appellant from the court when the complainant gave evidence. The appeal was dismissed.

The Queensland Court of Appeal has also held that, provided an appropriate warning is given to the jury, the use of special arrangements to enable vulnerable witnesses to give their evidence with minimum disadvantage does not unfairly prejudice an accused person.[913]

(b) Possible distortion of the image of the witness

One concern which has been expressed in relation to the use of closed-circuit television is the possibility of distortion of the information being conveyed by electronic means. The television screens might be considered to enhance or diminish the child's evidence. However, these concerns may now have been allayed, with the increasing acceptance of a large variety of witnesses giving evidence through the use of videoconferencing and videolink facilities in both the

910 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.10. See also the general discussion on this issue at paras 5.8-5.10 of the Report, and s 121 of the *Evidence Act 1906* (WA) which provides that a place outside the courtroom or other place where the court is sitting and from which evidence is received by video link is deemed to be part of the court.

911 See note 857 of this Report.

912 (1919) 14 Cr App R 128.

913 *R v West* [1992] 1 Qd R 227.

State and Federal courts.[914] These facilities are continually improving and it is now possible to obtain reliable, high quality images.

In an English study[915] there was nothing to suggest that jurors watching a witness give evidence over closed-circuit television would produce decisions or judgments on the credibility of the witness radically different from those made under regular court conditions. There was seen to be no significant difference in communication for "live" interviews of children as against interviews given by way of closed-circuit television. The effect of the style of television shot on perceptions of a witness's credibility was also examined. It appeared that the style of shot - for example, close-up or distant - does have an impact on a witness's credibility but not a consistent impact. Children seen in medium-distance were perceived as more honest than those seen close-up. Close-up shots produced higher overall ratings of attractiveness and also appeared to reduce or eliminate differences in credibility based on the age of the witness. Older children were generally perceived as more credible than younger children.

The results of this study suggest that, in order to eliminate any bias resulting from one or other fixed camera image of a witness (close-up/medium shot), a jury should ideally be presented with more than one view of the witness giving evidence by closed-circuit television.

In Western Australia, a review of jurors' perceptions of the use of closed-circuit television revealed that problems relating to possible distortion were considered to be minimal.[916] Out of the 13 Supreme Court trials in which children gave evidence using closed-circuit television over the review period there were problems with the sound to the jury in one trial and to a lesser extent in a second trial. A third trial had problems with sound being transmitted to the witness. A power failure during one trial meant that the complainant had to continue her evidence the next day. There were also problems at that trial with cameras focusing on two counsel. Instead of an automatic shift of the transmitted image from one counsel to the other, this had to be done manually by moving the focus of the one operating camera.

At least 94% of the jurors said they could hear the witness clearly. Ninety-seven per cent of the jurors said they could see the witness clearly. One juror indicated that the closed-circuit television gave a clearer, truer picture of the type of child in years and maturity.

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914 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 5.3.2. See also Bennetts V, "Appearing by Video Link - Old Dogs Learn New Tricks" (Sept 1998) *Proctor* at 23-24.

915 Westcott H, Davies G and Clifford B, "The Credibility of Child Witnesses Seen on Closed-Circuit Television" 15(1) (1991) *Adoption and Fostering* 14.

916 Ministry of Justice (WA) (Strategic and Specialist Services Division), *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995); Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996).

Jurors were asked if they found anything about the closed-circuit television equipment which was distracting. Two thirds answered "no". The most common source of distraction was the time taken to set up the closed-circuit television link with the separate room. The next most common sources of distraction were the distance of the television monitors from the jury box and reflections on the monitors.

Three quarters of the jurors were satisfied with their views of the witness. The view on one of the monitors is a narrow angle view showing a close-up view of the witness - usually of the face and upper body. The other gives a wide angle view showing the witness at the table facing the camera together with the adults seated either side of the witness. In most trials the jury sees a close-up view of the witness while the witness is speaking. The wider angle view is shown occasionally, often when there is a pause in the evidence, to show the jury the environment from which the child is giving evidence.

Those jurors who were dissatisfied with the views they had most commonly expressed a preference for a whole body shot or for a wide angle shot of the room including the two adults seated with the child.

The findings of the survey led to the following conclusions:[917]

> most jurors do not perceive CCTV to be an impediment in reaching a verdict;
>
> jurors do not find the CCTV equipment distracting when it is working properly;
>
> jurors who hear evidence by CCTV which is working properly are likely to hear more clearly than jurors who hear evidence from a child witness speaking without amplification in the courtroom;[918]

The main recommendations of the review team were:[919]

> When closed-circuit television or removable screens are used, jurors should be asked at the earliest convenient point whether any aspect of the equipment - such as reflections on television monitors or the placement of removable screens - is interfering with their ability to judge evidence. ...
>
> When closed-circuit television is used, consideration should be given to showing jurors the separate room from which evidence is given - before the witness enters - so that jurors have a better understanding of the surroundings in which the witness is giving evidence. This may assist the minority of jurors who have difficulty with an image relayed by television.

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917 Ministry of Justice (WA) (Strategic and Specialist Services Division), *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 36.

918 This was considered important because jurors need to hear well if they are to make judgments based on the facts of the case.

919 Ministry of Justice (WA) (Strategic and Specialist Services Division), *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 37.

(c) The inadequacy of screens

Although screens are a less expensive alternative to the use of closed-circuit television, and may be an acceptable compromise to people who have concerns about the effect of using closed-circuit television, they are less effective than closed-circuit television in reducing the trauma for the witness while arguably more prejudicial to the accused.

The following arguments have been advanced against the use of screens:

- screens are used in the courtroom and so do not address other difficulties associated with the courtroom environment;[920]
- screens can upset the dynamics of the proceedings, make the logistics of questioning the witness more difficult and diminish the audibility of the witness within the courtroom;[921]
- it may be difficult to ensure that the witness cannot see the accused while still ensuring that the jury is able to see the witness;[922]
- screens give an impression of guilt;[923]
- even if his or her view of the accused is obstructed, the witness would be bound to know that the accused was behind the screen.[924]

4. EVALUATION OF USE OF CLOSED-CIRCUIT TELEVISION AND SCREENS

(a) Western Australia

A Western Australian evaluation of the mandatory use of closed-circuit television or screens for child witnesses in certain circumstances revealed positive results.[925]

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920 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 5.2.21.

921 Ibid.

922 Ibid.

923 Ibid.

924 Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Report 125, 1990) at para 4.17.

925 Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996).

The basic conclusion endorsed the continued use of closed-circuit television as the preferred facility for assisting children to present their evidence:[926]

> Closed-circuit television (CCTV) and removable screens were introduced to reduce the stress on children and other vulnerable witnesses giving evidence to juries about criminal matters. Those who used closed-circuit television adapted well to it and appreciated the protection and privacy it offered. The use of closed-circuit television - and to a lesser extent removable screens - does remove some major sources of stress, without compromising the rights of the accused person. However, it is clear from witnesses' responses that, even with the aid of this equipment, the experience of giving evidence in a criminal trial remains a difficult one for many.

During the evaluation observers watched 75 jury trials where children and young people 18 years of age or under gave evidence about alleged sexual assaults committed against them, or an alleged sexual act directed at them. That figure includes all jury trials for the period under review where evidence was taken by closed-circuit television, and most metropolitan jury trials in which removable screens were used.

Interviews were conducted with 32 witnesses and 26 lawyers, including both prosecutors and defence counsel. The views of 138 jurors who served on trials where children gave evidence were obtained through a mail survey. Eight judges who had presided in some of the trials agreed to be interviewed or provide written comment.

(i) Witnesses' responses

The witnesses who were interviewed were in favour of the use of closed-circuit television. Of the witnesses who had used closed-circuit television, none regretted doing so, and all said they would recommend it to other witnesses. Most adapted well and quickly to the experience of speaking to a television image, and reported that the perception of being supported by prosecutors came across on the television link. None wanted more exposure to the accused than they actually had. Many of the witnesses who had given evidence directly in the courtroom, whether with or without screens, would have used closed-circuit television if it had been offered.[927]

(ii) Jurors' responses

The responses given by jurors in relation to technological issues involved in the use of closed-circuit television have been discussed above.[928]

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926 Id at 150.

927 Id at 143.

928 See pp 196-197 of this Report.

The review found that most jurors understood and accepted the reasons for using closed-circuit television and that, despite some reported difficulties in assessing the age and size of the witness, most did not find that the use of closed-circuit television made it more difficult to reach a verdict. Some jurors were aware of a difference in the kind of visual information they were getting about the witness when closed-circuit television was used, but they did not see the difference as significant to their deliberations. Most of the jurors who had difficulty judging the age or size of the witness said that seeing the child in the courtroom would not have made their deliberations easier.

(iii) Judges' responses

Judges interviewed as part of the evaluation agreed with the legislative intent that the procedures such as closed-circuit television be routine rather than optional. Judges who had used both closed-circuit television and screens preferred closed-circuit television because screens were not seen as capable of removing as many sources of stress for the witness.[929] Most of the judges thought the use of closed-circuit television was fair to all parties.[930]

(iv) Lawyers' responses

The review also involved interviews with lawyers who had used closed-circuit television or removable screens. In the interviews a number of lawyers were concerned that jurors would react to evidence given by closed-circuit television differently from the way they would react if the same evidence were given "live" in the courtroom.

The authors of the review noted, for example, that some prosecutors believed that evidence seen on television screens in the courtroom would have less emotional impact on jurors than evidence given from the witness box and therefore jurors would be less likely to believe the witness. There was also a concern that the closed-circuit television picture would make it difficult for jurors to judge the size and age of the child witness. It was considered that this in turn would affect the ability of the jury to judge the relative size and power of the accused and the witness. "These factors, it was believed, would reduce the chances of a conviction".[931] These concerns are not borne out to any significant degree by the jurors' responses to the survey.

A number of defence counsel were concerned that the use of closed-circuit television or removable screens would give the jury the impression that the accused must be guilty. They doubted the effectiveness of the compulsory

929 Ministry of Justice (WA), *Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996) at 141.

930 Id at 97.

931 Ministry of Justice (WA) (Strategic and Specialist Services Division), *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 2.

warning that the judge gives the jury that the jury is not to draw any inference about guilt or innocence from the use of closed-circuit television or removable screens.[932] Others were of the view that it would be easier for witnesses making false statements to do so in front of a video camera from a separate room than it would be to do so in front of the accused in the courtroom, the jury and the judge - resulting in more wrongful convictions. Again, the jurors' responses do not support such a view.[933]

The review concluded that, overall, the reaction of both prosecutors and defence counsel to the use of closed-circuit television was positive or, at most, mixed. Few had a purely negative opinion. Few thought it unfair to the accused. Many thought that the well-being of the witness was of equal or greater importance than the presentation of their case.

Removable screens, used when closed-circuit television was not available, were acceptable to most and preferred by a few. Few thought them to be unfair to the accused.

(b) Australian Capital Territory

As a result of a project jointly undertaken by the Australian Law Reform Commission and the Australian Capital Territory Magistrates Court, legislation came into effect in the Australian Capital Territory in 1989 providing for the discretionary use of closed-circuit television by children giving evidence in the ACT Magistrates Court, the ACT Children's Court and the ACT Coroner's Court. The legislation, which was based on a draft prepared by the Australian Law Reform Commission, originally allowed for a trial period of twelve months during which time an evaluation of the legislation would be carried out. However, the trial period was later extended for eighteen months so that a large enough sample of cases could be evaluated. The Australian Law Reform Commission retained Dr Judy Cashmore as a consultant to conduct the evaluation. The results of the evaluation were published by the Australian Law Reform Commission,[934] which used them as a basis for consultation in the formulation of its recommendations for the use of closed-circuit television in the Australian Capital Territory.

The purpose of the evaluation was to assess whether closed-circuit television reduces the stress of testifying for child witnesses both for its own sake and in order to improve the quality of their evidence or the ascertainment of facts, and whether closed-circuit television was acceptable to the participants in the litigation process.

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932 Id at 3.

933 See for example the studies into the behaviour of mock trials referred to in Ministry of Justice (WA) (Strategic and Specialist Services Division), *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (1995) at 3.

934 Cashmore J, Children's Evidence Research Paper 1, *The Use of Closed-Circuit Television for Child Witnesses in the ACT* (ALRC, 1992).

The evaluation did not include the use of screens.

The methodology used for the evaluation was to compare three groups of child witnesses:

- children in the Australian Capital Territory who used closed-circuit television;
- children in the Australian Capital Territory who did not use closed-circuit television even though it was then available; and
- children in New South Wales where closed-circuit television was not available at the time when the evaluation took place.

The comparisons were based on:

- observations made by members of the evaluation project team of the children's testimony in court and videotapes of that testimony;[935]
- the participants' (magistrates, lawyers, social workers and psychologists, police) assessments of the children's behaviour; and
- the children's perceptions of their experience in court.

The evaluation recommended that there should be a presumption in favour of allowing the use of closed-circuit television for children under 18, unless the child did not wish to use it or unless there were demonstrable reasons why it would be unfair.[936]

(i) Witnesses' responses

The evaluation concluded that the most important factor was whether the children gave evidence in the way in which they wished to do so. It found that there were few differences between children who did and did not use closed-circuit television. The main difference was between the two groups who did not use closed-circuit television, with a consistent trend for those who wanted to use it, but who were unable to do so, to be in a poorer emotional state and to perform more poorly than either the children who used it or refused it.

All the children who used closed-circuit television wanted to do so, and their reaction to it was very positive. They all said that it was easier to give evidence that way than in the courtroom in the presence of the accused. They found testifying easier than children who would have liked to use closed-

935 The researchers reported that their observations corresponded quite well with the perceptions of magistrates and prosecution lawyers but less well with those of defence lawyers: Australian Law Reform Commission, Report, *Children's Evidence: Closed Circuit TV* (ALRC 63, 1992) at 3.

936 Australian Law Reform Commission, Report, *Children's Evidence: Closed Circuit TV* (ALRC 63, 1992) at 31.

circuit television but were unable to do so. However, they also said it was harder to "tell on" the accused than the children in either of the groups that did not use closed-circuit television.

There was some evidence that cases proceeded with closed-circuit television that may not have proceeded without it.[937]

(ii) Magistrates' and lawyers' responses

In general, magistrates and lawyers saw the use of closed-circuit television as reducing stress on children as they gave evidence and as facilitating their testimony. Defence lawyers were alone in the view that the more anxious the children, the more effective they were seen to be.

There was some concern, especially among prosecutors, that the impact of evidence may be reduced as a result of being viewed on a television screen. However, magistrates, in particular, were impressed with the ability to see the child more clearly than when the child is in court.

The overwhelming majority of legal professionals did not believe that the use of closed-circuit television prejudiced the defence case. Closed-circuit television was generally seen as being fair, both to the accused and to the child.

The evaluation also noted a beneficial effect on magistrates and lawyers who deal with the child in court. The lawyers were perceived to be more supportive, and magistrates to intervene more often when the child gave evidence by closed-circuit television, especially during cross-examination, to clarify questions or to provide breaks for distressed or tired children.[938]

(c) Scotland

Legislation introduced in Scotland in 1991 permitted the use, at the discretion of the court, of closed-circuit television for child witnesses under the age of 16 in criminal trials. The legislation provided that the court could authorise the use of closed-circuit television only after having regard to the possible effect on the child if required to give evidence in court, and whether it would be likely that the child would be better able to give evidence by closed-circuit television. It allowed the court, in making its determination, to take into account factors such as the age and maturity of the child, the nature of the alleged offence, the nature of the evidence which the child is likely to be called to give, and the relationship, if any, between the child and the accused.[939]

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937 Id at 4, 28-29.

938 Id at 3-5, 28-30.

939 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1990* s 56.

Between October 1991 and December 1993, an evaluation was undertaken of the effect of the new legislative provisions. The results of the evaluation were published in 1995.[940] The study involved pre- and post-trial interviews with parents or parent substitutes, post-trial interviews with children who had given evidence, observation of children giving evidence by closed-circuit television and children giving evidence in the conventional manner, and interviews with judges and sheriffs who had presided at application hearings and trials where closed-circuit television was used, with prosecutors and defence counsel in observed trials, and with court staff, expert witnesses, support persons and social workers.[941]

The study found that "key decision-makers" were cautious about the use of closed-circuit television, and was critical of the reliance placed on expert opinion to evaluate the possible effect on the child of testifying in the conventional way, a requirement "that made extra demands on children and families and on professional resources".[942]

There was no significant difference in either the number of guilty pleas or the conviction rate as a result of the use of closed-circuit television.[943]

(i) Witnesses' responses

Contrary to some misgivings about the use of closed-circuit television, particularly for young children, the study found no basis for the belief that the use of television might detract from the child's perception of the seriousness of the occasion and might cause children to regard giving evidence as a kind of game. Without exception, the children observed at trial were extremely serious about the matter at hand.[944]

Although the use of closed-circuit television made little difference to observed levels of anxiety and distress during examination-in-chief, children in the courtroom were significantly more distressed during cross-examination than children using closed-circuit television.[945]

The children who used closed-circuit television found it a favourable experience compared to non-users. They were particularly relieved not to

940 Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office Central Research Office, 1995).

941 Id at 49.

942 Id at ii.

943 Id at 46-47.

944 Id at 70.

945 Id at 75.

have to confront the accused. For the majority of children, this was more important than being outside the courtroom itself:[946]

> In a very real sense, they confirmed that facing the accused at trial re-exposed them to part of the original assault. Although only young children may fail to realise that the accused cannot hurt them in the court room, regardless of age, seeing the accused again revived traumatic memories, reawakened feelings of anger, hurt and helplessness.

Children who used closed-circuit television also reported a greater sense of fairness and justice arising from the model of presentation of evidence. They thought judges and lawyers treated them fairly, and that the questioning was fair even when they had been subjected to some quite unsympathetic examinations.[947]

There was general agreement amongst parents, lawyers and social workers that the use of closed-circuit television enabled children who would otherwise have been unable to give evidence to do so.[948] However, the evidence given by children using closed-circuit television was significantly less detailed and complete than that given by child witnesses in the courtroom.[949] This finding could be explained by differences between the two groups of children,[950] and by the fact that, given the criteria which have to be met before the court is able to authorise the use of closed-circuit television,[951] the children using closed-circuit television are likely to be those who are most vulnerable and have most difficulty in giving evidence under any circumstances.

(ii) Lawyers' responses

Legal practitioners were generally wary of departing from the traditional method of giving evidence, but conceded that an alternative is desirable for children who are reluctant to testify in open court.[952] Both prosecution and defence lawyers agreed that the use of closed-circuit television could lessen

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946 Ibid.

947 Ibid.

948 Id at 107.

949 Id at iii, 108.

950 The evaluation report noted that the sample of non-users was relatively small and that the case characteristics did not exactly match those of the closed-circuit television sample. There were also significant differences in the ages of the two groups. Of the 49 children who used closed-circuit television, 19 were under the age of 8, and 28 were under the age of 10. Of the 17 who did not use closed-circuit television, only 1 was under the age of 8, and 5 were under the age of 10: Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office Central Research Office, 1995) Table 5.4 at 51.

951 See p 203 of this Report.

952 Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office Central Research Office, 1995) at 109.

the ordeal of testifying for the child witness. However, they were less certain whether this was always in the interests of justice.[953]

Although they unanimously agreed that the use of closed-circuit television offends against the right of an accused person to be faced directly by his or her accuser, the great majority considered that the confrontation principle should be compromised in the interests of fairness to the child, provided that the accused's case could be put fairly and the child's evidence could be tested by cross-examination.[954]

Both prosecution and defence lawyers felt that the use of closed-circuit television interfered with their examination technique,[955] and that it created a sense of distance and remoteness which made it more difficult to command the child's attention and pick up on their reactions.[956] There were also concerns that the impact and import of the child's evidence were either greatly exaggerated or very much reduced as a result of being on screen.[957] Defence lawyers, in particular, considered that the technology interfered with the jury's ability to properly assess the demeanour of the witness.[958] Both prosecution and defence lawyers believed not only that children were more likely to tell lies when using closed-circuit television, but also that frequently the jury would be unable to recognise the truth.[959]

(iii) Judges' responses

The majority of judges interviewed believed that the introduction of closed-circuit television had been a positive step[960] and there was a unanimous view that, in most cases, it had successfully allayed some of the worst fears and apprehension of child witnesses regarding the giving of evidence.[961]

However, although they agreed that it enabled evidence to be heard at trial which might not otherwise have been available, they had some serious reservations about its impact on the value of the child's evidence and on the ability of the jury to test the truth of that evidence.[962] There was some

953 Id at iii.

954 Id at 112.

955 Id at 109.

956 Id at 116.

957 Id at 117.

958 Id at 109.

959 Id at 109, 117.

960 Id at 124.

961 Id at 128.

962 Id at 129.

concern that children who use closed-circuit television might appear so full of confidence that the jury might get the wrong impression and that, while some children might find it easier to be honest, some might be more likely to fantasise or tell deliberate lies.[963]

More than any of the other participants in the evaluation survey, judges recognised the inherent risks of prosecuting cases involving children as victims and the importance of the principle of the presumption of innocence. More than a quarter of those interviewed considered the use of closed-circuit television potentially unfair to the accused, but believed some of the potential hazards might be overcome if the child gave evidence in the courtroom and the accused watched the proceedings from a remote location via closed-circuit television.[964]

There was unanimous agreement that closed-circuit television should be used selectively for particular children in particular circumstances.[965]

(d) England

In England, the *Criminal Justice Act 1988* and the *Criminal Justice Act 1991* authorised the use of closed-circuit television (called the "Live link") for witnesses under the age of 17 years in cases involving sexual assault and under the age of 14 years in cases involving physical violence.

In the period from January 1989 to December 1990, 98% of applications to use the Live link were granted.[966] Closed-circuit television was used in 544 cases in the first two years of the scheme.[967] An evaluation conducted during that period sought the views of users of the system - judges, lawyers and court officials - but for legal reasons did not seek the views of the children involved. Members of the research team, specially trained psychology graduates, attended 100 trials involving 154 child witnesses in which closed-circuit television was used.[968] The mean age of the children at the time of their appearance in court was 10 years 1 month and their ages ranged between 4 years 9 months and 13 years 9 months. Very few of the children (8%) were under 7 years of age. The remainder was evenly divided between the 8-10 year age group (45%) and the 11-13 year age group (47%). The majority (89%)

963 Id at 128.

964 Id at 140.

965 Id at 141.

966 Davies G and Noon E, *An evaluation of the live link for child witnesses* (Home Office, 1991) at 30.

967 Id at 7.

968 Id at 10.

of the children were complainants, with only 11% being witnesses to an alleged abuse.[969]

The aims of the project were:[970]

- to observe and record the reactions of child witnesses to being examined and cross-examined through the medium of the link;
- to collect and analyse the observations of court officials and the judiciary to the introduction of the scheme and to monitor how, if at all, their opinion changed over the period of the study;
- to secure information and views from other interested parties (for example, barristers, social workers and police officers) on their experiences with witnesses using the link;
- to assess, if possible, the impact on children of testifying via the link compared to conventional open court testimony and the use of screens.

The overall reaction of all user groups was very favourable. The principal advantage of the use of closed-circuit television was perceived to be the reduction of the level of stress for the child. Other advantages identified were protection for the child against the oppressive courtroom atmosphere and against seeing the accused.

(i) Lawyers' responses

Of the barristers involved in the observed trials, 78 participated in the survey.[971] Of these, 68% had acted for the prosecution and 32% for the defence.[972] However, statistical analysis revealed no significant difference between the two groups' ratings.[973] Overall, the majority of the barristers were in favour of the Live link.[974]

The main perceived advantages of the Live link were reduction of stress for the child, protection of the child from confrontation with the defendant, ease of eliciting information from the child and protection of the child from the

969 Id at 22-23.

970 Id at 8.

971 Id at 77.

972 Id at 81. The authors suggest that the discrepancy between the number of prosecution and defence responses could mean that prosecution counsel were more eager to share opinions with the research team or, alternatively, that the barristers acting for the defence constituted a small specialised group involved in a large number of cases who had each completed only one questionnaire.

973 Id at 82.

974 Ibid, Table 23.

courtroom atmosphere.[975] Other advantages reported were that, rather than diminishing the impact of evidence on the jury, the Live link allowed the jury to see the child close up, which made it easier to "read the witness", and that the children tended to be more audible when using the Live link.[976]

On the other hand, there were four areas of concern identified relating to the issue of communication via the Live link. These were loss of impact on the jury (31%), loss of immediacy (26%), loss of rapport (18%) and loss of eye contact (18%). Other reservations were that the Live link interfered with the efficiency of cross-examination (13%) and that it was prejudicial to the accused (10%). Only two barristers believed that it was easier for the child to lie when using the Live link than in the courtroom.[977]

(ii) Judges' responses

The majority of judges who had used the Live link also reported a favourable impression of its effectiveness.[978] The most commonly reported advantage was that children using the Live link were less frightened, more relaxed and less tearful when giving evidence. This was seen to be important not only for the welfare of the child, but also for the fairness of the hearing. One judge was reported as commenting that:[979]

> It is a considerable disadvantage to a defendant if a child complainant breaks down in tears and the avoidance of such a situation is a benefit to the defence and to the fairness of the trial.

Another identified advantage was that the Live link protected the witness from the courtroom atmosphere and procedure.[980] A number of judges considered that children using the Live link were more forthcoming and confident,[981] and that the use of the Live link resulted in some cases being brought to court that otherwise would not have been prosecuted.[982]

The greatest cause for concern among the judges appeared to be a perceived loss of immediacy.[983]

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975 Id at 79, 83 (Table 24).

976 Id at 79.

977 Id at 78. Figures in parentheses denote the percentage of barristers expressing concern. Some barristers expressed more than one concern.

978 Id at 103.

979 Id at 105.

980 Id at 106.

981 Id at 105.

982 Id at 106.

983 Id at 107-108.

(iii) Social workers' and police officers' responses

All social workers and police officers who responded to the survey considered that the Live link made it easier for children to give effective evidence.

The main advantages perceived by these respondents were that the child was not confronted with the accused, that the child was not required to give evidence from the courtroom and was therefore protected from courtroom procedure, and that there was no longer a need for the child to give evidence in front of strangers.[984]

The majority of police officers and social workers reported no disadvantages of the Live link.[985]

(e) United States

A study conducted in the United States attempted to identify the effect of closed-circuit television on the accuracy of children's evidence and on jurors' perceptions of child witnesses.[986]

Unlike the evaluations discussed previously, this study was purely experimental and did not involve real witnesses or jurors. A group of children aged 6 and 8 took part in a staged event. Several weeks later the children "testified" about the event in a court environment. Some children gave their "evidence" in a traditional courtroom setting, while the others used closed-circuit television. Panels of mock jurors recruited from the community viewed the proceedings and made predeliberation ratings concerning the child witness and the defendant, deliberated on a verdict and provided postdeliberation ratings.[987]

The study found that correlations between measures of children's accuracy overall and jurors' judgments of children's accuracy indicated little ability to accurately discern the children's testimony, and that there was no indication that they could discern the children's accuracy better in the closed-circuit as opposed to the regular trial condition.[988]

Further, it found that the closed-circuit television technology created consistent biases in the minds of the mock jurors against the child witnesses, indicating that

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984 Id at 98-99.

985 Id at 99.

986 Tobey AE, Goodman GS, Batterman-Faunce JM, Orcutt HK and Sachsenmaier T, "Balancing the Rights of Children and Defendants: Effects of Closed-Circuit Television on Children's Accuracy and Jurors' Perceptions" in Zaragoza MS et al, *Memory and Testimony in the Child Witness* (1995) at 214.

987 Id at 228-229.

988 Id at 237.

direct testimony will be more effective for the prosecution.[989] Although the method of giving evidence did not appear to influence the postdeliberation verdict,[990] in predeliberation ratings jurors considered children who testified using closed-circuit television to be less believable, less accurate for both the prosecution and the defence, less accurate in recalling the event, more likely to have made up the story, less able to testify based on fact rather than fantasy, less attractive, less intelligent and less confident.[991]

5. ISSUES FOR CONSIDERATION

In the Discussion Paper, the Commission sought submissions on whether there is a need to limit the eye contact between a child witness and others, such as the accused, in the courtroom.[992] The submissions received by the Commission in response to the Discussion Paper, confirmed research indicating that, in criminal trials, it is particularly upsetting for a child complainant to have to confront the accused.[993] They strongly supported the need to limit contact between the child and the accused.[994] The experience of one PACT volunteer was that:[995]

> The assurance that the child will not have to face the offender in court lessens the trauma considerably, enabling [the] child to go into court in a more relaxed frame of mind and perform better.

Another respondent submitted that, in cases of abuse:[996]

> It should be the right of every child not to be intimidated and often terrified by the gaze of the perpetrator.

Intimidating behaviour on the part of an accused need not necessarily be overt and may be difficult to detect. The Commission was informed, for example, of one case in which, during the questioning of the child complainant who claimed to have been sexually abused, the accused continuously tapped a pen. The case involved an allegation that the accused had used a pen to penetrate the child.[997] Respondents

989 Id at 238.

990 Id at 237.

991 Id at 232.

992 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 160.

993 See also note 1255 of this Report.

994 Submissions 2, 10, 12, 18, 19, 20, 24, 31, 42, 47, 49, 52.

995 Submission 12.

996 Submission 52.

997 Submission 49.

referred to behaviour by accused persons such as coughing, laughing or making other noises to make the child aware of the accused's presence.[998]

The options for restricting contact between a child witness and an accused person are discussed below.

(a) Mandatory use of closed-circuit television

In the Discussion Paper, the Commission sought submissions on whether, for the presentation of children's evidence in certain types of matters, the use of closed-circuit television (if available) should be mandatory rather than a question of judicial discretion as at present, and, if so, in what types of matters it should be mandatory.[999]

The majority of the submissions which addressed this issue were in favour of a legislative requirement that closed-circuit television be used for the presentation of children's evidence, particularly in cases of sexual abuse or offences of violence.[1000] Two respondents, including the President of the Childrens Court, expressed the view that closed-circuit television should be used in all cases involving child witnesses.[1001] One respondent considered that closed-circuit television should be used for all children under the age of 16,[1002] while one thought it should be used for witnesses under the age of 16 in prosecutions for charges of sexual offences.[1003] Another submission recommended that child witnesses under the age of 16 should generally be entitled to give evidence by videolink in criminal proceedings, but that the use of special facilities should be subject to a judicial discretion for children who are accused.[1004]

A discretionary power to order the use of closed-circuit television was opposed on the grounds that prosecutors were perceived as reluctant to make an application,[1005] and courts to accede:[1006]

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998 Submissions 8, 31, 49.

999 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 160.

1000 Submissions 2, 12, 24, 27, 31, 33, 37, 44, 45, 47.

1001 Submissions 45, 49.

1002 Submission 24.

1003 Submission 12.

1004 Submission 31.

1005 Submission 49.

1006 Submission 31. The Commission will consider the position of child witnesses who are accused of having committed criminal offences in Part 3 of this Report, to be published in 2001.

> Judges appear loathe to adopt this option unless a child demonstrates an incapacity to give evidence in the normal way. Proof of incapacity is usually acknowledged by a child's overwrought and distressed state. By this stage, however, a declaration enabling the child to give evidence by video link is too late to ensure the child's ability to provide the court with the best evidence possible, as their distress usually impairs their capacity to be an effective witness.

A judge of the District Court of Western Australia, with experience in the use of closed-circuit television in that State, expressed the view that:[1007]

> It is very important that there be a presumption in favour of the use of closed-circuit television where available, … so that no onus is placed on one of the parties to apply, the Crown prosecutor cannot put other concerns ahead of the child's interest, there is no waste of court time in hearing argument on the matter and no need to call expert evidence as to the child's capacity to give "live" evidence …

The President of the Childrens Court, while endorsing a legislative requirement to use closed-circuit television, also advocated an overriding discretion in the trial judge to make orders that are in the interests of justice and for the purposes of ensuring that the accused has a fair trial.[1008] Similarly, the Children's Commission of Queensland expressed the view that the provision of special facilities should be subject to the court's opinion that the use of those facilities would unfairly prejudice the accused.[1009]

Two submissions noted that a legislative provision requiring the use of screens would prevent an adverse inference being drawn against the accused, and would therefore be fairer.[1010]

Respondents were generally of the view that, if there were to be a legislative requirement to use closed-circuit television, a child witness should have the right to choose to give evidence by other means.[1011] In particular, two submissions identified cultural considerations which might make the use of closed-circuit television inappropriate.[1012]

One respondent observed:[1013]

> The use of closed-circuit television … is inappropriate for some indigenous children as some communities believe that photographic images capture the soul.

1007 Submission 54.

1008 Submission 45.

1009 Submission 31.

1010 Submissions 2, 12.

1011 Submissions 20, 24, 31, 32, 37, 49.

1012 Submissions 31, 33.

1013 Submission 33.

Another respondent proposed that only children over the age of 12 years should be able to decline the use of special facilities.[1014]

Only the Bar Association of Queensland opposed the suggestion that, if the use of closed-circuit television were to be made mandatory, there should be any exceptions:[1015]

> If, for example, an exception to the mandatory rule is allowed for when a child requests that closed-circuit television not be used, all that the legislation achieves would be to place the responsibility of choosing the method by which the evidence will be given on the child. In such circumstances, one could well imagine an over-zealous prosecutor or police officer bringing pressure to bear upon a child to choose to give evidence in person if it was thought that to do so would be advantageous to the Crown case.

A number of respondents acknowledged the resource implications of the mandatory use of closed-circuit television, and urged that priority should be given to providing appropriate facilities.[1016]

However, four respondents considered that the use of closed-circuit television should not be mandatory.[1017] The Bar Association of Queensland, for example, expressed the view that:[1018]

> It is impossible for the legislature to envisage all situations which might occur. Human personality is ever changing and always surprising. When it is considered in conjunction with the unique situation that a court room and a trial present, justice is far more likely to be done if judges and magistrates are allowed the discretion to run their court room in the manner they deem most appropriate in the circumstances of each case.

Nonetheless, the Association noted that, under the existing legislation:[1019]

> There is a clear inconsistency in approach to the use of screens between various members of the bench (judges and magistrates alike).
>
> One example is whether a Judge or Magistrate needs to be presented with evidence in relation to the anticipated problems that the witness will face if no screen is in place, or whether a statement from counsel is sufficient material upon which to base a decision on this issue.

1014 Submission 49.

1015 Submission 53.

1016 Submissions 24, 30, 31, 37, 45, 49.

1017 Submissions 19, 32, 40, 53.

1018 Submission 53.

1019 Ibid.

> A further *"flow on"* example of a problem is that when actual evidence is required to determine the issue, some courts require the child to give the voir dire evidence without a screen because the decision to put a screen in place cannot be made until after the bench actually decides whether or not it should be used (Catch 22).

(b) Mandatory use of screens

In the Discussion Paper, the Commission sought submissions on whether, if closed-circuit television facilities are not available, it should be mandatory for screens to be used so that the child witness does not have to see the accused.[1020]

Most respondents who considered the issue were of the view that, where closed-circuit television is not available, the use of screens should be mandatory when a child witness gives evidence.[1021] Screens were recognised as an appropriate alternative for witnesses from cultural groups whose beliefs would make the use of closed-circuit television unacceptable.[1022] It was generally acknowledged that a child witness should have the option of refusing to use a screen.[1023]

The Bar Association of Queensland commented that if the use of closed-circuit television where available were mandatory, then the use of screens as a substitute should also be mandatory if the closed-circuit television technology were not available and that there should be no exceptions:[1024]

> An immediately apparent potential problem if the child is allowed to choose the method of giving evidence, is the consequences of the child changing his or her mind part way through the evidence. One can easily envisage such situations occurring and causing mistrials.

However, the Association was of the view that the present test should be retained to determine whether or not a screen should be used.

Despite the level of support for screens in the absence of closed-circuit television technology, screens were generally seen as a poor substitute for the use of closed-circuit television.[1025] A number of respondents commented on problems encountered with the use of screens. These problems included the accused peering around the edge of the screen at the witness and the accused's reflection being visible on the screen.[1026] The Children's Commission submitted that screens do not

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1020 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 160.

1021 Submissions 2, 20, 24, 27, 31, 47, 49, 52.

1022 Submission 31.

1023 Submissions 19, 20, 24, 32, 52.

1024 Submission 53.

1025 Submissions 2, 8, 24, 31, 45, 49,

1026 Submission 24.

eliminate many of the other stresses associated with being in the courtroom and that, although they can prevent eye contact between the child witness and the accused, they do not protect the child from hearing sounds made by the accused.[1027] Families, Youth and Community Care Queensland confirmed that:[1028]

> … screens would not necessarily remove all sources of stress, such as being in a formal court environment, being able to see persons sitting in the public gallery whom the child knows support the accused, knowing the accused is on the other side of the screen, and the possibility of hearing sounds made by the accused.

The President of the Childrens Court noted that, from a practical point of view, many courtrooms are unsuitable for the use of screens.[1029] According to the Bar Association of Queensland, the layout of the courtroom often means that the child, whilst en route to the screened witness box, sees the accused seated in the dock. The Association also stated that the screens used in Queensland do not allow the accused person to see the witness at all.[1030]

(c) Judicial warning about the use of CCTV or screens

In the Discussion Paper, the Commission sought submissions as to whether a judge should be required to warn a jury that no inference adverse to the accused is to be drawn from the use of closed-circuit television or screens to assist a child witness to give evidence.[1031]

Seven respondents favoured the adoption of such a requirement.[1032] The former Director of Public Prosecutions expressed the view that:[1033]

> If a closed circuit television or screen is used, the judge should instruct the jury that the use of such is allowed in cases of this kind by reason of the youth of the witness, and that, since it has nothing to do with the guilt or innocence of the accused, the jury must not draw any inference of any kind from its use, and, in particular, that no adverse inference should be drawn against the accused because of such use.

One respondent considered that the judge should be required to warn the jury that an adverse inference against either the accused or the child witness should not be

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1027 Submission 31.

1028 Submission 49.

1029 Submission 45.

1030 Submission 53.

1031 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 161.

1032 Submissions 31, 32, 37, 41, 47, 49, 53.

1033 Submission 32.

drawn from the use of closed-circuit television or a screen.[1034]

The Bar Association of Queensland stressed the importance of a standard warning:[1035]

> Different judges give different directions to juries about the reason for the screen/closed-circuit television being utilized. One must wonder whether there is a risk that a juror would not accept a direction on the subject if that juror had been given a different direction on the same point during an earlier trial.

Only one submission opposed a requirement that the judge warn the jury against drawing any adverse inference from the use of special facilities to assist a child witness to give evidence.[1036]

6. THE COMMISSION'S VIEW

(a) Mandatory use of closed-circuit television

The Commission acknowledges that there are some children for whom it will be impossible, because of either the unfamiliar atmosphere of the courtroom or the emotional distress involved in a potential courtroom confrontation with an accused person, or a combination of both, to give evidence in court in the conventional way. In the view of the Commission, any concerns about the effects of the use of closed-circuit television are outweighed by the benefits.[1037] There seems to be ample evidence to suggest that, provided the equipment used is of adequate quality and is sufficiently reliable, the use of closed-circuit television to assist a child witness is also to the advantage of the court, and ultimately the administration of justice, because it may enable the court to receive evidence which would otherwise be unavailable to it.

A further advantage of the use of closed-circuit television is that it would allow the child's evidence to be recorded on videotape and to be available in subsequent proceedings.[1038]

Although the use of closed-circuit television is currently permitted under the *Evidence Act 1977* (Qld), the legislation requires the prosecution to make an application for an order that it be used. The court must then exercise its discretion in deciding whether or not to grant the application. Any reluctance on the part of the

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1034 Submission 49.

1035 Submission 53.

1036 Submission 20.

1037 See pp 194-197, 198-211 of this Report.

1038 In Chapter 9 of this Report the Commission has recommended that, where the evidence of a child has been given by means of a pre-recorded videotape, the party who called the child as a witness may apply for an order that the videotaped recording of the child's evidence be admitted at a rehearing or a retrial.

prosecution to request, or on the part of the court to order, the use of closed-circuit television may mean that closed-circuit television is not being used in cases where it would assist both the witness and the court. The Commission considers it undesirable that the use of closed-circuit television should depend on whether an application is made by the prosecution. It is also undesirable there should be differences in approach towards closed-circuit television among different magistrates and judges, or that varying standards of proof should be required to establish the need for its use.

However, the Commission recognises the need to retain some degree of flexibility to ensure that closed-circuit television is not used inappropriately.

Accordingly, the Commission is of the view that there should be a presumption in favour of the use of closed-circuit television, subject to a judicial discretion to order that it should not be used. Such a presumption would reverse the current situation, under which it is necessary for the prosecution to apply for an order authorising the use of closed-circuit television and to persuade the court that closed-circuit television should be used. Rather, it would be necessary for the party opposing the use of closed-circuit television to show why it should not be used - for example, the defence might seek to displace the presumption in favour of closed-circuit television on the grounds that its use would unduly prejudice the accused. The presumption should apply in criminal proceedings for offences involving violence or sexual assault, in civil proceedings arising from the commission of an offence of a violent or sexual nature, and in proceedings for domestic violence orders.[1039]

Consistently with its recommendations in relation to out-of-court statements[1040] and videorecorded evidence,[1041] the Commission considers that child witnesses under the age of 16 years should use closed-circuit television unless the court orders that it would not be in the interests of justice for them to do so. In addition, the court should have a discretion to order that a witness who is 16 or 17 years of age and who meets the definition of a "special witness" in section 21A of the *Evidence Act 1977* (Qld)[1042]

1039 The situation where the child witness is the accused person will be discussed in Part 3 of this Report, to be published in 2001.

1040 See Chapter 8 of this Report.

1041 See Chapter 9 of this Report.

1042 Section 21A of the *Evidence Act 1977* (Qld) was amended by s 46 of the *Criminal Law Amendment Act 2000* (Qld), which received Royal Assent on 13 October 2000. Section 21A(1)(b), in its amended form, defines a "special witness", other than a child under the age of 12, as:

> a person who, in the court's opinion -
>
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
>
> if required to give evidence in accordance with the usual rules and practice of the court.

"Relevant matter" is defined in s 21A(1) as the person's "age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant".

give his or her evidence by means of closed-circuit television.

However, the Commission believes that a child should be able to choose not to give evidence by means of closed-circuit television. If, for example, the child has a cultural belief that would make the use of closed-circuit television inappropriate, or is sufficiently mature and feels strong enough to confront an accused person directly in court, the wishes of the child should be respected.

The Commission's view in favour of the use of closed-circuit television is based on the assumption that the facilities provided if its recommendations were to be implemented would operate reliably and that their sound and image quality would enable the witness to be seen and heard clearly by those in the courtroom.

(b) Mandatory use of screens

The Commission is of the view that, although screens are not a satisfactory substitute for the use of closed-circuit television, nonetheless child witnesses would benefit from their use where closed-circuit television is unavailable. The Commission therefore believes that there should also be a presumption in favour of the use of screens where closed-circuit television is not available or where the child chooses not to use it. A child should also be able to choose not to use screens if he or she does not wish to do so.

However, in expressing this view, the Commission wishes to emphasise that where screens are used in place of closed-circuit television care should be taken to ensure that they are placed so as to avoid contact between the child and the accused and that the accused does not engage in any form of subtle intimidatory behaviour.

(c) Judicial warning about the use of special arrangements

The Commission agrees that, in fairness to an accused person, a warning should be given to a jury that no adverse inference should be drawn against an accused person if special arrangements are made for the evidence of a child witness who testifies against that person.

The Commission also believes that, in order to allay fears that a jury may find a witness who uses special arrangements to give evidence less persuasive than one who testifies directly in court, the jury should be warned not to give the evidence any greater or lesser weight because of the special arrangements. The legislation should provide for a standard form of warning to ensure that juries are not confused as a result of having been given inconsistent information.

7. RECOMMENDATIONS

The Commission makes the following recommendations in relation to the use of closed-circuit television and screens for child witnesses to give evidence:

10.1 If a child under the age of 16 years is giving evidence in criminal proceedings for offences involving violence or sexual assault, in civil proceedings arising from the commission of an offence of a violent or sexual nature or in proceedings for domestic violence orders, the child's evidence should be given by means of closed-circuit television.

10.2 Recommendation 10.1 should not apply if the court orders that it would not be in the interests of justice for the child's evidence to be given in that way, or if the child chooses not to use closed-circuit television.

10.3 If a child under the age of 16 years is giving evidence in a proceeding specified in Recommendation 10.1 and closed-circuit television facilities are not available or such facilities are available but the child chooses not to use them, the child's evidence should be given with the use of a screen which prevents the witness from seeing the accused person, but does not prevent the accused from seeing the witness.

10.4 Recommendation 10.3 should not apply if the court orders that it would not be in the interests of justice for the child to give evidence with the use of a screen or if the child chooses not to use a screen.

10.5 When a child witness under the age of 16 years gives evidence using closed-circuit television or a screen the jury should be given a warning to the effect that:

(a) it is standard procedure for children's evidence in such cases to be given by those means; and

(b) the jury should not draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of closed-circuit television or a screen.

10.6 If, in the opinion of the court, a young person aged 16 or 17 years who is to give evidence in a proceeding specified in Recommendation 10.1 is a person who satisfies the definition of "special witness" in section 21A of the *Evidence Act 1977* (Qld), the court may order that the child's evidence be given using closed-circuit television or, if closed-circuit television facilities are not available, using a screen which prevents the witness from seeing the accused person.

10.7 When a witness referred to in Recommendation 10.6 gives evidence using closed-circuit television or a screen, the jury should be warned not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because of the use of closed-circuit television or a screen.

10.8 Where a child gives evidence by means of closed-circuit television, the evidence given by the child should be recorded on videotape.

10.9 Where a child has given evidence by means of closed-circuit television, the party who called the child as a witness may apply for an order that the videotaped recording of the child's evidence be admitted at a rehearing or a retrial.

CHAPTER 11

PRELIMINARY HEARINGS

1. INTRODUCTION

In this Report, the Commission has made recommendations about the way in which children give evidence in court proceedings. These recommendations concern issues such as when the evidence of a child witness should be taken and the facilities which should be made available to the child to make the process of giving evidence less difficult.

If the Commission's recommendations are implemented, there will be a number of preliminary matters which could, if appropriate procedures were in place, be resolved before a child witness gives evidence. Early resolution of the preliminary issues would potentially have two significant advantages. If threshold questions could be determined prior to the commencement of proceedings, less time would be taken up by them during the proceedings and the proceedings would be able to proceed with fewer delays. This may result in more efficient use of court time. It may also help alleviate concerns that have been expressed to the Commission about the adverse effects that delays in court proceedings have on child witnesses.[1043] Further, where child witnesses are involved, it would allow the child to know in advance what arrangements will be made for hearing the child's evidence, and the experience of giving evidence may therefore be less traumatic for the child.

The advantages of settling as many procedural matters as possible before the commencement of a trial has been recognised in civil proceedings for a number of years, with an increasing emphasis on case management.[1044] In relation to criminal proceedings, there has also been an increasing emphasis on the use of pre-trial procedures to narrow the issues in dispute and to reduce trial times.[1045]

The Australian Institute of Judicial Administration, in discussing the importance of pre-trial hearings, has recommended that any pre-trial hearing should be "formally part of the trial proper so all rulings and directions given are binding from then on".[1046]

1043 See Chapter 3 of this Report.

1044 See the discussion of case management in the civil context in Davies GL, the Hon Mr Justice, *Managing the Work of the Courts*, a paper delivered at the Australian Institute of Judicial Administration Asia-Pacific Courts Conference "Managing Change" (22-24 August 1997). Note the comment at pp 7-8 of that paper that, at least in relation to civil proceedings, the reduction in trial time that is brought about by case management may be achieved at the cost of a total increase in costs, especially where multiple hearings are involved.

1045 See for example s 592A of the *Criminal Code* (Qld), which was inserted into the *Code* by s 108 of the *Criminal Law Amendment Act 1997* (Qld).

1046 The Australian Institute of Judicial Administration Incorporated, *Anatomy of Long Criminal Trials* (1997) at para 6.2.4.

2. THE NEED FOR LEGISLATION

At common law, there is no general authority enabling evidence to be taken in a criminal matter, or its form and admissibility to be determined, before the commencement of the trial:[1047]

> Trials on indictment are governed by common law rules of procedure and evidence, according to which admissibility falls to be determined at the time the evidence is tendered, which takes place only at trial.

In Queensland, a trial on indictment does not commence until the accused is called on to plead to the indictment.[1048] However, a considerable period of time may elapse between the presentation of the indictment and the accused being called upon to plead.

To enable binding orders about the admissibility of evidence or about the form in which evidence is to be given to be made in the interval between presentation of the indictment and the commencement of the trial, it is necessary to enact legislation to that effect.

3. EXISTING LEGISLATION

(a) Queensland

Section 592A of the *Criminal Code* (Qld) provides that, once an indictment has been presented, the court may make a number of rulings, including a ruling as to the admissibility of evidence.[1049] By enabling such a ruling to be made prior to the commencement of the trial (that is, before the accused is required to plead), the section provides an exception to the common law rule that evidence cannot be taken, and its admissibility cannot be determined, before the commencement of a trial on indictment.[1050] Section 592A would therefore allow issues such as the competence of a child witness or the admissibility of a pre-recorded statement to be resolved before the trial itself commenced.

A ruling made under section 592A of the *Criminal Code* (Qld) will generally be binding at the trial. Sections 592A(3) and (4) provide:

1047 *R v His Honour Judge Noud, ex parte MacNamara* [1991] 2 Qd R 86 per McPherson J at 91-92.

1048 *Criminal Code* (Qld) s 594.

1049 *Criminal Code* (Qld) s 592A(2)(e).

1050 *R v His Honour Judge Noud, ex parte MacNamara* [1991] 2 Qd R 86.

(3) A direction or ruling is binding unless the trial judge, for special reason, gives leave to re-open the direction or ruling.

(4) A direction or ruling must not be subject to interlocutory appeal but may be raised as a ground of appeal against conviction or sentence.

However, although the court is authorised by section 592A(2)(e) of the *Criminal Code* (Qld) to decide "questions of law including the admissibility of evidence", section 592A does not include an express power to make a ruling about the form or manner in which a witness is to give evidence at trial.

(b) Western Australia

Section 106S of the *Evidence Act 1906* (WA) provides:[1051]

(1) In any proceeding in which -

(a) the giving of evidence by a person; or

(b) a matter affecting a person as a witness,

is likely to require the making of an order or the giving of directions under sections 106E(2) [approval of a support person], 106F(1) [appointment of a communicator], 106J [giving of evidence-in-chief by video-tape], 106K [giving of all evidence at pre-trial hearing], 106O [application that the mandatory provision relating to use of closed-circuit television should not apply], or 106R [declaration that a person is a special witness], the party who is to call that person as a witness is to apply for a pre-trial hearing for the purpose of having all such matters dealt with before the trial.

(2) In subsection (1) "pre-trial hearing" in relation to a Court means a hearing provided for by rules of that Court for purposes of this section. [words in square brackets added]

The Western Australia legislation also provides that, before or after the filing of the indictment, the court can, if it thinks fit, determine any question of law or procedure anticipated to arise or determine any question of fact.[1052] These procedures can be conducted by a judge other than the trial judge,[1053] and are considered part of the trial itself.[1054]

1051 Section 106S is to be amended by cl 27 of the *Acts Amendment (Evidence) Bill 1999* (WA), which will delete the word "trial" and insert instead the word "proceeding", and by cl 29 of the Bill, which will delete the word "pre-trial" and insert instead the word "special". The Bill has passed both Houses of Parliament but, because of an amendment made in the Legislative Council, had to be referred back to the Legislative Assembly. As of 13 October 2000, it had not been considered further by the Legislative Assembly.

1052 *Criminal Code* (WA) s 611(A).

1053 *Criminal Code* (WA) s 611(A)(2).

1054 *Criminal Code* (WA) s 611A(3).

Judicial guidelines for the use of special facilities for giving evidence provide that all decisions at the pre-trial hearing will normally be made on the basis of depositions and affidavits, rather than on oral evidence.[1055]

(c) Victoria

In Victoria, once a presentment has been filed[1056] but before the trial is due to commence, the court may conduct a directions hearing[1057] at which it may, amongst other things, require an accused person to advise whether he or she is legally represented and has funding for continued legal representation up to and including the trial,[1058] and require the parties to advise whether there are any particular requirements of, or facilities needed for, witnesses.[1059] In the context of child witnesses, these provisions would allow the court to determine issues such as the manner in which the evidence of a child is to be given. At any subsequent directions hearing, the court may require the parties to advise whether they are aware of any questions that require determination before the trial is due to commence,[1060] and determine any question of law or procedure that arises or is anticipated to arise in the trial.[1061] These provisions would enable the court to deal with issues such as the admissibility of evidence or the competency of a child witness prior to the commencement of the trial.

It is not necessary for the judge constituting the court at the trial to be the judge who constituted the court at the directions hearing.[1062] However, if the trial is heard by a different judge, any ruling made by the judge at the directions hearing is binding on the trial judge unless, in the opinion of the trial judge, it would not be in the interests of justice for the ruling to be binding.[1063]

1055 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (May 1998) at 1.

1056 A "presentment" is a document that sets out the necessary details of an indictable offence. In some jurisdictions the terms "indictment" or "information" are used instead.

1057 *Crimes (Criminal Trials) Act 1999* (Vic) s 5(1).

1058 *Crimes (Criminal Trials) Act 1999* (Vic) s 5(4)(c).

1059 *Crimes (Criminal Trials) Act 1999* (Vic) s 5(4)(d).

1060 *Crimes (Criminal Trials) Act 1999* (Vic) s 5(5)(a).

1061 *Crimes (Criminal Trials) Act 1999* (Vic) s 5(5)(b).

1062 *Crimes (Criminal Trials) Act 1999* (Vic) s 12(1).

1063 *Crimes (Criminal Trials) Act 1999* (Vic) s 12(2).

4. ISSUES FOR CONSIDERATION

(a) The need for preliminary hearings

In the Discussion Paper, the Commission sought submissions on the desirability of holding a preliminary hearing before committal or trial to determine issues relating to the giving of evidence by a child witness.[1064]

Of the seven respondents who addressed this issue,[1065] only one was opposed to the idea of a preliminary hearing. The Queensland Council for Civil Liberties submitted that there should be no changes to the current system, and that there should be no pre-trial hearing other than a committal.[1066]

However, the former Director of Public Prosecutions suggested, in accordance with existing "special witness" provisions,[1067] that where the witness is of or over the age of 12:[1068]

> … it may well be that orders can sensibly only be made after the witness has begun his or her evidence and it has become apparent that, for example, the witness is likely to be so intimidated as to be disadvantaged as a witness.

(b) When should a preliminary hearing be held?

In the Discussion Paper, the Commission sought submissions as to whether a preliminary hearing should be conducted in all cases involving a child witness, or whether there are some matters relevant to how a child witness gives evidence that it is not appropriate to determine at a preliminary hearing.[1069]

Of the submissions which addressed this issue, three expressed the view that preliminary hearings should be conducted in all cases.[1070] The former Director of Public Prosecutions considered that they should be held "where practicable".[1071] The Queensland Council for Civil Liberties was opposed to any preliminary hearing

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1064 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 194.

1065 Submissions 8, 19, 20, 32, 40, 49, 53.

1066 Submission 40.

1067 *Evidence Act 1977* (Qld) s 21A.

1068 Submission 32.

1069 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 194.

1070 Submissions 2, 20, 49.

1071 Submission 32.

other than a committal. It expressed the view that the only possible matter for a preliminary hearing would be if administrative arrangements for an appropriate support person could not be agreed between the prosecution and the defence.[1072] Families, Youth and Community Care Queensland submitted that it would not be appropriate for a preliminary hearing to determine issues that are mandated by legislation.[1073] The President of the Childrens Court indicated that a separate preliminary hearing would be appropriate where there is a challenge to the competence of the child to give evidence.[1074]

(c) Should the preliminary hearing be heard by the judge who will preside at the trial?

The Australian Institute of Judicial Administration has recommended that, preferably, a pre-trial hearing should be conducted by the trial judge.[1075] However, the Western Australian legislation does not require the judge who presided at the preliminary hearing to conduct the trial. Similarly, in Victoria, it is not necessary for the trial to be heard by the judge who constituted the court for the purposes of a direction hearing.

In the Discussion Paper, the Commission sought submissions on this issue.[1076] Of the four submissions that addressed the question,[1077] three were in favour of a requirement for the preliminary hearing to be heard, where possible, by the judge who is to preside at the trial.[1078]

(d) Should orders made at a preliminary hearing be binding at trial?

In the Discussion Paper, the Commission sought submissions on whether orders made at a preliminary hearing should in general be binding at trial.[1079]

1072 Submission 40.

1073 Submission 49.

1074 Submission 45.

1075 The Australian Institute of Judicial Administration Incorporated, *Anatomy of Long Criminal Trials* (1997) at para 6.2.4.

1076 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 194.

1077 Submissions 19, 20, 32, 49.

1078 Submissions 20, 32, 49.

1079 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 194.

Five submissions addressed this issue.[1080] Of those respondents, only the Queensland Council for Civil Liberties opposed the idea of binding orders being made prior to committal or trial.[1081] However, both the former Director of Public Prosecutions and Families, Youth and Community Care Queensland stressed the need for flexibility to deal with changing circumstances.[1082]

5. THE COMMISSION'S VIEW

(a) The need for preliminary hearings

The question of whether a preliminary hearing should be held to determine issues relating to the giving of evidence by a child witness at a committal proceeding is discussed in Chapter 12 of this Report.

With respect to the position in relation to holding a preliminary hearing prior to trial, the Commission agrees with those respondents who favoured this proposal. In the view of the Commission, there are two principal benefits to be derived from settling in advance of the trial itself questions of law such as the admissibility of the evidence of a child witness and procedural issues such as the way in which the child's evidence is to be given at trial.

The first is the benefit to the child. Research has shown, and several respondents support the proposition, that children find the experience of giving evidence far less distressing if they know in advance the procedure to be followed and the facilities to be made available so that they have the opportunity to become familiar with them.[1083]

The second benefit is more efficient use of court time during the trial. If questions of law and procedural matters could be dealt with at a preliminary hearing, the trial would be able to proceed with fewer delays. In particular, the jury system would be able to operate more cost-effectively. The reduction in delays during the court proceedings would also make the experience of giving evidence less stressful for child witnesses.

Although the court is presently authorised by section 592A(2)(e) of the *Criminal Code* (Qld) to decide "questions of law including the admissibility of evidence", a more specific power is arguably desirable if the court is to have the power to decide

1080 Submissions 19, 20, 32, 40, 49.

1081 Submission 40.

1082 Submissions 32, 49.

1083 See for example Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office Central Research Unit, 1995) at 62, 71.

questions as to the various facilities that might be used to assist a child witness to give evidence and as to how and when the child's evidence is to be given.

(b) When should a preliminary hearing be held?

Where evidence is to be given by a child witness, the following issues might arise before the commencement of the proceedings:

- the competency of the child to give evidence;
- whether a prior statement of the child is to be admitted;
- whether formal court attire should be worn by the judge and legal counsel while the child gives evidence;
- whether, and to what extent, the evidence of the child is to be pre-recorded on videotape to be replayed in court;
- the conditions under which the child's evidence should be videotaped (for example, the persons who should be allowed to be present while the child gives evidence);
- whether, in a criminal proceeding, the child will be required to identify the accused;
- the facilities to be provided to assist the child to give evidence (for example, whether closed-circuit television will be available);
- the identity of the support person for the child;
- the arrangements to be made for cross-examination of the child in a criminal proceeding where the accused is unrepresented.

The Commission is of the view that there should be legislative provision for a preliminary hearing to take place to determine as many of the relevant issues as possible. Any party to the proceeding should be entitled to apply for a preliminary hearing for the purpose of having such matters dealt with and, if it is likely that the making of an order or the giving of directions will be necessary, the party proposing to call the child as a witness should be required to make such an application.

(c) Should the preliminary hearing be heard by the judge who will preside at the trial?

The Commission agrees that it would be desirable for the preliminary hearing and the trial to be presided over by the same judge, who would then be familiar with the

issues when the case came to trial. However, the Commission also acknowledges the administrative difficulties which could result from such a requirement. The Commission is therefore of the view that the legislation should not include a mandatory provision to the effect that the judge who constitutes the court for the trial must be the judge who presided at the preliminary hearing.

(d) Should orders made at a preliminary hearing be binding at trial?

The purpose of a legislative provision of the kind under consideration is to overcome the common law position that, subject to specific statutory exceptions, there is no general authority enabling evidence to be taken or its form or admissibility to be determined in advance of a trial on indictment.[1084] The Commission therefore considers that orders made at a preliminary hearing should generally be binding in subsequent proceedings.

However, the Commission also acknowledges the need, highlighted in some of the submissions, for a flexible approach. Accordingly, the Commission is of the view that directions or orders made at a preliminary hearing should be binding unless they are varied or set aside in the interests of justice by the trial judge or a judge of equivalent jurisdiction. The Commission's view is consistent with the existing provision in section 592A(3) of the *Criminal Code* (Qld).[1085]

6. RECOMMENDATIONS

The Commission makes the following recommendations in relation to the holding of preliminary hearings:

11.1 A new provision should be inserted in the *Evidence Act 1977* (Qld) to enable a preliminary hearing to be held before trial in any matter in which a child is likely to be a witness.

11.2 Any party to the proceeding should be entitled to apply for a preliminary hearing to resolve an issue about the giving of evidence by a child witness.

11.3 If it is likely that the making of an order or the giving of a direction will be necessary in relation to the evidence of a child witness, the party proposing to call the child as a witness should be required to apply for a preliminary hearing to obtain such order or direction.

1084 See *R v His Honour Judge Noud, ex parte MacNamara* [1991] 2 Qd R 86 per McPherson J at 91-92.

1085 See pp 223-224 of this Report.

11.4 It should not be necessary for the judge who constitutes the court for the trial to preside at the preliminary hearing.

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

CHAPTER 12

COMMITTAL PROCEEDINGS

1. INTRODUCTION

A committal proceeding is a preliminary hearing, usually before a magistrate,[1086] 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 committal proceedings "stand as a safeguard against speculative prosecutions in the higher criminal courts".[1087] The importance of the committal procedure has been acknowledged by the High Court of Australia:[1088]

> … 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.[1089]

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,[1090] 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:[1091]

1086 A single justice of the peace (magistrates court) is also able to hear a committal: *Justices Act 1886* (Qld) s 104 and *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) s 29(4)(b). See also Queensland Law Reform Commission, Report, *The Role of Justices of the Peace in Queensland* (R 54, December 1999).

1087 Bishop J, *Criminal Procedure* (2nd ed, 1998) at 398.

1088 *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J (with whom Aickin J agreed) at 99.

1089 Ibid. See also *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J (with whom Mason CJ, Brennan, Deane and Toohey JJ agreed) at 15.

1090 *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.

1091 *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 99, and per Stephen J at 105.

> … 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.

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:[1092]

> … the accused may through counsel conduct an exhaustive cross-examination of the prosecution witnesses, opening up lines of defence for trial and taking risks in the full assurance that adverse answers are generally not admissible before a jury. The proceedings operate as a 'trial run' in which the accused may test not merely the accuracy and reliability of the prosecution evidence, but may also make observations on the character and demeanour of the prosecution witnesses. The information so obtained may be invaluable in determining whether to make a witness the focal point of attack at trial, or to accept the witness's evidence as true and build a defence around it … Precise cross-examination of the prosecution witnesses may be used to 'freeze' the evidence of the witnesses on the critical issues, so as to confine the witnesses to that evidence at trial, or to destroy their credibility by cross-examination at trial on the difference between their evidence at committal and trial. [note omitted]

The prosecution may also benefit from the committal process. If weaknesses in the prosecution case are identified, the prosecution has the options of not proceeding with the trial even if the accused is committed, or of substituting a lesser charge which may be easier to prove. If other evidence is available, it may be decided not to call a particular witness at trial. On the other hand, if the prosecution presents a strong case at committal, the accused may plead guilty to the charge, thus avoiding the need to proceed to trial. However, if the accused pleads not guilty, the committal will not necessarily assist the prosecution to anticipate defences which the accused may raise at trial since, although the accused may put forward a defence at committal, there is no obligation to do so.

2. ATTENDANCE AT COMMITTAL BY A CHILD WITNESS

As 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, a child who is a prosecution witness at a committal proceeding is likely to be subjected to rigorous cross-examination. 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

1092 Bishop J, *Criminal Procedure* (2nd ed, 1998) at 332.

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.[1093]

The Commission is not in a position to establish the extent to which cross-examinations of this kind actually take place, although anecdotal material supplied to the Commission in preliminary submissions and in submissions received in response to the Discussion Paper suggests that it is not uncommon in committal proceedings involving child prosecution witnesses. One submission, from a group of nineteen non-government organisations concerned with child welfare and related issues stated:[1094]

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

In recent years, a number of Australian jurisdictions have addressed concerns about child witnesses having to attend committals. In addition to concerns about the way in which cross-examination of child witnesses may be conducted, there is also a concern that it is undesirable for children to have to testify - and be cross-examined - at both committal and trial. In some jurisdictions, the need for the presence of any witness at committal has been reconsidered. In those jurisdictions, reforms have largely accepted the record of a witness's out-of-court statement as evidence rather than requiring the witness to give oral evidence at the committal.

(a) Mandatory tendering of out-of-court statements

Legislation in South Australia, New South Wales and Western Australia generally provides for the mandatory tendering of out-of-court statements by child witnesses so that children do not have to present oral evidence at the committal. The Victorian legislation imposes a more general restriction on the right of cross-examination at committal.

(i) South Australia

In South Australia, the evidence of prosecution witnesses must be tendered at committal in the form of written statements, unless the witness is a child under

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1093 See Chapter 13 of this Report for the Commission's recommendations in relation to the power of a court to restrict inappropriate cross-examination of a child witness.

1094 Submission 33.

12 or a person who is illiterate or suffers from an intellectual handicap.[1095] If the witness falls within this excepted class, a verified transcript of the witness's out-of-court oral statement may be tendered - that is, evidence may be in the form of a written statement of a police officer verifying it to be an accurate record of the witness's oral statement at interview, or a videotape or audiotape of interview accompanied by a verified transcript.[1096]

The court will not grant leave to call a witness for oral examination in court unless it is satisfied that there are special reasons for doing so.[1097] In determining whether those special reasons exist, the court must have regard to a number of matters including:[1098]

> (a) the need to ensure that the case for the prosecution is adequately disclosed; and
>
> (b) the need to ensure that the issues for trial are adequately defined; and
>
> (c) the Court's need to ensure … that the evidence is sufficient to put the defendant on trial; and
>
> (d) the interests of justice, but if the witness is the victim of an alleged sexual offence or a child under the age of 12 years, the Court must not grant leave unless satisfied that the interests of justice cannot be adequately served except by doing so. [emphasis added]

It has been suggested that the South Australian provisions, by not permitting cross-examination of the alleged victim of a sexual offence at committal, deny an accused person a fair trial.[1099] It has also been suggested that the lack of cross-examination at committal may be responsible for the fact that, in South Australia, more charges for sexual offences than for all other categories of offences are withdrawn by the entry of a *nolle prosequi* at trial.[1100] In 1987, the rate of entry of *nolle prosequi* was 19% for sexual offence charges compared to an average rate of 9%, prompting the observation that some of these matters may not have been proceeded with if a full committal had been

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1095 Committals in South Australia are referred to as "preliminary examinations" and are covered by ss 101-113 of the *Summary Procedure Act 1921* (SA).

1096 *Summary Procedure Act 1921* (SA) s 104(4).

1097 *Summary Procedure Act 1921* (SA) s 106(2).

1098 *Summary Procedure Act 1921* (SA) s 106(3).

1099 O'Gorman T, "Defence Strategies in Child Sexual Abuse Accusation Cases" (1991) *Queensland Law Society Journal* 195 at 202.

1100 The entry of a *nolle prosequi* is a procedure by which a prosecutor indicates to the trial judge that the Crown will not proceed further with the indictment before the court. It has the effect of bringing the proceedings to an end and discharging the accused from any further proceedings on that indictment. However, it does not prevent a further indictment in respect of the same offence being presented at a later date. See Kenny RG, *An Introduction to Criminal Law in Queensland and Western Australia* (5th ed, 2000) at para 5.46.

held.[1101] More recent figures also indicate that proceedings for charges of sexual offences in the Supreme and District Courts of South Australia are dropped[1102] more frequently than proceedings for other kinds of charges[1103] although, in the majority of cases where the charges were dropped, the complainant was aged 17 or over.[1104] Sexual offence cases involving a child complainant do not seem to have been dropped at a higher rate than average.

(ii) New South Wales

In New South Wales, the evidence for the prosecution in any committal must be given by written statement, although a magistrate may dispense with that requirement in certain specified circumstances.[1105]

A person who has made a written statement may be required to attend the committal. However, if that person is an alleged victim of an offence involving violence, he or she cannot be called for cross-examination on the statement unless the magistrate is satisfied that there are "special reasons" why, in the interests of justice, the witness should be called to give oral evidence.[1106] Offences "involving violence" are defined to include prescribed sexual offences and abduction or kidnapping.[1107] The magistrate will normally determine whether "special reasons" exist at a preliminary hearing at which the statement of the alleged victim is tendered for the purpose of the application to have the alleged victim attend the committal.

1101 Brereton D and Willis J, *The Committal in Australia* (1990) at 26, citing figures based on a study carried out by the Office of Crime Statistics (SA), *Crime and Justice in South Australia* (1987).

1102 The category 'charge dropped' covers circumstances where the Director of Public Prosecutions either enters a *nolle prosequi*, does not proceed, withdraws the charge or declines to file an information. Prior to 1997 this was labelled '*nolle prosequi*'. In 1997 in over 80% of cases in this category, the charge was dropped by means of a *nolle prosequi*: Attorney-General's Department (Office of Crime Statistics) (SA), *Crime and Justice in South Australia 1999* at 125.

1103 In 1999, 28% of sexual offence proceedings were dropped, compared to an average rate of 12.1%: Attorney-General's Department (Office of Crime Statistics) (SA), *Crime and Justice in South Australia 1999* Table 3.1 at 125 and Table 3.3 at 127.

1104 Attorney-General's Department (Office of Crime Statistics) (SA), *Crime and Justice in South Australia 1999* Table 3.3 at 127.

1105 *Justices Act 1902* (NSW) s 48AA. The exceptions include where the statement was prepared but a copy of the statement could not reasonably be served on the defendant.

1106 *Justices Act 1902* (NSW) s 48E(2)(a). In any other case the magistrate must be of the opinion that there are "substantial reasons" why, in the interests of justice, the witness should attend to give oral evidence: s 48E(2)(b). Note that s 48E(8) of the *Justices Act 1902* (NSW) provides that the regulations to that Act may make provision for or with respect to the determination of special reasons under s 48E(2)(a) and the determination of substantial reasons under s 48E(2)(b). A recent review of applications to cross-examine under s 48E has shown approximately 60 per cent have been granted. The frequency of applications under s 48E is low - only 7.5 per cent of cases. This has been attributed in large part to the fact that legal aid is generally not available for committals. See Berry P, "Impact of the New Committals Regime: Justices Amendment (Committals) Act 1996" (March 1998) *Law Society Journal* 70.

1107 *Justices Act 1902* (NSW) s 48E(9).

The object of the procedure is to avoid the necessity of the alleged victim giving evidence twice, especially in matters involving allegations of a sexual offence.

(iii) Western Australia

In 1991, the Law Reform Commission of Western Australia recommended that, in the case of an alleged sexual offence against, or intra-familial assault on, or abuse of, a child under 16 at the time the proceedings are initiated, the court should be empowered to allow the child's evidence at committal to be given in the form of a previously made written statement, audiotape or videotape.[1108] This would then constitute the child's evidence at committal. The Law Reform Commission of Western Australia further recommended that, where such a statement was admitted, the child should not be called or summoned to attend for examination and/or cross-examination unless the magistrate was satisfied that there were special circumstances that justified the complainant being so called.[1109]

That recommendation was made in response to concerns that children were being routinely subjected to examination and cross-examination both at committal and at trial. It was not considered appropriate that a child should have to give evidence in person on both occasions. The Commission noted the views put by a number of respondents who believed that cross-examination at committal could be more stressful to the child than cross-examination at trial because at trial there is the constraining effect of the jury's presence on defence counsel.[1110]

These recommendations of the Law Reform Commission of Western Australia were implemented by an amendment to section 69 of the *Justices Act 1902* (WA) in 1992.[1111]

(iv) Victoria

In Victoria, prior to a contested committal, the prosecution must give the accused a hand-up brief containing information about the offence with which the accused is charged, the committal process and the evidence against the accused.[1112] The accused must be given a list of witnesses who have made

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1108 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 3.38.

1109 Ibid.

1110 Id at para 3.35.

1111 *Acts Amendment (Evidence of Children and Others) Act 1992* (WA) s 11. In Western Australia, committals are referred to as "preliminary hearings" and are regulated by ss 66, 69-73 and 101-130 of the *Justices Act 1902* (WA).

1112 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 6(1), (2).

statements which it is proposed to tender at the committal[1113] and, if the committal proceeding relates to a charge for a sexual offence or an offence of violence, a transcript of any audio or videotaped evidence proposed to be tendered.[1114] If the evidence-in-chief of a witness has been pre-recorded for presentation at the committal,[1115] the accused must also be given a transcript of that evidence.[1116] A witness whose statement or evidence is included in the hand-up brief cannot be cross-examined at the committal without leave.[1117]

An accused person must give written notice of intention to seek leave to cross-examine a specified witness or witnesses at the committal, and must state the scope and purpose of the proposed questioning and how it has relevance to the facts in issue.[1118] The court must not grant leave unless it is satisfied that the evidence sought to be adduced by the proposed questioning has substantial relevance to the facts in issue and, if the witness is under the age of 18 years, that the interests of justice cannot be adequately served except by granting leave.[1119] In considering whether to grant leave, the court must take the following factors into account:[1120]

- the need to ensure that the prosecution case is adequately disclosed;
- the need to ensure that the issues are adequately defined;
- the need to ensure that the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged; and
- the interests of justice.

A witness whose statement is included in the hand-up brief or whose evidence-in-chief has been pre-recorded need not attend the committal unless the accused makes a successful application for leave to cross-examine the witness.[1121] If leave is granted, the witness must confine his or her evidence-in-chief to identifying himself or herself and attesting to the truthfulness of the

1113 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 6(1)(c).

1114 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 6(1)(h).

1115 *Magistrates' Court Act 1989* (Vic) s 56A.

1116 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 6(1)(d).

1117 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 13(1), (2).

1118 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 12(1)(a).

1119 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 13(4).

1120 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 13(5).

1121 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 13(6), cl 14(1).

statement or of the contents of the recording.[1122] However, the prosecution may seek leave to call the witness to give the whole of his or her evidence-in-chief orally at the committal or to give oral evidence supplementary to the statement or recording.[1123] The court must have regard to the interests of justice and must not grant the application unless exceptional circumstances exist.[1124] If the application is successful, the accused may cross-examine the witness only with the leave of the court.[1125]

(b) Avoidance of committal

In 1991, a procedure was introduced in England whereby the Director of Public Prosecutions may refer a matter involving a child witness directly to the Crown Courts, thereby bypassing the committal stage altogether. This move appears to have been designed to avoid both unnecessary delay before a matter is finally dealt with by the criminal courts and unnecessary trauma for the child witness.

The procedure is set out in section 53 of the *Criminal Justice Act 1991*:

> (1) If a person has been charged with an offence … (sexual offences involving violence or cruelty) and the Director of Public Prosecutions is of the opinion -
>
> (a) that the evidence of the offence would be sufficient for the person charged to be committed for trial;
>
> (b) that a child who is alleged -
>
> (i) to be a person against whom the offence was committed; or
>
> (ii) to have witnessed the commission of the offence,
>
> will be called as a witness at the trial; and
>
> (c) that, for the purpose of avoiding any prejudice to the welfare of the child, the case should be taken over and proceeded with without delay by the Crown Court,
>
> a notice ("notice of transfer") certifying that opinion may be given by or on behalf of the Director to the magistrates' court in whose jurisdiction the offence has been charged.
>
> (2) A notice of transfer shall be given before the magistrates' court begins to inquire into the case as examining justices.

1122 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 15(1).

1123 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 15(2).

1124 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 15(3).

1125 *Magistrates' Court Act 1989* (Vic) s 56(2), Sch 5 cl 15(4).

> (3) On the giving of a notice of transfer the functions of the magistrates' court shall cease in relation to the case ...

Essentially, the section provides for a "notice of transfer" to be given, in cases of alleged sexual offences involving violence or cruelty. The functions of the magistrates' court cease once the notice of transfer has been given. The notice is given if the Director of Public Prosecutions considers three conditions to have been met: the evidence is sufficient to commit the accused; a child is involved as complainant or witness; and the case should be transferred and proceeded with without delay by the Crown Court "for the purpose of avoiding any prejudice to the welfare of the child".

This provision was part of a package of reforms designed to give priority to the prosecution of child abuse cases. However, an evaluation of these reforms has revealed that, in practice, they have had little beneficial effect:[1126]

> The research discovered that these cases, far from receiving priority treatment, actually took longer than the national average to reach disposition … . New statutory procedures to expedite cases were little used and were ineffective in delay reduction. Cases where the new procedures were used actually took longer than others in the study sample.

Two hundred prosecution cases were evaluated. Notices of transfer were issued in only eleven of the one hundred cases studied that were eligible for such a notice:[1127]

> Prosecutors gave a number of different reasons for their reluctance to use notice of transfer provisions:
>
> (a) It is a mistake to consider notice provisions hurriedly, therefore it is difficult to issue them, as required, before a mode of trial decision.
>
> (b) Risk versus speed (notice should not be used to transfer weak cases, because it is a higher risk strategy to bypass committal).
>
> (c) Statements of evidence to be served with the notice may be vulnerable to defence review.
>
> (d) There is confusion as to whether charges can be added or the indictment amended (a relatively common practice) after transfer.
>
> (e) Notice of transfer does not necessarily result in a faster trial ...
>
> (f) These cases are more time-consuming to prepare ...
>
> (g) A decision cannot be made until the full file has been received from the police.

1126 Plotnikoff J and Woolfson R, *Prosecuting Child Abuse: An Evaluation of the Government's Speedy Progress Policy* (1995) at 82.

1127 Id at 48.

(h) Notice should be used only if the defence are delaying matters or ask for an old-style committal.

(i) The removal of the defence's right to require the presence of a child witness at an old-style committal is a far more significant protection, and makes the use of notice of transfer unnecessary in most cases.

(c) Childrens Court

In the Discussion Paper, the Commission put forward for comment the suggestion that committals involving a child complainant be conducted by a Childrens Court magistrate.[1128] It noted that currently the Childrens Court hears committals where children are charged with indictable offences. The Commission expressed the view that, since the Childrens Court is a specialist court established to cater for criminal and welfare matters involving children, a Childrens Court magistrate would be likely to have a special expertise to better facilitate the giving of evidence by a child.

3. EXISTING QUEENSLAND LEGISLATION

There is no legislation in Queensland specifically dealing with the way in which children give evidence in committal proceedings. However, there are three provisions which can affect the way in which the evidence of a child is given at committal.

Firstly, section 110A of the *Justices Act 1886* (Qld) provides that written statements of evidence from prosecution or defence witnesses may be admitted as evidence at committal instead of those witnesses attending at the committal to give evidence or make statements. Such a statement may be admitted if the prosecution and defence agree that the statement-maker is to be present for cross-examination when the statement is tendered in court. However, such statements may not be admitted if the defendant is unrepresented, or if the prosecution and the defence do not agree to their admission. Further, to be admissible, the statement must be signed by the person making it, and must contain a declaration under the *Oaths Act 1867* (Qld) or a written acknowledgment by the person that it is true to the best of the person's knowledge and belief and that the person made the statement knowing that, if it were admitted into evidence, the person may be liable for stating in it anything the person knew was false.

Secondly, section 93A of the *Evidence Act 1977* (Qld) allows for the admission in any proceeding[1129] of an out-of-court statement made by a child witness if the child,

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1128 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 183.

1129 "Proceeding" is defined in s 3 of the *Evidence Act 1977* (Qld) to mean "any civil, criminal or other proceeding or inquiry, reference or examination in which by law or by consent of parties evidence is or may be given, and includes an arbitration." The term would therefore include committal proceedings.

at the time of making the statement, was under the age of 12 years or was "intellectually impaired",[1130] and if the child had personal knowledge of the matters dealt with by the statement. To be admissible, the statement must be contained in a document,[1131] and must have been made either soon after the occurrence of the fact which the evidence is intended to prove or to a person investigating the matter to which the proceedings relate. The child must be available to give evidence in the proceedings. If the statement is admitted, the party seeking to tender it must, if required to do so by any other party to the proceedings, also call the person who recorded it.

Although each of these provisions would enable evidence-in-chief at committal to be given in pre-recorded form, each would also require that the child whose recorded evidence-in-chief had been admitted be available for cross-examination if requested by the accused.

Thirdly, section 21A(2)(e) of the *Evidence Act 1977* (Qld) enables the court, in any proceeding,[1132] to make an order in relation to the evidence of a "special witness"[1133] to the effect that:

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

1130 A child is "intellectually impaired" if he or she has a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment, resulting in substantial reduction of the child's capacity for communication, social interaction or learning and in the need for support: *Evidence Act 1977* (Qld) s 93A(5). As a result of the enactment of the *Criminal Law Amendment Act 2000* (Qld), which received Royal Assent on 13 October 2000, s 93A(5) of the *Evidence Act 1977* (Qld) will be omitted and the definition will be inserted into s 3 of that Act: see *Criminal Law Amendment Act 2000* (Qld) ss 46, 49.

1131 "Document" is expansively defined in s 3 of the *Evidence Act 1977* (Qld). For instance, it encompasses the following: parts of "documents", written documents, photographs, audiotapes and "any other record of information whatever". Section 92(4) provides that a statement contained in a document is made by a person if:

> (a) it was ... dictated or otherwise produced by the person; or
>
> (b) it was recorded with the person's knowledge.

1132 See note 1129 of this Report for the definition of "proceeding".

1133 Section 21A of the *Evidence Act 1977* (Qld) was amended by s 46 of the *Criminal Law Amendment Act 2000* (Qld), which received Royal Assent on 13 October 2000. Section 21A(1)(b), as amended, defines a "special witness" as a child under the age of 12 years or:

> a person who, in the court's opinion -
>
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
>
> (ii) would be likely to suffer severe emotional trauma; or
>
> (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
>
> if required to give evidence in accordance with the usual rules and practice of the court.

"Relevant matter" is defined in s 21A(1) as the person's "age, education, level of understanding, cultural background or relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or another matter the court considers relevant".

Any person entitled to cross-examine the special witness must be given reasonable opportunity to view any portion of the videotape of the evidence relevant to the conduct of the cross-examination.[1134] This provision seems to envisage that the witness will be cross-examined at the proceeding on videotaped evidence-in-chief. However, section 21A(2)(e), although apparently rarely used,[1135] is sufficiently broadly expressed to enable the evidence of a special witness to be recorded in its entirety.

4. ISSUES FOR CONSIDERATION

Consideration of the existing Queensland legislation and the legislation outlined above from other comparable jurisdictions raises the following questions:

- Should the committal process be retained when the complainant or a significant prosecution witness is a child?
- If the committal process is retained, should a complainant or a significant prosecution witness who is a child continue to be required to attend the committal to give evidence?
- If a child witness is to be required to give evidence at committal, should there be provision for the evidence of the child to be pre-recorded?
- Should a preliminary hearing be held to determine issues relating to the evidence of a child witness at committal?

A further issue for consideration is whether committals involving a child complainant should be conducted by a Childrens Court magistrate.

(a) Retaining the committal process

The importance of the role of a committal hearing in the prosecution of an indictable offence has been outlined above.[1136]

Although the procedures adopted at committal hearings have been modified to varying degrees in other Australian jurisdictions in an attempt to accommodate the special needs of child witnesses, no other State or Territory has taken the step of abolishing the committal process when the complainant or a significant prosecution witness is a child.

1134 *Evidence Act 1977* (Qld) s 21A(5A).

1135 See p 159 of this Report.

1136 See pp 232-233 of this Report.

Moreover, in England, where a procedure for bypassing the committal stage was introduced, a subsequent evaluation revealed not only that prosecutors were reluctant to use the new arrangements, but also that, when the new procedure was used, it was ineffective in reducing delays in bringing matters to trial.[1137]

Some of the submissions received by the Commission in response to the Discussion Paper were in favour of bypassing a committal hearing.[1138] However, there was also some resistance to the suggestion. The respondents who favoured retaining the committal process in cases where the complainant or a significant prosecution witness is a child included the former Director of Public Prosecutions,[1139] the Queensland Council for Civil Liberties,[1140] the President of the Childrens Court[1141] and the Bar Association of Queensland.[1142] The present Director of Public Prosecutions also acknowledges the importance of the role of the committal process.[1143]

The former Director of Public Prosecutions noted that:[1144]

> Committal proceedings as presently conducted give the prosecution a real chance to decide whether there are reasonable prospects of proving guilt.

(b) Requiring the child to give evidence at committal

(i) Cross-examination

In Queensland, a child witness whose evidence-in-chief has been pre-recorded will generally have to attend the committal and undergo direct cross-examination if required to do so by the defence.[1145] However, in some other Australian jurisdictions, a child complainant in certain kinds of proceedings is not to be cross-examined at committal unless "the interests of justice cannot be adequately served except by doing so",[1146] or unless there are "special

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1137 See pp 239-241 of this Report.

1138 Submissions 2, 8, 19, 20.

1139 Submission 32.

1140 Submission 40.

1141 Submission 45.

1142 Submission 53.

1143 Meeting between the Director of Public Prosecutions, Ms Leanne Clare, and a representative of the Commission, 25 October 2000.

1144 Submission 32.

1145 See pp 241-243 of this Report.

1146 *Summary Procedure Act 1921* (SA) s 106(3).

reasons",[1147] or "special circumstances"[1148] that justify calling the complainant.

The Report of the Taskforce on Women and the Criminal Code recommended that there should be a prohibition on the calling of child witnesses at committal unless "special reasons" exist.[1149]

Seven of the submissions received by the Commission in response to its Discussion Paper considered that child witnesses should not be required to attend committal proceedings for the purpose of cross-examination.[1150] A community legal service supported moves aimed at reducing "the necessity of the victim giving evidence twice".[1151] Some respondents were concerned that, at committal, children were made particularly vulnerable by a combination of circumstances including inexperience of prosecutors,[1152] behaviour of defence counsel,[1153] and the apparent unwillingness of magistrates to intervene.[1154] Two Senior Crown Prosecutors commented on the potential effect of committal proceedings on child witnesses and on the possible impact of the committal experience on the child's ability to testify effectively at trial:[1155]

> Our experience has been that the committal process is grossly unfair to children. It is considered by defence counsel to be a legitimate tactic to use the committal hearing as an opportunity to intimidate the child. This may have several effects: first, the child may be so traumatised by the experience that s/he refuses to give evidence again at trial; second, the ability of the witness to give reliable evidence is impaired; and third, the witness may appear to a jury at trial to be curiously hostile and defensive towards defence counsel for no apparent reason.

These views were echoed by a PACT volunteer:[1156]

> … the Committal Hearing is the ideal place for the child to have its first bad taste of how the Defence Barrister is going to behave if the accused is recommended to go to Trial, and believe you me they certainly make the most of it …

1147 *Justices Act 1902* (NSW) s 48E(2)(a).

1148 *Justices Act 1902* (WA) s 69.

1149 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 74 at 324.

1150 Submissions 2, 20, 39, 41, 43, 49, 54.

1151 Submission 41.

1152 Submissions 20, 43.

1153 Submissions 20, 43, 49.

1154 Ibid.

1155 Submission 43.

1156 Submission 20.

Four submissions considered that there should be a total prohibition against the presentation of oral evidence by child witnesses at committal proceedings.[1157]

A judge of the District Court of Western Australia, with considerable experience of the legislation in that State which requires a child complainant in certain kinds of cases to give oral evidence or to be cross-examined at committal only if special circumstances exist to justify calling the child,[1158] expressed the view that there is no justification for children being required to give oral evidence at committal:[1159]

> In my view there is much reason why the giving by children of oral evidence at a committal should be forbidden and written statements or pre-recorded interviews used if required and any cross-examination at trial of the child should be based on alleged inconsistency or retraction or amplification in respect of the original statement or interview.

Four submissions also agreed that the video-recorded evidence-in-chief of a child witness should be able to be used at committal proceedings without the child being called to testify at the committal,[1160] although the former Director of Public Prosecutions added the qualification that admissibility should be conditional upon the defendant not wanting the witness called. He also raised the practical issue that, if the child is not called to give evidence until the trial, the child might not be admitted as a witness because of lack of competency.[1161]

The present Director of Public Prosecutions, while acknowledging the importance of the role of the committal process, is in favour of a procedure which avoids the need for a child witness to have to undergo cross-examination at both committal and trial.[1162]

However, six submissions expressed the view that child witnesses should continue to be available for cross-examination at committal.[1163]

According to the former Director of Public Prosecutions:[1164]

1157 Submissions 2, 20, 49, 54.

1158 *Justices Act 1902* (WA) s 69.

1159 Submission 54.

1160 Submissions 19, 20, 32, 39.

1161 Submission 32.

1162 Meeting between the Director of Public Prosecutions, Ms Leanne Clare, and a representative of the Commission, 25 October 2000.

1163 Submissions 12, 19, 32, 40, 53, 55.

1164 Submission 32.

> There should be … no restrictions on cross-examination of the complainant other than the cross-examiner should be required to conduct himself or herself to the extent that he or she would conduct himself or herself before a jury, and further that the questioning should be so conducted as to allow of the witness understanding the import of questions put in cross-examination.

The Queensland Council for Civil Liberties was of the view that "there should be no change to the current position". The submission insisted that cross-examination of a child complainant must continue to be undertaken at committal level:[1165]

> A child needs to be cross-examined at committal (in cases where an accused person denies the allegations) after relevant cross-examination of the police, parents and other persons who have had contact with the child is undertaken.

In relation to difficulties experienced by child witnesses as a result of having to testify and be cross-examined on two separate occasions, the respondent commented:[1166]

> Whilst this may be a difficulty for an individual child witness, it is not such a serious difficulty that there should be any change to the law restricting the right of an accused person to appropriately cross-examine at committal hearing.

The Bar Association of Queensland also favoured retention of the requirement that a child witness be available for cross-examination at committal, despite any resulting trauma to the child:[1167]

> However, in no other area of human experience - be it within the family, school or other social unit - is a young child's word as to serious matters taken at face value. Children are routinely cross-examined, whether it be by a parent after they have made an allegation against a sibling or by teachers after they have made an allegation against a class mate. The tool of cross-examination is as indispensable to the ascertainment of truth in those circumstances as it is to the Courts. The ascertainment of the truth from a child in any such situation may not be without some degree of trauma. Of course, it is desirable to reduce unnecessary trauma. However, any model - such as that adopted in NSW - which removes the right of cross-examination flies in the face of reality, and is to be resisted. [note omitted]

The Association 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. 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

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1165 Submission 40.

1166 Ibid.

1167 Submission 53.

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".[1168]

The President of the Childrens Court stressed the need for caution in considering changes to the committal system. His Honour noted that, in his experience, children are cross-examined at committal proceedings in only a small minority of cases, because failing to plead guilty and then subjecting a child complainant to needless cross-examination would be a relevant factor in the determination of the sentence to be imposed if the accused person is ultimately found guilty. He observed:[1169]

> If I am correct in my belief that cross-examination of children at committal is relatively rare, then great care has to be taken in interfering with this important right of an accused person by amendments to the law which will apply to every case. In my experience, on the rare occasions in which persons accused of offences involving children have been acquitted, it is essentially because of the inconsistencies between the child witness's testimony at committal and trial that causes the jury to have reasonable doubt.

(ii) Evidence-in-chief

In Queensland, the evidence-in-chief of a witness at a committal proceeding does not have to be given by the witness in person. It may be given in the form of a written "hand up" under section 110A of the *Justices Act 1886* (Qld)[1170] or, if the witness is a child under the age of 12 years or has an intellectual disability, it may be given as an out-of-court statement admitted under section 93A of the *Evidence Act 1977* (Qld).[1171]

However, the "hand up" procedure, which was introduced in 1974, may be used only if the accused has legal representation at the committal. The purpose of the condition is to ensure that an accused person does not waive the right to confront his or her accusers face to face without the benefit of legal advice.[1172] In contrast, section 93A of the *Evidence Act 1977* (Qld), which was enacted in 1989, does not impose a similar restriction. This means that, unless there is a statement which is admissible under section 93A, a child witness must give his or her evidence-in-chief in person at committal if the accused is unrepresented.

1168 Ibid.

1169 Submission 45.

1170 See p 241 of this Report.

1171 See pp 241-242 of this Report.

1172 Legislative Assembly (Qld), *Queensland Parliamentary Debates* (2 April 1974) at 3437-3438; Legislative Assembly (Qld), *Queensland Parliamentary Debates* (9 April 1974) at 3711.

Two of the submissions received in response to the Discussion Paper were of the view that this situation should be reviewed.[1173]

(c) Pre-recording the evidence of a child witness

In Chapter 9 of this Report, the Commission makes a number of recommendations about the pre-recording of the evidence of a child witness for presentation at trial. The question therefore arises as to whether these recommendations should also apply to a child who is required to give evidence at a committal proceeding.

There is at present provision under section 21A of the *Evidence Act 1977* (Qld) for the evidence of some child witnesses to be recorded on videotape to be played in a proceeding instead of the direct testimony of the witness.[1174] The legislation is sufficiently widely expressed to encompass a committal proceeding.[1175] However, in practice, section 21A is rarely used to pre-record the evidence of a child witness.[1176] A number of the submissions received by the Commission in response to the Discussion Paper[1177] addressed this issue.[1178] They were supportive of the use of pre-recorded evidence at committal, although the former Director of Public Prosecutions was of the view that the child should be available for cross-examination.[1179] Other respondents were generally in favour of pre-recording the evidence of a child witness, but did not refer specifically to committal proceedings.[1180] However, lack of technical facilities was seen as an obstacle.[1181]

(d) Preliminary hearings

In Queensland, there is no provision at present for a preliminary hearing to be held before a magistrate to determine issues relating to the giving of evidence by a child witness at a committal proceeding.[1182]

1173 Submissions 31, 44.

1174 *Evidence Act 1977* (Qld) s 21A(2)(e). This provision is discussed at pp 242-243 of this Report.

1175 *Evidence Act 1977* (Qld) s 3 (definition of "proceeding").

1176 Submission 32.

1177 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1178 Submissions 20, 32, 49, 54.

1179 Submission 32.

1180 Submissions 37, 45.

1181 Submissions 45, 53.

1182 Although there is provision in the *Criminal Code* for a court to make a number of rulings, including a ruling as to the admissibility of evidence, prior to the commencement of a trial, this provision applies only once an indictment has been presented and therefore is not relevant to committal proceedings. See *Criminal Code* (Qld) s 592A.

In this Report, the Commission has made a number of recommendations about early resolution of preliminary issues relating to the giving of evidence at trial by a child witness.[1183] The question therefore arises as to whether provision should be made for a preliminary hearing to be held prior to a committal. Issues which could be dealt with at such a preliminary hearing include, for example, whether the child is competent to give evidence, whether the child is a "special witness" within the meaning of section 21A of the *Evidence Act 1977* (Qld)[1184] and the facilities to be made available to the child if he or she testifies in person at the committal.

(e) Committal by Childrens Court magistrate

In the Discussion Paper, the Commission recognised that the proposal for all committals involving a child complainant to be conducted by a Childrens Court magistrate may not be feasible. The Commission noted that there is only one full-time Childrens Court magistrate.[1185]

Although there was some support from respondents for the proposal,[1186] there was also recognition that the shortage of Childrens Court magistrates made the idea unworkable.[1187]

5. THE COMMISSION'S VIEW

(a) Retaining the committal process

In considering this issue, the Commission has been conscious of a number of different interests which, at times, may be in conflict with each other.

On the one hand, there is the recognised importance of committals in protecting the rights of accused persons.[1188] There is also the role played by committal procedures in the efficient operation of the criminal justice system. A committal hearing may result in a trial not proceeding, because either the prosecution does not consider the evidence strong enough to obtain a conviction or the accused, having seen the strength of the prosecution case, decides to plead guilty.

1183 See Chapter 11 of this Report.

1184 See note 1133 for the definition of "special witness".

1185 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 183.

1186 Submissions 2, 12, 19, 20, 49, 53.

1187 Submissions 40, 49, 53.

1188 See the discussion at pp 232-233 of this Report.

On the other hand, the interests of children who are complainants or other witnesses should also be considered. It is undesirable that a young witness should be required to give evidence more frequently than is strictly necessary. It is even less desirable that young witnesses should have to undergo cross-examination on a number of occasions.

The submissions which favoured retaining the committal process in cases involving child complainants or witnesses represent a diverse range of interests and experience in the criminal justice spectrum.[1189] In the face of these submissions, the Commission is reluctant to recommend that committal proceedings should not be held in such cases.

However, each of these submissions focused on the benefits to either the prosecution or the accused person of the opportunity provided by the committal hearing to assess the strength of the evidence against the accused. In the view of the Commission, if the committal process is to be retained it will be necessary to ensure that proceedings are conducted in such a way that they are directed not only towards preserving the rights of the accused and facilitating efficiency within the criminal justice system but also towards protecting vulnerable child witnesses.

(b) Requiring the child to give evidence at committal

As a matter of principle, the Commission believes it is desirable to minimise to the greatest possible extent any delay in taking the child's evidence and to avoid the need for the child to repeat his or her evidence on numerous occasions. Although both the existing procedures for taking the evidence of a child witness at committal in the form of an out-of-court statement or a written deposition facilitate timely recording of the child's evidence,[1190] both allow the accused person to require the child to give oral evidence at the committal hearing. As a result, a child may have to make a written or video-recorded statement prior to the committal and then appear to give evidence at both committal and, subsequently, trial. This may be stressful for the child, and may compromise the child's ability to testify effectively at trial. It is open to question whether these outcomes are desirable from the point of view of the welfare of the child or the efficacy of the criminal justice system.

(i) Cross-examination

The Commission believes the essential question to be whether the potential disadvantages of requiring a child witness to attend a committal hearing for the purpose of cross-examination outweigh the detriments arising from absence of opportunity of an accused person to cross-examine the child before the trial.

1189 See p 244 of this Report.

1190 See *Evidence Act 1977* (Qld) s 93A and *Justices Act 1886* (Qld) s 110A. These provisions are discussed at pp 241-242 of this Report.

The members of the Commission have not been able to reach a unanimous conclusion on this issue.

The majority of the members, while acknowledging the role of the committal process in the criminal justice system, has two major reservations about the way in which it operates in relation to child witnesses, particularly in relation to committal proceedings involving charges of sexual or violent offences.

The principal concern of the majority is the effect which having to testify at both committal and trial may have on the child and on the quality of the child's evidence. It considers it undesirable for children who are complainants or witnesses to crimes to be required to give evidence on more than one occasion. It considers such a situation to be unnecessarily stressful for the child, which may adversely affect the child's welfare. It may also mean that the prosecution has to be discontinued because the child is too traumatised by the experience at committal to give evidence on a second occasion. Moreover, even if the child is still willing and able to testify at trial after having been cross-examined at committal, the memory of a committal cross-examination designed to destroy the child's credibility as a witness is likely to shake the child's confidence and may unfairly affect the jury's perception of the child as a witness by making the child appear confused, hostile or defensive.

The majority is also concerned at the effect which aggressive cross-examination of a child witness at committal may have not only on the child but also on the future availability of evidence at trial if the child is so demoralised by the experience that he or she is unable or unwilling to testify a second time. Although there are no official statistics kept of the number of trials which have to be aborted because a complainant refuses or is unwilling to continue with the prosecution of the offence, it is apparent that this situation does in fact occur.

In 1996, the Research and Coordination Division of the Criminal Justice Commission undertook a review of a sample of prosecution files concerning sexual offences alleged to have been committed against children under the age of 17 years. Thirty-seven files, where it was recorded that a *nolle prosequi* had been entered,[1191] were selected from a list of 133 matters where charges had been entered between 1 February 1994 and December 1996.[1192] The 37 files involved 51 complainants and a total of 54 matters.[1193] The review revealed that, in over half the matters examined (30 out of 54), a *nolle* was entered in all charges. The main reason given (12 matters) was that the complainant refused to proceed or it was determined by the prosecutor and/or

1191 See note 1100 of this Report for an explanation of the term "*nolle prosequi*".

1192 The chosen method was to select every third file on the list, but some were excluded because the matter proceeded to trial or sentence.

1193 There was more than one offender against some complainants.

the parents of the child that it was not in the child's interests to continue. In three matters, reasons other than the child's reaction to giving evidence at the committal were given for the discontinuation of proceedings. Of the remainder, most were subject to a *nolle* before trial.[1194]

The majority does not have concrete evidence that the practice of inappropriate cross-examination of complainants is widespread. A respondent to the Discussion Paper expressed concern that the debate on this issue had become somewhat "skewed" by the lack of hard evidence by way of transcripts as to how child witnesses are in fact cross-examined. The respondent suggested that the Commission "seek out the widest possible examples of problem transcripts in order that the real extent of any actual problem, as opposed to anecdotal evidence, can be properly assessed."[1195] Unfortunately, the Commission does not have the resources to identify, obtain and analyse the transcripts of all committals involving child witnesses. However, 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 put 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 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.

1194 Unpublished analysis of Office of the Director of Public Prosecutions files undertaken by the Criminal Justice Commission, reproduced with the permission of the Director of the Research and Prevention Division of the Criminal Justice Commission, Dr David Brereton.

1195 Submission 40A.

A few moments later the magistrate repeated:

> 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.

The majority is of the view that the fact that harassment of child witnesses during cross-examination occurs at all is unacceptable. To the extent that defence counsel engage in intimidatory cross-examination and to the extent that cross-examination of this kind is not always able to be effectively checked by the presiding magistrate, there is clearly a need for attitudinal change on the part of at least some of the people involved. Despite the submission by the Bar Association of Queensland that there are many other measures that can be taken to improve the lot of young witnesses before the right to cross-examination at committal is removed,[1196] the majority is not persuaded that this change will take place in the absence of legislative reform which is directed specifically at the conduct of the committal process.

It is therefore the view of the majority that, in committal proceedings involving charges of sexual or violent offences, cross-examination of a child witness at committal should be significantly restricted. The majority believes that this can be done in most cases without unduly prejudicing the accused. The purpose of the committal in providing an opportunity for the defence to learn the case against the accused will not be compromised. The child's evidence-in-chief, together with the evidence of the other prosecution witnesses relied on at the committal, will be sufficient to inform the accused of the case to be answered if the accused is ordered to stand trial. In most cases it will also be possible to achieve the principal purpose of the committal procedure - to ensure that an accused is not brought to trial unless there is a prima facie case[1197] - on the basis of the child's evidence-in-chief and the evidence of the other prosecution witnesses, without requiring the child to undergo cross-examination.

The majority acknowledges, however, that situations may arise where, on the face of the evidence-in-chief of a child witness at committal, there is an apparent need for the child's evidence to be tested by cross-examination at that time rather than only at the trial. It may be, for example, that a magistrate would be unable to decide whether or not to commit the accused for trial

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1196 Submission 53. See Chapter 13 of this Report for the Commission's recommendations in relation to the power of a court to restrict inappropriate cross-examination of a child witness.

1197 *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J (with whom Aickin J agreed) at 99. See p 232 of this Report.

without the assistance likely to be provided by the child's answers to particular questions. There may also be other situations where the interests of justice override the desirability of not subjecting the child to the need to give evidence on more than one occasion. The majority would wish to retain the flexibility to deal with such situations.

Accordingly, the majority is of the view that there should be a presumption against the cross-examination of a child witness at committal, subject to a discretion in the court to order that the child be cross-examined if the court is satisfied that there are substantial reasons for doing so. The majority agrees with the approach adopted by Pidgeon J of the Supreme Court of Western Australia in relation to the legislation in that State:[1198]

> I would see the right to cross-examine as an important right at the trial where guilt or innocence of the accused person is determined. It is a different question whether there should be a further right to cross-examine at a [committal] which to an extent is a gathering of the evidence. … Parliament, in the case of young children, has clearly restricted it at this stage on the basis that the potential harm outweighs any good at a stage that is not the actual trial. It would not be proper to approach the question at a [committal] on the basis that there is an enshrined right to cross-examine. The proper approach must be that it is a very serious decision, not to be lightly made, to require a child to be in court, when it is not the actual trial, resulting in the child having to give evidence and be liable to be cross-examined, on two occasions. The court must have regard to the potential harm to the child of this procedure and to the limited benefit of cross-examination at this stage.

However, the majority view is less restrictive than the effect which has been given to the Western Australian legislation referred to earlier in this Chapter.[1199] In Western Australia, it has been held that the term "special circumstances", in the context of an application to cross-examine a child at committal, should be restricted to questions affecting the magistrate's own decision whether or not to commit the accused for trial:[1200]

> The committal for trial is the initial decision that the magistrate must make. I would not see matters relating to the trial as providing special circumstances as the undesirability of the child having to be present at the (committal), in addition to having to be present at the trial, is paramount.

The majority considers that, although an accused person should be required to demonstrate "substantial reasons" why cross-examination of a child witness should be permitted at committal, those substantial reasons should not be confined to matters affecting the magistrate's decision whether or not to commit the accused for trial. There may be matters affecting, for example, a potential ground of defence - such as the existence of an alibi - at trial, which

1198 *Angus v Di Lallo* (1994) 11 WAR 93 at 102.

1199 See p 237 of this Report.

1200 *Angus v Di Lallo* (1994) 11 WAR 93 per Pidgeon J at 102.

may, in the circumstances of a particular case, constitute sufficient reason to grant the accused leave to cross-examine the child witness at committal. The majority considers that it would be desirable, in the interests of consistency, for the magistrates to develop a set of guidelines as to what would constitute sufficient reason to grant leave to cross-examine a child witness.

One member of the Commission is unable to concur in the view of the majority that there should be a restriction on cross-examination of child witnesses at committal.

The dissenting member, Mr P McMurdo QC, recognises that there is a particular potential in a committal for an abuse of the process of cross-examination, where the cross-examiner is not inhibited by the presence of the jury or by the impact that an abusive cross-examination could have upon the verdict. He acknowledges that, even if the cross-examination is conducted properly, in many cases the ordeal for the child in having to undergo the process of giving evidence twice - that is, at committal and at trial - could be very serious for the welfare of the child, and that the prospect of the child's having to testify twice might result in the withdrawal of the complaint.

However, in Mr McMurdo's view, these factors are outweighed by the proper purpose served by committal proceedings as a protection against an abuse of process resulting from the prosecution of a case brought without reasonable basis. Mr McMurdo considers that "the view that there can be no injustice or unfairness to an accused in putting him on trial without reasonable grounds merely because he will ultimately be acquitted" should be "emphatically rejected".[1201] He stresses the importance of the opportunity to cross-examine Crown witnesses at committal as an ingredient in the committal process and notes the description of the loss of opportunity to cross-examine at committal as "the most serious detriment which absence of prior committal proceedings imposes upon an accused".[1202] He believes it is significant that submissions favouring a retention of the right to cross-examine came not only from respondents professionally involved on the defence side, but also from the former Director of Public Prosecutions, the President of the Childrens Court and from the Bar Association of Queensland, whose membership includes both prosecution and defence counsel.

Mr McMurdo is of the view that the governing consideration should be that the accused be given an opportunity to properly and fairly test the prosecution case to avoid a potential miscarriage of justice, and that in many, although not all, cases that can be done only by cross-examination. He considers that, in many cases, cross-examination is essential to test the evidence of the complainant and thereby to assess the existence or otherwise of reasonable grounds for putting the accused on trial. He points to the advantages, as

1201 *Barton v The Queen* (1980) 147 CLR 75 per Gibbs ACJ and Mason J at 96-97.

1202 Id per Stephen J at 106.

indicated by various submissions received by the Commission, of a properly conducted cross-examination: a trial which could result in unfairness to an accused, trauma to a child complainant and unnecessary expense could be avoided if, at committal, the prosecution case is shown to be weak; on the other hand, where the evidence as tested by cross-examination at committal reveals a relatively strong case, it is more likely that a trial would be avoided by a plea of guilty.

Mr McMurdo is not persuaded that, if the right to cross-examine at committal were restricted, the majority recommendation for magistrates to be given a discretion to allow cross-examination where there are substantial reasons for so doing could sufficiently preserve the benefits referred to above. In his view, there is potential for error in the exercise of such a discretion and, if the right to cross-examine a child witness is to depend on a favourable exercise of the magistrate's discretion, there are likely to be cases where there is an injustice from a refusal of the cross-examination. In addition, he considers that in many cases it would be unfair to the accused to have to reveal, when applying for the magistrate's leave, the particular basis for, or the proposed course of, the cross-examination.

Mr McMurdo maintains the view that to retain the right of cross-examination would not be to deprive a magistrate of any power to prevent a cross-examination which is an abuse of process involving, for example, unduly repetitious or bullying questioning.

(ii) Evidence-in-chief

Consistently with the view of the majority set out above to the effect that, at a committal involving a charge of a sexual or violent offence, an accused should not generally be able to cross-examine a child witness, the Commission does not consider that it should be necessary for a child witness to attend such a committal proceeding to give direct evidence-in-chief, even if the accused does not have legal representation.

The Commission is therefore of the view that section 110A(4) of the *Justices Act 1886* (Qld) should be amended to provide that, where a child is to give evidence at a committal proceeding involving a charge of a sexual or violent offence, the "hand up" procedure may be used for the evidence of the child, even if the accused is unrepresented.

The Commission believes that this view is supported by the fact that section 93A of the *Evidence Act 1977* (Qld), which was enacted subsequently to the *Justices Act* provision, and which was introduced specifically in order to facilitate the giving of evidence by children and other vulnerable witnesses, does not contain a similar restriction against the use of the provision when the accused does not have legal representation.

(c) Pre-recording of the evidence of a child witness

The existing legislation already allows for the evidence-in-chief of a child witness to be presented in a pre-recorded form at committal.[1203] However, at present it may be necessary for the child to attend the committal to be cross-examined on his or her pre-recorded evidence-in-chief.[1204] In this Chapter, a majority of the members of the Commission has expressed the view that, at a committal proceeding for a charge of a sexual or violent offence, a child witness should not generally be cross-examined.[1205] Consistently with this approach, the existing provisions should be amended to ensure that the child's pre-recorded evidence-in-chief may be admitted at committal even though the child is not required to undergo cross-examination.

Although the majority favours a general presumption against cross-examination of a child witness at committal proceedings for certain offences, it acknowledges that, in some circumstances, cross-examination of a child witness may be necessary.[1206] Where closed-circuit television is not available, pre-recording the child's evidence so that the child does not have to attend the committal proceeding in person may significantly reduce the stress experienced by the child and therefore help the child to testify as effectively as possible. On the other hand, pre-recording of the child's evidence in its entirety for committal may be logistically difficult to arrange, requiring the availability of a magistrate, the prosecutor, the defence counsel and the accused. It would impose some additional strain on court resources, and would increase the cost of representation for an accused.

In Chapter 9 of this Report, the Commission expresses the view that the legislation dealing with the giving of evidence by a child witness should provide the court with the greatest possible degree of flexibility to decide the fairest and most appropriate method of hearing the evidence of a child witness in the circumstances of a particular case.[1207] Consistently with this view, the Commission believes that, on balance, the legislation should specifically provide for the pre-recording of the whole of a child's evidence, including cross-examination, for presentation at committal. The Commission recognises that, for a number of reasons, pre-recording a child's evidence for committal may not always be possible. However, it considers that, in an appropriate case, the legislation should permit the child's evidence to be presented in this way.

1203 *Evidence Act 1977* (Qld) ss 21A(2)(e), 93; *Justices Act 1886* (Qld) s110A.

1204 Although the terms of s 21A(2)(e) of the *Evidence Act 1977* (Qld) would seem to provide for the cross-examination also to be pre-recorded, this happens infrequently, if at all. The Commission has been informed that, in practice, s 21A(2)(e) is rarely used. See pp 242-243 of this Report.

1205 See pp 252-254 of this Report.

1206 See pp 254-256 of this Report.

1207 See p 173 of this Report.

(d) Preliminary hearing

The Commission acknowledges that a requirement to hold a preliminary hearing prior to a committal proceeding may be seen as adding to the criminal justice system a layer of complexity which does not presently exist and as increasing the workload of magistrates.

However, in the view of the Commission, resolving as many preliminary matters as possible before the hearing takes place would, rather than increasing complexity, streamline procedures and make the committal process more efficient. If threshold questions could be determined prior to the commencement of the committal, less time would be taken up by them during the proceeding, and the committal would be able to proceed with fewer delays, resulting in more effective use of court time. The Commission believes that the resources devoted to a preliminary hearing would be at least compensated for by the consequential time saving at the committal itself.

A further, and perhaps more important, advantage of a preliminary hearing from the point of view of a child witness would be that the child would know in advance of the committal the extent of his or her involvement in the process, and the conditions which would apply if he or she were required to give evidence. For example, in this Chapter a majority of the members of the Commission has expressed the view that a child witness should be required to undergo cross-examination at committal only if the court is satisfied that there are substantial reasons why the child should be cross-examined. If an application for leave to cross-examine a child witness could be determined at a preliminary hearing, the result would be not only that the actual committal could proceed more smoothly, but that the child would know in advance of the committal whether or not he or she would have to attend. The child would be spared the anxiety of not knowing until the commencement of the committal whether he or she would be required for cross-examination. Where substantial reasons are shown why the child should be cross-examined at committal, the preliminary hearing could be used to determine issues relating to the presentation of the child's evidence.

The Commission is therefore of the view that issues relating to the evidence of a child witness at a committal proceeding should, where practicable, be determined at a preliminary hearing.

(e) Committal by Childrens Court magistrate

The Commission remains of the view that it would not be feasible for all committals involving a child complainant to be heard by a Childrens Court magistrate.

6. RECOMMENDATIONS

The Commission recommends that:

12.1 The committal process should be retained in cases involving child complainants.

12.2 Section 110A(4) of the *Justices Act 1886* (Qld) should be amended to provide that, at a committal proceeding for a charge of a sexual offence or an offence of violence, the "hand up" procedure may be used, even though the accused does not have legal representation.

12.3 At a committal proceeding for a charge of a sexual offence or an offence of violence, a child who is the complainant or other prosecution witness should be cross-examined only if there are substantial reasons for requiring the child to undergo cross-examination.[1208]

12.4 The term "substantial reasons" should not be restricted to questions affecting the magistrate's decision whether or not to commit the accused for trial.

12.5 Magistrates should develop guidelines for determining what constitutes substantial reasons for permitting cross-examination of a child witness at a committal proceeding involving a charge of a sexual offence or an offence of violence.

12.6 Section 93A of the *Evidence Act 1977* (Qld) and section 110A of the *Justices Act 1886* (Qld) should be amended to allow the evidence-in-chief of a child witness to be presented in pre-recorded form at a committal proceeding for a charge of a sexual offence or an offence of violence, even though the child is not required to attend the committal to undergo cross-examination.

12.7 Legislative provision should be made for the pre-recording of the evidence of a child who is a complainant or other prosecution witness and who is required to undergo cross-examination at a committal proceeding for a charge of a sexual offence or an offence of violence.

12.8 Issues relating to the giving of evidence at committal by a child witness should, where practicable, be determined at a preliminary hearing.

1208 This is a recommendation of a majority of the members of the Commission. Mr P McMurdo QC dissents from this recommendation. Mr McMurdo's view is set out at pp 256-257 of this Report.

12.9 There should not be a requirement that committals involving child complainants be heard by a Childrens Court magistrate.

CHAPTER 13

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:[1209]

> … 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.[1210] In a proceeding for certain specified sexual offences, there are limits on cross-examination of the complainant about his or her previous sexual history.[1211] 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.[1212] 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,[1213] or a question it considers is asked only for the purpose of insulting or annoying the witness or is needlessly offensive in form.[1214]

2. CROSS-EXAMINATION OF CHILD WITNESSES

Given that one of the purposes of cross-examination is to cast doubt on the credibility of an opposing witness, the experience of being cross-examined is likely to be difficult for any witness. Child witnesses who, depending on their age, may have

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1209 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 17430.

1210 *Evidence Act 1977* (Qld) s 15A.

1211 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4.

1212 *Evidence Act 1977* (Qld) s 20.

1213 *Evidence Act 1977* (Qld) s 21(1).

1214 *Evidence Act 1977* (Qld) s 21(2).

a significantly lower level of linguistic development and emotional maturity than adult witnesses, are often particularly vulnerable to the adversarial nature of cross-examination:[1215]

> The language of cross-examination … takes little account of the characteristics of the emerging language user. Structures, vocabulary, tone and context reinforce the status of the child as an inferior and immature speaker of the language. These language differences between the developing and the developed speakers are entrenched and strengthened by the ways in which questions are asked. … The child witness is expected to conform and then respond to an unknown pattern of language without the prior experience, the developmental capacity or the linguistic maturity necessary to understand it.

An Australian study has highlighted the way in which child witnesses can be confused by the way language is used in cross-examination:[1216]

> During cross-examination the capacity of language is most often used, not for assessing or displaying the veracity of a proposition, but for calling into question the credibility of the child victim witness. Cross-examination is that part of court proceedings where the interests and rights of the child are most likely to be ignored and sacrificed. Evidence is displayed to discredit the witness and thus bolster the case for the defendant. The techniques used are all created with words, since they are the only currency of the court …

The authors analysed twenty-six transcripts of evidence given under cross-examination in child abuse cases by children aged between 6 and 15 years of age. From the transcripts they identified a number of linguistic techniques which were commonly used by lawyers in cross-examining child witnesses and which, because they are departures from common usage patterns, "pose the greatest degree of difficulty for unsophisticated and young language users".[1217] The techniques identified included:

- the inclusion of multiple negatives;[1218]
- juxtaposition of unrelated topics;[1219]
- nominalisation of an action so that neither the agent nor the recipient of the action is mentioned;[1220]

1215 Brennan M and Brennan R, *Strange Language: Child Victims Under Cross Examination* (1988) at 71.

1216 Id at 5.

1217 Id at 62.

1218 Id at 62-64.

1219 Id at 64-65.

1220 Id at 65-66.

- multifaceted questions;[1221]
- unclear or confused questions;[1222]
- specific and difficult vocabulary, particularly unfamiliar legal terminology.[1223]

While age-inappropriate questioning is not necessarily confined to cross-examination, studies conducted in Scotland and the United States found that cross-examinations contained a significantly higher proportion of vocabulary that a child witness did not understand than did examinations-in-chief.[1224] Similarly, an American analysis of a number of transcripts of the evidence of a 5 year old witness to an alleged murder concluded that:[1225]

> No adult conducted an error-free examination, although the three judges and two district attorneys … did a credible job for the most part. The defense attorneys, on the other hand, had a terrible time, and the irony was that they seldom seemed to know it. Occasionally they did recognize that they had become hopelessly entangled in their own questions … but more often than not, they continued along their way, in the apparent assumption that because the child was giving them a *response* of some kind, she was giving them an *answer* to their questions.

The author identified age-inappropriate words and expressions, complex syntactic constructions and general ambiguity as three areas of potential problems with respect to the ability of a child witness to understand and answer a question.[1226]

Another technique used in cross-examination is to attempt to make the witness's evidence appear inconsistent and therefore unreliable. One way of doing this is for the cross-examiner to focus on inconsistency in a matter of minor detail:[1227]

> Cross-examiners often attempt to reveal faulty memory about trivial detail in the hope that evidence of such lapses will spill over to encourage disbelief of the central point of the witness's recollections.

Children may be more susceptible than adults to this kind of questioning. Although studies show that even quite young children can remember, over long periods of time, directly experienced events that are important to them, for less personally relevant or indirectly experienced events their memory may become less consistent

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1221 Id at 66-67.

1222 Id at 67-68.

1223 Id at 68-70.

1224 Flin RH, Bull R, Boon J and Knox A, "Children in the Witness Box" in Dent H and Flin RH (eds), *Children as Witnesses* (1992) 167 at 174.

1225 Walker AG, "Questioning Young Children in Court: A Linguistic Case Study" (1993) 17 *Law and Human Behavior* 59 at 67.

1226 Ibid.

1227 McGough LS, *Child Witnesses: Fragile Voices in the American Legal System* (1994) at 226.

over time.[1228] By confusing a child witness about peripheral details, it may be easier to suggest in cross-examination that the child's account of events is inaccurate:[1229]

> … psychological research suggests that it is harder by leading questions to get children to give false answers about the features of an incident that seemed to them to be of central importance, than it is about matters which seemed unimportant to them at the time. Yet it is considered as proper for counsel to put leading questions to witnesses about peripheral matters - the colour of an attacker's shoes, for example - as it is to put them about the central question of what the person did. There can be little doubt that a cross-examination that presses for details of peripheral matters, far from being an engine for the discovery of truth, produces a large amount of unreliable information.

Cross-examination may also attempt to portray a child witness as inconsistent because the child has given different accounts of events at different times. The cross-examiner may point to facts that are included in one version but not in another in an attempt to prove that the child's evidence is untrue. However, accounts given by very young child witnesses may appear inconsistent because, although young children can recall information, they may remember different aspects of an event on different occasions. It has been suggested that apparent inconsistencies in a child's memory may be the result of the child's difficulty in expressing his or her memories verbally, rather than an indication that the child's account is inaccurate:[1230]

> It is possible that children are able to remember a great deal about a past event but have difficulty putting what they remember into words. This process may be difficult enough that it exhausts young children's ability to recount all that they remember.

A cross-examiner may also be able to confuse a child witness by repeating the same question a number of times. The child may interpret repetition of the question as an indication that the first answer was incorrect and that an alternative answer is sought:[1231]

> … children are more prone than adults to change answers to yes-no questions, specific leading questions, and non-leading questions following negative feedback.

In Chapter 12 of this Report, the Commission referred to examples of aggressive and intimidatory cross-examination of child witnesses at committal.[1232] 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

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1228 Fivush R and Shukat J, "Content, Consistency, and Coherence of Early Autobiographical Recall" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 11.

1229 Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 273.

1230 Fivush R and Shukat J, "Content, Consistency, and Coherence of Early Autobiographical Recall" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 20.

1231 Poole DA and White LT, "Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 40.

1232 See pp 253-254 of this Report.

framed in such a way as to confuse the child and to unfairly destroy the child's credibility as a witness.

A number of the submissions received by the Commission in response to its Discussion Paper[1233] commented on the way in which children are cross-examined and the effect that cross-examination frequently has on child witnesses.[1234] A child psychiatrist observed that hostile, confusing or insensitive styles of cross-examination:[1235]

> … limit the quality and quantity of information children provide. These styles are often used with children in court proceedings in order to discredit their evidence. They constitute a form of emotional abuse.

One respondent expressed the view that:[1236]

> Because of the enormous difference in power between a young child on the witness stand and an adult, educated, trained and experienced in matters of law, … judges have a responsibility to manage the cross examination process much more …

The failure of the court to intervene to prevent questioning designed to reflect unfairly on the credibility of a child witness was seen as confirmation that the court saw the child as lying.[1237]

As a result of inappropriate cross-examination, a child's evidence may be distorted and the child may wrongly be perceived as an unreliable and untruthful witness. The fact that certain kinds of questions can be used by a cross-examiner to reflect unfairly on the worth of the evidence of a child witness may have a number of consequences. There may be an adverse impact on the child's emotional state, and a child who has been abused may feel that he or she has been revictimised by the court system. The welfare of the child may therefore be put at risk. Moreover, if the child is traumatised by cross-examination at a committal proceeding, he or she may refuse to testify at trial or the prosecution may decide not to proceed with the case in order to spare the child the ordeal of further cross-examination.[1238]

1233 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1234 Submissions 12, 20, 31, 33, 38, 39, 44, 49.

1235 Submission 39.

1236 Submission 33.

1237 Ibid.

1238 See pp 252-253 of this Report.

3. EXISTING POWERS TO RESTRICT INAPPROPRIATE CROSS-EXAMINATION

Section 21 of the *Evidence Act 1977* (Qld) enables the court to disallow certain questions, including questions asked in cross-examination. It applies to questions that the court considers to be indecent or scandalous or intended only to insult or annoy the witness, and questions that do not relate to a fact in issue in the proceeding or are needlessly offensive in form.

In addition to this legislative power to restrict inappropriate cross-examination, courts have an inherent power which would also enable them to control the way in which witnesses are cross-examined. Judicial officers have an inherent authority, which does not depend on legislation, "to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner".[1239] The exercise of the court's inherent jurisdiction has been described as "part of the power of the court to carry out the very role required of it by law - that is, to administer justice".[1240] Although the scope of the inherent jurisdiction of the courts is largely undefined, one aspect has been identified as powers exercised to "ensure convenience and fairness in legal proceedings".[1241] In the present context of the receipt by courts of the evidence of children, the jurisdiction could be expected to include ensuring that a child witness is not disadvantaged by cross-examination which is intimidatory or otherwise age-inappropriate.

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 section 21 of the *Evidence Act 1977* (Qld) is too narrowly framed to prevent improper questioning.[1242] It does not enable the court to disallow a question which, in view of the witness's age or lack of maturity and experience, is misleading or confusing, rather than offensive or insulting, nor does it entitle the court to take into consideration any particular factors such as cultural differences, language difficulties or level of education, which may affect the ability of a child witness to comprehend and respond to the question.

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

1239 Jacob IH, "The Inherent Jurisdiction of the Court" [1970] *Current Legal Problems* 23 at 29.

1240 de Jersey, the Hon Mr Justice P, "The Inherent Jurisdiction of the Supreme Court" (1985) 15 *Queensland Law Society Journal* 325 at 330.

1241 Mason K, "The Inherent Jurisdiction of the Court" (1983) 57 *Australian Law Journal* 449.

1242 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 314-315.

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.

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.[1243]

The Commonwealth and New South Wales legislation provides:[1244]

> **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.[1245] 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.[1246]

1243 *Evidence Act* (NT) s 21B(2).

1244 *Evidence Act 1995* (Cth) s 41; *Evidence Act 1995* (NSW) s 41.

1245 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 73.2 at 320.

1246 *Evidence Act* (NT) s 21B(2).

In Part 1 of this Report,[1247] the Commission expressed the view that 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 child's age, level of understanding and culture, is intimidating, overbearing, confusing, misleading, unduly repetitive or phrased in inappropriate language. The Commission agreed, however, that the Commonwealth and New South Wales provision was a suitable model and could be redrafted to accommodate the Commission's concerns.

It was 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.[1248]

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

However, in the view of the Commission, 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*:[1249]

> 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

1247 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000) at 5-7.

1248 See *Mooney v James* [1949] VLR 22 at 28-29.

1249 (1990) 93 ALR 79 per Mason CJ, Brennan, Deane, Toohey and McHugh JJ at 86.

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.

5. RECOMMENDATION

In Part 1 of this Report, the Commission made the following recommendation:[1250]

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

Improper questioning of child witness[1251]

(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.

6. *CRIMINAL LAW AMENDMENT ACT 2000* (QLD)

The *Criminal Law Amendment Act 2000* (Qld) received Royal Assent on 13 October 2000. Section 45 of that Act has taken the Commission's recommendation into consideration. It provides that the existing section 21 of the *Evidence Act 1977* (Qld) be repealed and replaced with a new provision.

1250 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000) at 8.

1251 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.

When it comes into operation the new section 21 of the *Evidence Act 1977* (Qld), as amended by the *Criminal Law Amendment Act 2000* (Qld), will enable a court to disallow a question that it considers to be an improper question. An "improper question" is one that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive.[1252] In deciding whether a question is an improper question, a court must take into account a number of factors, including the witness's cultural background and level of understanding.[1253]

1252 *Evidence Act 1977* (Qld) s 21(4).

1253 *Evidence Act* 1977 (Qld) s 21(2)(b).

CHAPTER 14

UNREPRESENTED LITIGANTS

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:[1254]

> 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.[1255] 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:[1256]

1254 *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.

1255 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: Effects of Closed-Circuit Television on Children's Accuracy and Jurors' Perceptions" in Zaragoza MS et al (eds), *Memory and Testimony in the Child Witness* (1995) at 217. See also Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office Central Research Office, 1995) at 75.

1256 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) England

In England, the Pigot Committee recommended that an unrepresented accused should be prohibited from cross-examining a child witness.[1257] An attempt was made to implement the Pigot Committee's recommendation by virtue of section 34A of the *Criminal Justice Act 1988*.[1258] However, that provision, which has been criticised by commentators,[1259] has been repealed and replaced by Chapter II of Part II of the *Youth Justice and Criminal Evidence Act 1999*.[1260]

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.[1261] There is a further prohibition against direct cross-examination by a person who is accused of certain specified offences.[1262] 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 videorecording 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,

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1257 Home Office (UK), *Report of the Advisory Group on Video Evidence* (The Pigot Committee, 1989) at para 2.30.

1258 This section was inserted by the *Criminal Justice Act 1991* s 55(7).

1259 See for example Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 95-96.

1260 Sections 34, 35, 38, 39 and 40 of the *Youth Justice and Criminal Evidence Act 1999* came into force on 4 September 2000, but only in respect of proceedings instituted on or after that date. The repeal of s 34A of the *Criminal Justice Act 1988* will not affect the operation of that section in relation to proceedings instituted before 4 September 2000: Statutory Instrument 2000 No 2091 (c. 55).

1261 *Youth Justice and Criminal Evidence Act 1999* s 34.

1262 The specified offences include various sexual offences against children, as well as some other offences against children, such as kidnapping.

depending on the offence with which the accused is charged.[1263] The prohibition in these situations is mandatory and the court has no discretion in relation to it.

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.[1264] 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.[1265] 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.[1266] If a legal representative is appointed by the court, the costs of such representation are to be met out of central funds.[1267]

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.[1268]

1263 *Youth Justice and Criminal Evidence Act 1999* s 35.

1264 *Youth Justice and Criminal Evidence Act 1999* s 36.

1265 *Youth Justice and Criminal Evidence Act 1999* s 38.

1266 *Legal Aid Act 1988* s 21(3)(e), inserted by the *Youth Justice and Criminal Evidence Act 1999* s 40(2).

1267 *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.

1268 *Youth Justice and Criminal Evidence Act 1999* s 39.

(b) New Zealand

The *Evidence Act 1908* (NZ) prohibits a defendant in a sexual abuse case from personally cross-examining a child complainant.[1269] 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.[1270] 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.[1271] 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.[1272]

(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.[1273] "The proper administration of justice" includes ensuring that the interests of witnesses under the age of 18 years are safeguarded.[1274] 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.[1275]

(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.[1276] In such cases, it was considered desirable for questions to be put through

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1269 *Evidence Act 1908* (NZ) ss 23C(b)(i), 23F(1).

1270 *Evidence Act 1908* (NZ) s 23C(b)(i).

1271 *Evidence Act 1908* (NZ) s 23F(3).

1272 *Evidence Act 1908* (NZ) s 23F(5).

1273 *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*.

1274 *Criminal Code* (Canada) s 486(1.1). See note 1273 of this Report.

1275 *Criminal Code* (Canada) s 486(2.3).

1276 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[1277] or other person approved by the court.[1278] The Western Australian Commission recommended:[1279]

> 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.

In Western Australia there are judicial guidelines for the operation of the special procedures available for the taking of children's evidence.[1280] These guidelines envisage that the intermediary will be the Judge's Associate.[1281]

(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:[1282]

> 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:[1283]

1277 The role of a child communicator is discussed in Chapter 4 of this Report.

1278 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 6.44.

1279 Id at para 6.47.

1280 *Evidence of Children and Special Witnesses: Guidelines for the Use of Closed-Circuit Television, Videotapes, and Other Means for the Giving of Evidence* (May 1998).

1281 Id at 26.

1282 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.1.2.

1283 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:[1284]

(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.[1285] 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.[1286] 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.[1287] 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.[1288] The provision applies whether closed-circuit television or similar technology is used and whether alternative arrangements are otherwise used.[1289]

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

1284 Id at para 8.1.5.

1285 *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).

1286 *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).

1287 *Evidence (Children) Act 1997* (NSW) s 28(3).

1288 *Evidence (Children) Act 1997* (NSW) s 28(4).

1289 *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.[1290]

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,[1291] there is no restriction on the right of an accused to personally cross-examine witnesses, including witnesses who are children. The former Director of Public Prosecutions has expressed the view that:[1292]

1290 *Evidence (Children) Act 1997* (NSW) s 25(4).

1291 *Evidence Act 1977* (Qld) s 21(2).

1292 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[1293] 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.[1294] The Children's Commission observed:[1295]

> 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 Families, Youth and Community Care Queensland 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:[1296]

> … 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.

Families, Youth and Community Care Queensland emphasised the risks posed by the secret nature of an abusive relationship:[1297]

1293 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1294 Submissions 4, 20, 31, 33, 34, 42, 49, 53.

1295 Submission 31.

1296 Submission 53.

1297 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:[1298]

> 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.[1299] 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.[1300]

However, the President of the Childrens Court was of the view that:[1301]

> 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.[1302] 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.

(i) Witnesses who should be protected

The New Zealand legislation applies only to child witnesses who are complainants.[1303] In New South Wales, the legislation applies to any child

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1298 Submission 42.

1299 Submissions 2, 20, 31, 32, 33, 34, 40, 41, 42, 49, 53.

1300 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 327. See also Recommendation 75 at 328.

1301 Submission 45.

1302 See pp 273-278 of this Report.

1303 See p 275 of this Report.

witness other than the accused.[1304] In Canada[1305] and in Western Australia,[1306] the prohibition against direct cross-examination by the accused protects any child witness. In England, 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.[1307]

The submissions received by the Commission in response to the Discussion Paper[1308] generally supported restriction of the right of an accused to personally cross-examine a child witness.[1309] However, the Bar Association of Queensland referred more specifically to children who are complainants.[1310]

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.[1311]

(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.[1312] In New South Wales[1313] and Western Australia,[1314] 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.[1315] In

1304 See p 277 of this Report.

1305 See p 275 of this Report.

1306 See p 276 of this Report.

1307 See pp 273-274 of this Report.

1308 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1309 Submissions 2, 20, 31, 33, 34, 40, 41, 49.

1310 Submission 53.

1311 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 75 at 328.

1312 See p 275 of this Report. See also note 1273 of this Report.

1313 See p 277 of this Report.

1314 See p 276 of this Report.

1315 See p 275 of this Report.

England, 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.[1316]

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.[1317]

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.[1318]

(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.[1319] 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.[1320] In England, the legislative prohibition applies in proceedings for sexual offences, offences of violence, kidnapping, false 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.[1321] The Western Australian provision applies in proceedings for any offence.[1322] 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.[1323]

1316 See pp 273-274 of this Report.

1317 Submission 53.

1318 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 75 at 328.

1319 *Evidence Act 1908* (NZ) ss 23C, 23F(1).

1320 See p 275 of this Report.

1321 See pp 273-274 of this Report.

1322 See p 276 of this Report.

1323 See p 277 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.

Four submissions received in response to the Discussion Paper[1324] addressed this issue. A PACT volunteer submitted that the prohibition should apply to all offences.[1325] Families, Youth and Community Care Queensland also thought that it should apply to all offences, but expressed a fall back position of sexual and violent offences.[1326] The former 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.[1327] 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.[1328]

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.[1329]

(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

1324 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1325 Submission 20.

1326 Submission 49.

1327 Submission 32.

1328 Submission 53.

1329 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) Recommendation 75 at 328.

questions which the accused or defendant requests the person to put to the child.[1330]

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.[1331] 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.[1332]

In Canada and England, 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 English 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 representative to act for the accused for the purpose of cross-examining the witness.[1333] 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.[1334]

A number of the submissions received by the Commission in response to the Discussion Paper[1335] addressed the issue of who should conduct the cross-examination on behalf of an unrepresented accused.[1336] All of these submissions were generally in favour of questions on behalf of an unrepresented accused being directed through an intermediary.

1330 See p 277 of this Report.

1331 See p 276 of this Report.

1332 Submission 54.

1333 See p 274 of this Report.

1334 See p 275 of this Report.

1335 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1336 Submissions 2, 20, 31, 32, 33, 34, 40, 41, 49, 53, 54.

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".[1337]

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,[1338] another that the intermediary should be independent,[1339] and a third that the identity of the intermediary should be accepted and approved by the court.[1340] Three respondents, including the former 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.[1341] The former Director of Public Prosecutions added that such an appointment should be made, even against the wishes of the accused.[1342]

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

(ii) Costs of professional representation

In England, 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.[1343] 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.[1344]

1337 Submission 38.

1338 Submission 2.

1339 Submission 34.

1340 Submission 41.

1341 Submissions 20, 32, 40.

1342 Submission 32.

1343 See p 274 of this Report.

1344 Submission 40.

(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.[1345]

The High Court of Australia has described the common law immunity as based on considerations of public policy, in particular:[1346]

- 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 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 England, 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:[1347]

> 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.[1348] There is no equivalent provision in other jurisdictions.

1345 *Giannarelli v Wraith* (1988) 165 CLR 543. In England, however, the immunity has been abolished in relation to both civil and criminal proceedings: *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543. The immunity has never been recognised in Canada: *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

1346 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.

1347 See note 1260 of this Report.

1348 See p 275 of this Report.

The former Queensland Director of Public Prosecutions expressed the view that the existing legislation in New South Wales[1349] and in Western Australia[1350] 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". Families, Youth and Community Care Queensland also agreed that the court should have power to limit questioning by the accused through the intermediary.[1351] 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)[1352] 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.[1353]

(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.[1354] 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.[1355] In England, 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.[1356] The legislation in New Zealand[1357] and in Western Australia[1358] does not provide any exceptions to the prohibition against cross-examination of a child witness by the accused.

1349 See pp 277-278 of this Report.

1350 See p 276 of this Report.

1351 Submission 49.

1352 See p 262 of this Report.

1353 Submission 53.

1354 See p 275 of this Report.

1355 See p 277 of this Report.

1356 See pp 273-274 of this Report.

1357 See p 275 of this Report.

1358 See p 276 of this Report.

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[1359] and the Bar Association of Queensland[1360] 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.[1361]

There is also provision for a judicial warning in the legislation in England. 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 is not prejudiced by the use of alternative arrangements for the cross-examination of a child witness.[1362]

Four of the submissions received by the Commission in response to the Discussion Paper[1363] 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.[1364] 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

1359 Submission 41.

1360 Submission 53.

1361 See pp 277-278 of this Report.

1362 See p 274 of this Report.

1363 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1364 Submissions 31, 32, 49, 53.

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.

(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.[1365] 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.

1365 See pp 280-281 of this Report.

(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 England the legislation applies only to certain offences of a violent or sexual nature or, in England, under child protection legislation.[1366]

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 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

1366 See p 282 of this Report.

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.[1367]

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

1367 See pp 283-284 of this Report.

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 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.[1368] 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.[1369]

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[1370] 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.

1368 See p 274 of this Report.

1369 The situation of an unrepresented party wishing to cross-examine a child witness in person is not likely to be a frequent occurrence. The former 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 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 324.

1370 *Giannarelli v Wraith* (1988) 165 CLR 543. See p 286 of this Report.

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.[1371] 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.

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.[1372] The former Queensland Director of Public Prosecutions criticised the existing legislation in New South Wales and Western Australia for not containing a similar power.[1373]

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.[1374] The Commission sees no need for the inclusion of a

1371 For example, a lawyer owes a duty of confidence to his or her client.

1372 See pp 286-287 of this Report.

1373 Submission 32.

1374 See p 292 of this Report.

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,[1375] 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.[1376]

(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.

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.

1375 *Evidence Act 1977* (Qld) s 21. See p 262 of this Report.

1376 See Chapter 13 of this Report.

5. RECOMMENDATIONS

In Part 1 of this Report,[1377] the Commission made the following recommendations.[1378]

The Commission recommends that:

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

14.2 The *Evidence Act 1977* (Qld) should be amended to prohibit, in a civil proceeding arising from the commission of a sexual offence or an offence of violence or in a proceeding for a domestic violence order, direct cross-examination of a witness under the age of 18 years by a defendant who does not have legal representation.

14.3 The *Evidence Act 1977* (Qld) should be amended to confer on the court a discretion to prohibit, in any other proceeding, direct cross-examination of a witness under the age of 18 years by a party who does not have legal representation if, in the opinion of the court, the ability of the child to testify effectively under cross-examination would be adversely affected if the cross-examination were to be conducted by the unrepresented party in person.

14.4 The *Evidence Act 1977* (Qld) should be amended to provide that, where an unrepresented party to a proceeding is prohibited from personally cross-examining a child witness, the court must:

(a) direct the unrepresented party to arrange for a legal representative to act for the purpose of cross-examining the witness; and

(b) require the unrepresented party to notify the court within a specified period whether a legal representative is to act for that purpose.

1377 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000).

1378 Id at 56-58.

14.5 The *Evidence Act 1977* (Qld) should be amended to provide that if, by the end of the specified period the unrepresented party has notified the court that no legal representative is to act for the purpose of cross-examining the child witness, or no notification has been received, the court must appoint a qualified legal representative to cross-examine the witness in the interests of the unrepresented party.

14.6 The *Evidence Act 1977* (Qld) should be amended to provide that the legal representation referred to in Recommendations 14.4 and 14.5 should be provided at public expense.

14.7 The *Evidence Act 1977* (Qld) should be amended to provide that a legal representative who is appointed by the court to cross-examine a child witness on behalf of an unrepresented party should have the same immunity as the legal representative would have had if he or she had been engaged by that party.

14.8 The *Evidence Act 1977* (Qld) should be amended to provide that where, in a trial by jury, an accused who is unrepresented is prohibited from personally cross-examining a child witness, the court must warn the jury that:

(a) no inference adverse to the accused should be drawn from the appointment of a legal representative to conduct the cross-examination; and

(b) the evidence given as a result of the cross-examination should be given no greater or lesser weight because the cross-examination was conducted by a legal representative whose appointment was ordered or made by the court.

6. *CRIMINAL LAW AMENDMENT ACT 2000* (QLD)

The *Criminal Law Amendment Act 2000* (Qld) received Royal Assent on 13 October 2000. Section 47 of that Act has taken the Commission's recommendations into consideration. It provides for the insertion into the *Evidence Act 1977* (Qld) of a series of new provisions relating to cross-examination of protected witnesses by a person who does not have legal representation.

When they come into operation, the new sections 21L to 21S of the *Evidence Act 1977* (Qld) will broadly reflect the Commission's recommendations with the following exceptions:

- they apply only to cross-examination by an unrepresented accused in a criminal proceeding, whereas the Commission's recommendation included a prohibition on cross-examination by an unrepresented litigant in a civil proceeding arising from the commission of a sexual offence or an offence of violence and in a proceeding for a domestic violence order;

- they apply only to child witnesses under the age of 16 years, unless the witness is an intellectually impaired person, the alleged victim of certain specified offences, or the alleged victim of certain other specified offences whom the court considers to be likely to be disadvantaged as a witness or to suffer severe emotional trauma if cross-examined by the accused in person, whereas the Commission's recommendations applied to all witnesses under the age of 18 years.

CHAPTER 15

EXPERT EVIDENCE

1. INTRODUCTION

Traditionally, the role of a witness is to give evidence about facts that are within the knowledge of the witness because the witness has personally experienced or observed them. It is for the judge or jury or for the magistrate, in coming to a decision about the questions in issue, to draw inferences and conclusions from the evidence which has been given by the witnesses in any particular proceeding. A witness is therefore not generally permitted at common law to state opinions or to draw inferences from the facts to which he or she has testified, because to do so would be to usurp the function of the tribunal of fact. This is known as the "ultimate issue" rule.

However, there are some matters about which a judge or magistrate or the ordinary members of the public who make up a jury are not qualified to draw inferences or conclusions from the evidence, because they lack the necessary knowledge, expertise or experience. In such a situation, an expert witness may be called and may, in certain circumstances, state his or her opinion about the matter in question in order to assist the tribunal of fact:[1379]

> A trier can be assumed to possess that general knowledge commonly held, and in many cases this will be sufficient to enable it to draw the appropriate inferences from the facts before it. But where the trier's knowledge runs out, there remains no option but to turn to those who do have the requisite knowledge and experience, experts, and ask them for guidance.

The admissibility at common law of expert evidence about a matter will depend, firstly, on whether the matter is one about which expert evidence can be called and, secondly, whether the proposed witness is appropriately qualified to give evidence about the matter.

Two conditions must be satisfied for a matter to be one about which expert evidence can be called. Expert evidence can be called only about a matter which is beyond the range of ordinary human knowledge and experience, and which therefore has to be explained by a person with special expertise so that the tribunal of fact can make an informed judgement about it:[1380]

1379 Ligertwood A, *Australian Evidence* (3rd ed, 1998) at 450.

1380 *Clark v Ryan* (1960) 103 CLR 486 per Dixon CJ at 491, citing JW Smith in the notes to *Carter v Beohm* 1 Smith LC (7th ed, 1876) at 577.

> … the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgement upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it.

Conversely, if the matter is one which is within the knowledge or experience of an ordinary person, expert evidence about it is unnecessary and the opinion of an expert witness on that matter is inadmissible. This is known as the "common knowledge" rule. The basis of the rule has been expressed to be that:[1381]

> The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; but there is a danger that they may think it does.

For expert evidence to be admissible on a matter, the matter must also fall within a recognised field of study. Expert evidence will not be admissible unless:[1382]

> … the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court.

Even if the evidence of an expert witness satisfies the above criteria, it still may not be admissible at common law. In order to be admissible, all evidence, including the evidence of an expert witness, must have probative value:[1383]

> The general rule is that all evidence that is sufficiently relevant to the issue before the court is admissible and all evidence that is irrelevant or insufficiently relevant is excluded.

Evidence which lacks the requisite degree of relevance is not probative merely because it is given by an expert.

Further, in a criminal trial, the court has a discretion to exclude evidence which would otherwise be admissible if the probative value of that evidence is outweighed by its prejudicial effect on the mind of the jury.[1384] The discretion will be exercised when the weight of the evidence when compared to the extent of the risk of prejudice to the accused is slight. For evidence to be rejected on this basis:[1385]

1381 *R v Turner* [1975] 1 QB 834 at 841.

1382 *R v Bonython* (1984) 38 SASR 45 per King CJ at 46-47.

1383 Halsbury's Laws of Australia, (Butterworths, looseleaf) Vol 13 [195-95]. See also *Hollington v F Hewthorn and Co Ltd* [1943] KB 587 at 594.

1384 *Driscoll v The Queen* (1977) 137 CLR 517 per Gibbs J at 541; *R v McLean and Funk, ex parte Attorney-General* [1991] 1 Qd R 231 per Carter J at 252.

1385 Freckleton I and Selby H, *The Law of Expert Evidence* (1999) at 267.

> … there must be a significant discrepancy between the quality of the evidence and the adverse impact that it is likely to have upon evaluation of the case against the accused.

2. EXPERT EVIDENCE AT COMMON LAW IN PROCEEDINGS INVOLVING CHILD WITNESSES

Although expert evidence is frequently given about children in cases such as family law or care and protection proceedings, where the interests of children are at stake, it appears that little use is currently made of expert opinion evidence about factors affecting child witnesses. In relation to child complainants in criminal proceedings, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission attribute this situation partly to the fact that the prosecution cannot generally call a witness - expert or otherwise - solely for the purpose of bolstering the credibility of the complainant, and partly to the effect of the "common knowledge" rule and the "recognised body of knowledge" rule.[1386]

There have been a number of attempts in Australian jurisdictions to rely on expert evidence to explain the behaviour of child complainants who have alleged that they have been sexually abused. For example, it has been sought to introduce expert evidence to show why a child continued a relationship with the alleged offender and delayed in making a complaint,[1387] and why, once a complaint had been made, the complainant gave inconsistent accounts of what had happened.[1388]

These attempts have, to date, been largely unsuccessful. It has been recognised that:[1389]

> It is a clear rule … that where the credibility of a witness is attacked, evidence is admissible for the purpose of rehabilitating the credibility of that witness. There is no reason why the rehabilitating evidence should not be expert evidence if the subject matter is a fit subject of expert opinion. … If the typical responses of sexually abused children is a fit subject of expert evidence, there is no reason why it should not be admitted for the purpose of rehabilitating the credit of the alleged victim.

For the most part, however, courts in Australian jurisdictions have been reluctant to concede that evidence about the typical behaviour and responses of child victims of sexual abuse satisfies the criteria for the admissibility of expert evidence. For example, in *R v C*,[1390] the South Australian Court of Criminal Appeal unanimously

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1386 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at paras 14.74, 14.75.

1387 *R v C* (1993) 70 A Crim R 378.

1388 *R v F* (1995) 83 A Crim R 502.

1389 *R v C* (1993) 70 A Crim R 378 per King CJ at 383. See also *R v J* (1994) 75 A Crim R 522 per Brooking J (with whom Southwell and McDonald JJ agreed) at 536-537.

1390 (1993) 70 A Crim R 378.

held that expert evidence about aspects of the behaviour of the complainant in an incest case had been wrongly admitted at trial. King CJ, with whom Mohr J agreed, held that the "possible explanation of the behaviour of an alleged victim of child sexual abuse in continuing a relationship with the alleged offender and refraining from making a complaint"[1391] was not a proper subject for expert evidence and should not have been admitted. They found, firstly, that the evidence did not establish that there was a scientifically accepted body of knowledge concerning the behaviour of child sexual abuse victims[1392] and, secondly, that the subject matter of the evidence was not outside the ordinary experience of members of the jury:[1393]

> Jurors are not ignorant of the behaviour and reactions of children or of the effect on such behaviour and responses, of family relationships. The effect of the relationship with the parent on a child's willingness to report abuse, is not, to my mind, beyond the capacity of a juror to appreciate without the assistance of psychological evidence. Neither is the desire of a child for the family relationship to continue and to avoid family disruption, nor is the influence of force or threats, or the beguiling influence of a shared secret, beyond a juror's unaided understanding.

The effect of child abuse was distinguished from the response of a victim of domestic violence:[1394]

> In *Runjanjic*,[1395] the Court was dealing with the responses of adults in a domestic situation. Juries would be likely to expect certain responses from those adults. The specialised body of knowledge concerning "learned helplessness" tended to falsify the ordinary expectations. Its conclusions were so surprising and so contrary to ordinary expectations that it was thought that juries might well be misled if they did not have the assistance of the expert evidence. The situation which faced the jury in the present case was quite different. [note added]

On the other hand, the Victorian Court of Criminal Appeal rejected the distinction drawn in the South Australian case between domestic violence and child abuse.[1396] According to Brooking J, with whom Southwell and McDonald JJ agreed:[1397]

> As to this distinction, I make the respectful comment that it seems to me that one could say that jurors were not ignorant of the behaviour and reactions of wives, or de facto wives, or of the effect of family relationships on such behaviour and responses and (as King CJ said with regard to children) that most jurors will have experienced, and all will have observed, relationships between man and wife and man and de facto wife. It seems to me also that it might be said that jurors are no more likely, and indeed are less likely, to have experienced or observed cases of child sexual abuse

1391 Id at 381.

1392 Id at 384.

1393 Id at 384-385.

1394 Id at 384.

1395 *Runjanjic and Kontinnen* (1991) 56 SASR 114.

1396 *R v J* (1994) 75 A Crim R 522.

1397 Id at 536.

> than cases of wife battering. In other words, my present strong disposition is not to accept the distinction drawn by King CJ in this regard between the battering of women and the sexual abuse of children.

Although the Court held that expert evidence had been wrongly admitted at trial, its decision was based on the inadequacy of the evidence in the particular case. The decision therefore leaves open the possibility that, in Victoria, expert evidence on the responses of victims of child abuse may be admissible in an appropriate case, as being outside the knowledge and experience of the jury.

This approach would be consistent with the views expressed by the majority of the High Court of Australia in *Murphy v The Queen*.[1398] Three members of the court rejected the proposition that there was a general principle of law to the effect that expert evidence about the psychological state of a witness could be admitted only if there was evidence of abnormality which would take the matter out of the range of the experience of an ordinary juror.[1399] Referring to an observation in an earlier English case that "Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life",[1400] two members of the majority noted:[1401]

> There are difficulties with such a statement. To begin with, it assumes that "ordinary" or "normal" has some clearly understood meaning and, as a corollary, that the distinction between normal and abnormal is well recognized. Further, it assumes that the commonsense of jurors is an adequate guide to the conduct of people who are "normal" even though they may suffer some relevant disability. And it assumes that the expertise of psychiatrists (or, in the present case, psychologists) extends only to those who are "abnormal". None of these assumptions will stand close scrutiny.

Expert evidence has been held to be admissible in child abuse cases in a number of Canadian jurisdictions, on the basis that the matters dealt with by the evidence were not within the ordinary knowledge and experience of the jury, and that the expert had special knowledge outside that of the jury.[1402]

3. MODIFICATION OF THE COMMON LAW BY LEGISLATION

The common law position with respect to expert evidence about child witnesses has been modified by legislation in a number of jurisdictions both in Australia and overseas. Statutory provisions have been enacted in relation to the admissibility of expert evidence concerning not only the credibility of child witnesses but also, in

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1398 (1989) 167 CLR 94.

1399 Id per Mason CJ and Toohey J at 111 and per Deane J at 127.

1400 *R v Turner* [1975] 1 QB 834 per Lawton LJ at 841.

1401 *Murphy v The Queen* (1989) 167 CLR 94 per Mason CJ and Toohey J at 111.

1402 See for example *J(FE)* (1990) 53 CCC (3d) 64; *C(RA)* (1990) 57 CCC (3d) 522.

some jurisdictions, such matters as the competency of a child to give evidence and the most appropriate way for the evidence of a child witness to be taken.

(a) Credibility

At common law, expert evidence about the credibility of a witness is not generally admissible because it would trespass on the fact-finding role of the judge or jury, and would therefore contravene the "ultimate issue" rule:[1403]

> It is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion. … A judge or jury who simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself [to] determine the credibility of a witness.

Nonetheless, there are exceptions to this rule which permit expert evidence about the credibility of a witness to be admitted at common law in certain circumstances, provided that it otherwise satisfies the criteria for the admissibility of expert evidence.

For example, expert evidence may be admitted about the psychological state of a witness in order to explain conduct on the part of the witness which may be relevant to the witness's credibility. This kind of evidence may be particularly useful for discrediting a witness for an opposing party. In *Farrell v The Queen*,[1404] for example, the accused sought to call in his defence expert psychiatric evidence about the complainant. The psychiatrist was to give evidence of his opinion, based on hospital and medical records relating to the complainant, that the complainant suffered from a number of mental disorders the likely consequences of which were relevant to an assessment of the complainant's truthfulness. The trial judge excluded some of this evidence. The High Court of Australia held, by majority, that the evidence should have been admitted:[1405]

> … in principle, while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on psychological and physical conditions which may lead to certain behaviour relevant to credibility, is admissible, provided that (1) it is given by an expert within an established field of knowledge relevant to the witness's expertise; (2) the testimony goes beyond the ordinary experience of the trier of fact; and (3) the trier of fact, if a jury, is provided with a firm warning that the expert cannot determine matters of credibility and that such matters are the ultimate obligation of the jury to determine.

On the other hand, evidence - including expert evidence - cannot be adduced by a party to a proceeding if the only purpose of the evidence is to re-inforce the

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1403 *R v Marquard* [1993] 4 SCR 223 per McLachlin J (with whom Iacobucci and Major JJ agreed) at 248.

1404 (1998) 194 CLR 286.

1405 *Farrell v The Queen* (1998) 194 CLR 286 per Kirby J at 300. See also per Gaudron J at 292 and per Callinan J at 322.

credibility of a witness for that party.[1406] However, where the credibility of a witness has been impugned, for example under cross-examination, evidence is admissible to rehabilitate the witness:[1407]

> Where a witness's credit is attacked on the ground of conduct apparently inconsistent with the testimony, the witness's credit may be rehabilitated by re-examination designed to explain the apparent inconsistency.

Evidence that is called to restore the credibility of a witness need not come from the same witness. It may be elicited from a third person and, if the subject matter is a fit subject of expert opinion, there is no reason why the rehabilitating evidence should not be expert evidence.[1408]

In Australia, both the Commonwealth and New South Wales *Evidence Acts* include a number of provisions of general application which affect the common law rules relating to the use of expert evidence. In particular, these Acts abolish both the "ultimate issue" and the "common knowledge" rules.[1409] The abolition of these rules overcomes the problem that, at common law, expert evidence about the ways in which children may respond to abuse is inadmissible because it concerns the question which the trier of fact has to decide or because, in the view of the court, it is about a matter that is within the experience of the trier of fact.

However, expert evidence to explain the behaviour of a child witness will not necessarily be admissible under the Commonwealth and New South Wales Acts. The Acts retain the common law rule that evidence cannot be admitted solely for the purpose of bolstering the credibility of a witness.[1410] They also provide a number of specific exceptions to the credibility rule. The exception which deals with the rehabilitation of a witness whose credibility has been impugned does not apply to expert evidence. It applies only to re-examination of the witness concerned or to the admission of a prior consistent statement of the witness, in order to counter suggestions that the witness has made a prior inconsistent statement or that the evidence given by the witness has been fabricated or re-constructed or is the result of suggestion.[1411] In this respect, the Commonwealth and New South Wales *Evidence Acts* are both more restrictive than the common law.

There is at present no provision in the *Evidence Act 1977* (Qld) which would allow expert evidence to be admitted in relation to the credibility of a child witness.

1406 *R v Turner* [1975] 1 QB 834 at 842.

1407 Byrne D and Heydon JD, *Cross on Evidence* (Australian edition, looseleaf) at para 19175; *Wojcic v Incorporated Nominal Defendant* [1969] VR 323; *R v Phair* [1986] 1 Qd R 136.

1408 *R v C* (1993) 70 A Crim R 378; *R v J* (1994) 75 A Crim R 522; *R v F* (1995) 83 A Crim R 502.

1409 *Evidence Act 1995* (Cth) s 80; *Evidence Act 1995* (NSW) s 80.

1410 *Evidence Act 1995* (Cth) s 102; *Evidence Act 1995* (NSW) s 102.

1411 *Evidence Act 1995* (Cth) s 108; *Evidence Act 1995* (NSW) s 108.

In New Zealand, the legislation allows expert evidence to be admitted on a number of issues in sexual abuse cases involving child complainants.[1412] The assumption is that expert evidence provides a context to aid the jury in assessing the child's credibility. It has been observed that expert evidence on these issues "will usually be especially important in assisting the jury to evaluate the truth of the complainant's evidence".[1413] The issues on which expert evidence is admissible include:[1414]

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

However, the ultimate issue rule still applies and, in giving evidence in relation to any of these issues, an expert witness may not express an opinion about the guilt or innocence of the accused or the truthfulness of the complainant.[1415]

(b) Competency

The *Evidence Act 1977* (Qld) allows a court to receive the unsworn evidence of a child witness, unless the court is satisfied that the child does not have sufficient intelligence to give reliable evidence.[1416] When a court is determining whether a child under the age of 12 years is competent to give unsworn evidence, expert evidence "relating to the level of intelligence of the child including the child's powers of perception, memory and expression or relating to any other matter relevant to the child's ability to give reliable evidence" is admissible.[1417]

1412 *Evidence Act 1908* (NZ) ss 23C, 23G.

1413 *R v Tait* [1992] 2 NZLR 666 at 668.

1414 *Evidence Act 1908* (NZ) s 23G(2).

1415 Pipe M and Henaghan M, "Accommodating Children's Testimony: Legal Reforms in New Zealand", in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) at 155.

1416 *Evidence Act 1977* (Qld) s 9. Section 9 is to be repealed and replaced by a provision that applies to a witness of any age who does not understand the meaning of an oath: *Criminal Law Amendment Act 2000* (Qld) s 44. This would include a child or young person between the ages of 11 and 18 years. As at 13 October 2000, this amendment had not commenced.

1417 *Evidence Act 1977* (Qld) s 9A(a). Section 9A is to be repealed and replaced with a provision which will allow expert evidence to be admitted about these matters if the court is deciding whether a person who does not understand the meaning of an oath has sufficient intelligence to give reliable evidence, or if the evidence of a child under the age of 12 years is admitted: *Criminal Law Amendment Act 2000* (Qld) s 44. As at 13 October 2000, this amendment had not commenced.

However, in this Report, the Commission has recommended that the current test of competency for a child witness to give evidence should be replaced.[1418] If the Commission's recommendation is implemented, the existing provision will no longer be relevant in relation to use of expert evidence to determine the competency of a child witness.

Both the Commonwealth and New South Wales *Evidence Acts* permit the court, in determining the competency of a witness, to "inform itself as it thinks fit".[1419]

In England, legislation introduced in 1999 provides that expert evidence is admissible in criminal proceedings on the questions of competence to give evidence and competence to give sworn evidence.[1420]

(c) Taking the child's evidence

Section 21A of the *Evidence Act 1977* (Qld) deals with the evidence of special witnesses, but does not expressly state whether expert evidence can be admitted to determine whether a person qualifies as a "special witness". However, the Queensland Court of Appeal has suggested that there is no reason why expert evidence should not be admitted on this issue.[1421]

In England, where legislation provides for a "special measures" direction to be made with respect to the giving of evidence by a vulnerable witness in a criminal proceeding,[1422] the legislation also permits rules of court to be made to provide for expert evidence to be given in connection with an application for, or for varying or discharging, such a direction.[1423] Rules of court may also be made to make provision for the use of expert evidence in connection with an application for, or for discharging, a direction prohibiting an unrepresented accused from cross-examining certain witnesses in person.[1424]

1418 See Chapter 7 of this Report.

1419 *Evidence Act 1995* (Cth) s 13(7); *Evidence Act 1995* (NSW) s 13(7).

1420 *Youth Justice and Criminal Evidence Act 1999* ss 54(5), 55(6). As at 13 October 2000, these provisions had not commenced.

1421 *R v FAR* [1996] 2 Qd R 49 per Fitzgerald P at 52.

1422 *Youth Justice and Criminal Evidence Act 1999* ss 16(1), (2), 17(1), (2), 19. As at 13 October 2000, these provisions had commenced only for the purpose of the exercise of any power to make rules of court.

1423 *Youth Justice and Criminal Evidence Act 1999* s 20(6)(c). As at 13 October 2000, this provision had commenced only for the purpose of the exercise of any power to make rules of court.

1424 *Youth Justice and Criminal Evidence Act 1999* ss 36, 37(5)(c). As at 13 October 2000, these provisions had commenced only for the purpose of the exercise of any power to make rules of court.

4. CONCERNS ABOUT THE USE OF EXPERT EVIDENCE

In addition to concerns about expert witnesses unduly influencing or even usurping the role of the finder of fact, the question of increased admissibility of expert evidence gives rise to a number of other considerations. These considerations are largely derived from the adversarial nature of the justice system.

Within the adversarial system, the traditional approach to the presentation of expert evidence has been for the opposing parties to appoint and to seek to admit the evidence of their own experts. As a consequence, an expert witness may be perceived as and, indeed, may assume the role of, an advocate for the cause of the party on whose behalf he or she appears. An expert may be reluctant to put forward evidence which is not favourable to that party, and may testify selectively in an attempt to show the party's case in the best possible light. In such a situation, the risk is not only that the integrity of the expert's evidence may be compromised, but that the trial will become a "battle of the experts" and that the trier of fact will be faced with the task of deciding which of the conflicting expert opinions to accept. The New Zealand Law Commission noted:[1425]

> Conclusions and opinions are only reliable if they come from independent people who are not partisans. Injustice sometimes results when experts interpret their role as being to support the case of the party who hired them and only bring to light evidence supporting the other party when they are specifically asked. … it is still common to find expert witnesses expressing opinions for one side which are diametrically opposed to the opinions of the experts for the other side.

The practice of each of the parties appointing its own expert is also time and resource intensive. Further, it may result in unfairness to one of the parties, since the party which has the greater financial resources is likely to be advantaged by increased access to expert opinion.

5. ISSUES FOR CONSIDERATION

There are a number of issues which arise in the context of the use of expert opinion about the evidence of child witnesses. They include:

- whether legislation should provide broader scope for the admission of expert evidence relating to the evidence of children;
- if so, on what kinds of issue should the evidence of expert witnesses be admissible; and

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1425 Law Commission (NZ), Discussion Paper, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP 18, 1991) para 90 at p 37.

- how expert witnesses should be appointed and their conduct regulated.

(a) Admissibility of expert evidence

In their 1997 Report on children in the legal process, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission strongly favoured the admissibility of expert evidence on issues affecting the reliability of a child witness's evidence, particularly in cases involving allegations of abuse. They recommended that:[1426]

> Expert opinion evidence on issues affecting the perceived reliability of a child witness should be admissible in any civil or criminal proceeding in which abuse of that child is alleged.

In the Discussion Paper, this Commission sought submissions on the question of whether the range of issues upon which an expert may be called to give evidence in sexual abuse cases should be broadened.[1427] A majority of the submissions which addressed the issue favoured more extensive use of expert evidence.[1428]

However, three respondents were against extending the use of expert evidence in relation to child witnesses.[1429] The Bar Association of Queensland submitted:[1430]

> The receipt of expert evidence in the trial proper and before the jury, as to the reliability of a particular child complainant, would completely undermine the role of the jury in a criminal trial. A jury ultimately forms a powerful fact finding tribunal. A jury is well qualified to decide issues of credibility in relation to child witnesses. There is a considerable risk that a psychiatrist or psychologist would, in this setting, give unduly enthusiastic or partisan expert evidence.

The Bar Association was also opposed to a broader approach to expert evidence in child abuse cases on the following grounds:[1431]

- In order for an accused to challenge a prosecution expert witness in relation to the reliability of a child's evidence, the accused's expert would have to interview the child so as to be able to express an opinion. It would be likely that the child, by the time of the trial, would have been required to relive the allegations, in whole or in part, on many occasions. Such a potentially

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1426 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 101 at 329.

1427 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 86.

1428 Submissions 9, 19, 25, 31, 39, 41, 44, 49, 54.

1429 Submissions 32, 40, 53.

1430 Submission 53.

1431 Ibid.

protracted process could not be in the interests of the child and would not be in the interests of justice.

- Extended use of expert evidence would add to the cost of conducting criminal trials, both as to the cost of the experts and as to longer trials.

- Extended use of expert evidence would have the potential to significantly delay the finalisation of criminal trials, in an area where a speedy resolution of charges is in the interests of a young complainant.

(b) Issues on which expert evidence should be admissible

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, in coming to their conclusion that expert evidence should be admissible in cases involving allegations of child abuse, expressed the view that:[1432]

> The rules of evidence should clearly indicate that expert evidence, on such issues as patterns of children's disclosures in abuse cases or the effects of child abuse on children's behaviour or demeanour in or out of court, is admissible to explain why general assumptions about the behaviour of a child witness or a certain line of cross-examination might not reflect adversely on a particular child witness's credibility.

They recommended that:[1433]

> In particular, evidence that may assist the decision maker in understanding patterns of children's disclosure in abuse cases or the effects of abuse on children's behaviour and demeanour in and out of court should be able to be admitted.

They further recommended that all Australian States and Territories should be encouraged to institute reforms, particularly the abolition of the common knowledge and ultimate issue rules.[1434]

The New Zealand Law Commission, although advocating a cautious approach to the admissibility of expert evidence,[1435] proposed that all expert evidence reflecting on credibility or truthfulness should be admissible provided that it met the test of "substantial helpfulness" proposed by that Commission.[1436] The "substantial helpfulness" test requires that, to be admissible, expert opinion evidence must "help the court or jury to understand other evidence in the proceeding or to ascertain any

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1432 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.77.

1433 Id, Recommendation 101 at 329.

1434 Ibid.

1435 Law Commission (NZ), Discussion Paper, *Evidence Law: Character and Credibility* (NZLC PP 27, 1997) at 27.

1436 Id at 29.

fact that is of consequence in the determination of the proceeding".[1437] However, one of the submissions received by this Commission in response to the Discussion Paper rejected the proposed New Zealand test as too restrictive, since the court, in making its decision about the admissibility of the evidence, "may well be doing so under the influence of a significant myth".[1438]

Among the submissions which favoured a broader approach to the admissibility of expert evidence in relation to child witnesses, there was particular support for the abolition of the "common knowledge" rule:[1439]

> … "common knowledge" with respect to child abuse is often wrong, and expert evidence can be myth dispelling.

Families, Youth and Community Care Queensland observed that:[1440]

> Child sexual abuse is a taboo subject, little discussed or understood in the community. The result of this is widely held misconceptions and ignorance about sexual abuse. This is the case both for members of juries and the legal profession. Expert evidence provides an opportunity to furnish an appropriate context for deliberations in the legal process. In its absence, legal professionals and lay people are confronted with the challenge of unravelling complex human behaviour without a framework for understanding the genesis and maintenance of such behaviour, particularly the behaviour of child victims which may to many people appear to reduce their credibility as witnesses. For example, behaviours of children related to the abuse such as criminal offending, self-harming or recanting their disclosure are all behaviours that would be presented as undermining the credibility of the child. However, these behaviours are all consistent with that of an abused child.

These observations confirm the view that "social framework evidence" may be necessary in child abuse cases "not because the subject is not a matter of common knowledge but rather because what is 'known' about it is simply wrong".[1441]

Three respondents to the Discussion Paper supported the existing New Zealand legislative model.[1442] One submission supported adoption of the recommendation of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission that both the "common knowledge" and "ultimate issue" rules should be abolished.[1443] However, another, while supporting a more liberal

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1437 Law Commission (NZ), Discussion Paper, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP 18, 1991) at 52.

1438 Submission 39.

1439 Ibid.

1440 Submission 49.

1441 Norris J and Edward M, "Myths, Hidden Facts & Common Sense: Expert Opinion Evidence and the Assessment of Credibility" (1995) 38 *Criminal Law Quarterly* 73 at 83.

1442 Submissions 19, 25, 39. The New Zealand legislation is discussed at p 306 of this Report.

1443 Submission 41.

approach to the use of expert evidence, was not convinced of the desirability of abolishing the "ultimate issue" rule.[1444]

(c) Appointment of an expert witness

Some of the concerns outlined earlier in relation to the use of expert evidence[1445] may be able to be overcome by the way that expert witnesses are appointed and their conduct regulated by court practices and rules of procedure.

(i) Experts appointed by the parties

The Federal Court of Australia has taken steps to ensure that the reliability of expert evidence called by the parties in cases heard in that court is not compromised by the adversarial nature of the proceedings. The Chief Justice of the Court has issued a Practice Direction containing guidelines for expert witnesses and imposing an obligation on practitioners to give a copy of the guidelines to any expert witness they propose to retain for the purpose of giving evidence in a proceeding in the court.[1446] The guidelines clearly state the role of the expert. They provide that:

- An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
- An expert witness is not an advocate for a party.
- An expert witness's paramount duty is to the Court and not to the person retaining the expert.

The guidelines attempt to minimise the possibility of an expert witness adopting a partisan approach to his or her evidence by requiring the expert to make a declaration that he or she has made all inquiries which he or she believes desirable and appropriate and that no matters of significance which he or she regards as relevant have been withheld from the court. Concerns that the presentation of expert evidence may add to the length, and therefore increase the cost, of litigation are addressed by a requirement which attempts to limit the scope of expert evidence by identifying in advance the areas on which expert witnesses for opposing parties are able to agree. The guidelines also state that it would be improper conduct on the part of a legal practitioner to give, or of an expert witness to accept, instructions not to reach agreement with an expert retained by an opposing party.

1444 Submission 39.

1445 See p 308 of this Report.

1446 Federal Court of Australia, *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*.

One of the submissions received by the Commission in response to the Discussion Paper suggested that, if greater use were to be made of expert witnesses in relation to the level of competence of child witnesses, these guidelines would provide a useful model.[1447]

In Queensland, the use of expert witnesses in civil proceedings is governed by the Uniform Civil Procedure Rules. Under those rules, a party who proposes to call expert evidence in a civil proceeding must inform opposing parties prior to the date of trial of the substance of the evidence it is proposed to adduce from the expert.[1448] The court may order expert witnesses to confer and to prepare and file a document setting out areas of agreement and disagreement and the reasons for the disagreement. Although at present there are no formal guidelines to clarify the role of an expert witness and to regulate the conduct of expert witnesses, the Commission understands that the Uniform Civil Procedure Rules are currently under review by the Rules Committee established in accordance with section 118C of the *Supreme Court of Queensland Act 1991* (Qld).

The Planning and Environment Court, a Division of the District Court of Queensland, has recently introduced formal directions and guidelines with respect to expert witnesses.[1449]

(ii) Experts appointed by the court

An alternative approach to the appointment of an expert witness is for the expert to be appointed by the court, rather than each party appointing its own expert.

In Queensland, provision for the appointment of an expert by the court already exists in the Uniform Civil Procedure Rules.[1450] These rules do not apply in criminal proceedings. The Queensland rules relating to court-appointed expert witnesses include a mechanism for the parties to agree on a panel of experts for the court to choose from. The rules were introduced because:[1451]

> A system for court appointed experts avoids the need for considerable duplication of evidence, with the court then having to decide which expert it should accept.

1447 Submission 40.

1448 *Uniform Civil Procedure Rules 1999* (Qld) r 423(1)(c).

1449 Planning and Environment Court, Practice Direction No 1 of 2000.

1450 *Uniform Civil Procedure Rules 1999* (Qld) r 425.

1451 Department of Justice, *Uniform Civil Procedure Rules for the Supreme Court, District Courts & Magistrates Courts: Consultation Draft* (1997) at xv.

The use of experts appointed by the court may help to overcome the potential for expert witnesses to adopt a partisan approach to their evidence and to present only evidence which is to the advantage of the party who retained them. In the context of expert evidence about child witnesses, the system would have the added benefit of reducing the number of times the child is interviewed, which would reduce stress on the child and decrease the risk of the child's evidence becoming contaminated.

However, the intervention of the court in appointing its own expert could be seen as contrary to the traditional operation of the adversarial system. Within that system, courts have generally refrained from becoming involved in the selection and presentation of evidence. The traditional view has been that:[1452]

- the court should only address such evidence as may be placed before it by one or more of the parties;
- the court should not seek out other evidence that may occur to the court to be relevant; and
- parties should be entitled to know what evidence is being led against them, and should be able to test that evidence by cross-examination.

Other disadvantages of court-appointed experts have been identified:[1453]

> … where there are both court and party experts, because of the aura of independence given to the court expert, the evidence of the parties' experts may be devalued - even though they may be just as competent and committed to ascertaining true facts. In addition, if the court expert is the sole or predominant source of opinion, then the court may be given unreliable evidence without an effective check.

Reservations about the use of court-appointed experts have emerged particularly in relation to criminal proceedings. The Law Commission of New Zealand observed:[1454]

> … under our present system it is very doubtful whether the court should appoint an expert witness to give evidence at trial over the objections of the accused. Such a step might give the appearance that the court was adopting a prosecutorial role or overruling the accused's wishes concerning the conduct of the defence. If the court is to appoint an expert in a criminal case it would seem necessary to have the consent of the accused. Appointment on that basis could on occasions be valuable to an accused (especially where the defence had inadequate resources). We doubt, however, whether an accused will often be willing to take the risk involved in seeking a court-

1452 McMullan J, "Expert Witnesses: Who Plays the Saxophone?" (1999) 9 *Journal of Judicial Administration* 94 at 108.

1453 Law Commission (NZ), Discussion Paper, *Evidence Law: Expert Evidence and Opinion Evidence* (NZLC PP 18, 1991) para 92 at 37-38.

1454 Id, para 97 at 39.

> appointed expert, since the expert's report might well turn out to be unfavourable to the accused.

Of the submissions received by this Commission in response to its Discussion Paper, the majority of those which addressed this issue were in favour of court-appointed experts in criminal proceedings.[1455] A Judge of the Queensland Court of Appeal noted:[1456]

> There would be a risk that the expert chosen would be biased in favour of the prosecution or defence, but that risk is not so great, of course, as it would be if the jury were "assisted" by experts paid by one side or the other. … It is likely that there are people available who are not passionately committed to one side or the other and whose opinions on such matters would be likely to improve the accuracy of the outcomes.

Two of the respondents who agreed with the concept of court-appointed experts qualified their support with a requirement that the court-appointed expert be in addition to, rather than in place of, experts called by the parties.[1457] On the other hand, two respondents were of the view that the point of using a court-appointed expert would be defeated if the parties were also able to call their own experts.[1458]

Three respondents opposed the use of court-appointed experts in criminal trials.[1459] According to the Bar Association of Queensland:[1460]

> … the utilisation of Court appointed experts would add significantly to the cost of criminal justice in this State, in circumstances where their usefulness in the vast majority of cases is doubtful.

6. THE COMMISSION'S VIEW

(a) The admissibility of expert evidence relating to the evidence of children

The Commission acknowledges that expert witnesses should be used carefully so as to minimise potential problems such as unnecessarily adding to the length of proceedings or creating a "trial by experts". However, the Commission does not accept that adding to the length of a trial because of the use of expert evidence is, of

1455 Submissions 9, 19, 25, 29, 39, 41, 49, 54.

1456 Submission 9.

1457 Submissions 25, 41.

1458 Submissions 29, 49.

1459 Submissions 32, 40, 53.

1460 Submission 53.

itself, an undesirable outcome if the result of the expert evidence is that the issues are better understood by the court.

The Commission is of the view that, in cases involving child witnesses, expert evidence about some of the issues relating to the evidence of those witnesses may be of considerable assistance to the court. If, for example, courts and juries were told about the way in which children are likely to react to certain situations, they would be able to assess in an informed way the weight that they should give to the evidence of child witnesses about those situations. The admissibility of the evidence would remain subject to the requirement for it to be probative and, in a criminal proceeding, to the court's overriding discretion to exclude the evidence on the basis that its probative value is outweighed by the risk of prejudice to the accused.[1461]

The issues about which the Commission believes that expert evidence should be admissible are discussed below.

In particular, the Commission does not believe that expert testimony about child witnesses should be excluded on the basis of the "common knowledge" rule. The effect of the rule is, in the view of the Commission, to perpetuate misunderstandings about the giving of evidence by child witnesses in some circumstances.

However, the Commission is not in favour of abolishing the "ultimate issue" rule. Although the Commission is of the view that expert evidence may assist the court or the jury to assess the evidence of a child witness, it does not consider it appropriate that an expert witness should generally be able to testify as to the questions in issue in the proceeding.

(b) The issues on which expert evidence should be admissible

(i) Credibility

In the view of the Commission, the existing common law position with respect to expert evidence about credibility should be retained and should be given legislative expression.

The legislation should provide that expert evidence is admissible about the psychological state of a child witness in order to explain conduct on the part of the child which may be relevant to the child's credibility. This could include evidence about the effects of child abuse on children's behaviour, for example patterns of disclosure. The Commission agrees with the Supreme Court of Canada that:[1462]

1461 *Driscoll v The Queen* (1977) 137 CLR 517 per Gibbs J at 541; *R v McLean and Funk, ex parte Attorney-General* [1991] 1 Qd R 231 per Carter J at 252. See also *Evidence Act 1977* (Qld) s 130.

1462 *R v Marquard* [1993] 4 SCR 223 per McLachlin J (with whom Iacobucci and Major JJ agreed) at 249.

> Expert evidence has been properly led to explain the reasons why young victims of sexual abuse often do not complain immediately. Such evidence is helpful; indeed it may be essential to a just verdict.

However, in the view of the Commission, evidence of this kind should not be admissible purely for the purpose of bolstering the child's credibility. The Commission considers that to allow expert evidence to be adduced to re-inforce the credibility of a child witness, in the absence of any suggestion (either through cross-examination of the child or through an expert witness called for an opposing party) that the child's credibility is in issue, would impinge upon the role of the court or the jury in determining whether the child is a truthful witness and would thus contravene the ultimate issue rule. Expert evidence in support of the credibility of a child witness should be, as at present, inadmissible unless the child's credibility has been impugned. In such a situation, expert evidence should be admissible to restore the child's credit. For example, if the credibility of a child witness is attacked under cross-examination on the basis of conduct which is apparently inconsistent with evidence given by the witness, expert evidence which is intended to explain the apparent inconsistency should be admissible.

(ii) Competence

The Commission is of the view that expert evidence should be admissible to assist the court in determining the competence of a child witness to give evidence.

At present, section 9A(a) of the *Evidence Act 1977* (Qld) permits expert evidence to be given in relation to the competence of a child under the age of 12 years to give unsworn evidence.[1463] However, in this Report the Commission has recommended that there should be new tests of competency in relation to both sworn and unsworn evidence from child witnesses.[1464]

The Commission favours the adoption of a provision expressed in terms of these new competency tests. Accordingly, the Commission believes that expert evidence should be admissible on the questions of whether a proposed child witness understands that the giving of evidence is a serious matter and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the truth, and of whether the child is able to give an intelligible account of events which he or she has observed or experienced.

1463 See notes 1416 and 1417 of this Report.

1464 See Chapter 7 of this Report.

(iii) Reliability

The Commission is aware that, although quite young children can provide a court with a coherent account of what they have seen or experienced, there are a number of factors which might affect the reliability of the child's evidence. For example, the child's age and level of cognitive development may affect the child's ability to recognise a person or thing, to recall a particular event, or to make judgments about concepts such as time and distance. The accuracy of the child's memory may be affected by the length of time that has elapsed since the incident in question occurred, or by the number of times the child has been questioned about the incident and the type of interview technique employed. The child may have been susceptible to suggestion or may have confused the reality with his or her own imagination.

In the view of the Commission, expert evidence should be admissible to assist the court or jury to determine whether the evidence of a child witness has been affected by factors such as these, and the weight which should therefore be attached to what the child has said.

(iv) Taking the child's evidence

In this Report, the Commission has made a number of recommendations about the use of special measures or facilities to assist child witnesses to give their evidence effectively. In some cases, the Commission's recommendation is that the use of the special measures or facilities should be mandatory. In other cases, the Commission has recommended that courts should have a discretion as to whether or not to order the use of the special measures or facilities.[1465] In some situations where the Commission has recommended that there should be a judicial discretion in relation to the use of the special measures or facilities, it has specified the criteria that should be taken into account in exercising the discretion.

For example, in relation to some measures or facilities, the Commission has recommended that the court should have power to exercise its discretion if a witness, in the opinion of the court, satisfies the definition of a "special witness" set out in section 21A of the *Evidence Act 1977* (Qld).[1466] Although expert evidence is probably admissible at common law on the question of whether a witness comes within the terms of section 21A,[1467] the Act itself is silent on the issue. The Commission considers that it would be desirable for the matter to be put beyond doubt. The Commission is therefore of the view

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1465 See for example Recommendation 10.6 at p 220 of this Report in relation to the use of closed-circuit television for certain child witnesses and Recommendations 5.3(b) and 5.3(c) at p 88 of this Report in relation to the entitlement of certain child witnesses to the presence of a support person while they give evidence.

1466 See for example Recommendation 10.6 on p 220 and Recommendation 5.3(c) on p 88 of this Report.

1467 *R v FAR* [1996] 2 Qd R 49 per Fitzgerald P at 52.

that there should be a legislative provision to the effect that expert evidence is admissible on the issue of whether a witness meets the criteria for consideration as a "special witness" under section 21A of the *Evidence Act 1977* (Qld).

In other situations, the Commission has recommended that the court should exercise its discretion to order the use of special measures or facilities for a child witness if it considers that the ability of the child to testify effectively would be adversely affected if it did not do so.[1468] In the view of the Commission, expert evidence should also be admissible to assist the court in determining the child's need for the special measures or facilities.

(c) Appointment of an expert witness

(i) Experts appointed by the parties

The Commission has given consideration to the introduction of guidelines modelled on the Federal Court of Australia Practice Direction[1469] to regulate the conduct of expert witnesses, thereby minimising the potentially partisan effect of the adversarial system on the use of expert evidence.

It is the view of the Commission that, although it would be desirable for professional guidelines to be developed with respect to the quality and form of reports by expert witnesses, there is no need for a Practice Direction to clarify the role of an expert witness.

(ii) Experts appointed by the court

The Commission recognises the benefits that may result from a system of court-appointed expert witnesses, and acknowledges that, wherever possible, steps should be taken to reduce the number of times a child witness is interviewed. However, it is of the view that, while it may be appropriate for a court to have power to appoint an expert in a civil proceeding, such a power should not be conferred in relation to criminal proceedings.

The Commission considers that appointment by the court of an expert witness in a criminal trial would be fundamentally inconsistent with the existing criminal justice process. It is a basic principle of that system that the prosecution must prove beyond a reasonable doubt the guilt of a person accused of committing an offence. The accused is not obliged to call any evidence in his or her defence, but may instead simply argue that the prosecution has failed to meet the requirements of its burden of proof.

1468 See for example Recommendation 14.3 on p 296 of this Report in relation to cross-examination of a child witness by an unrepresented party to a proceeding.

1469 See p 312 of this Report.

Potentially, for the court to appoint its own expert to give evidence would significantly alter the traditional role of the court in criminal proceedings and infringe the accused's right to control the conduct of the defence. Changes of this nature are beyond the scope of this reference.

Moreover, even if these problems could be overcome by stipulating that the court could appoint an expert witness in a criminal proceeding only with the consent of the accused, the Commission doubts that such a provision would work successfully in practice. In the first place, the Commission agrees with the conclusion reached by the Law Commission of New Zealand that it is unlikely that an accused would be willing to accept the risk that the opinion of a court-appointed expert witness might turn out to be unfavourable to the accused.[1470] Further, if the court-appointed expert were to testify in addition to expert witnesses representing the parties, the evidence of the court-appointed expert might be given undue weight because of its perceived independence. If the court-appointed expert were to replace experts representing the parties, it may be difficult to test the reliability of the expert's evidence.

7. RECOMMENDATIONS

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

15.1 The "common knowledge" rule should be abolished in relation to expert evidence about child witnesses.

15.2 If it is probative in the circumstances of the particular case, expert evidence should be admissible in relation to psychological factors which may lead to behaviour relevant to the credibility of a child witness. However, such evidence should be admissible in support of the credibility of a child witness only to rebut suggestions that the child is not a credible witness.

15.3 Expert evidence should be admissible on the questions of:

(a) whether a proposed child witness understands that the giving of evidence is a serious matter and that he or she is under an obligation to give truthful evidence that is over and above the ordinary duty to tell the truth; and

1470 See pp 314-315 of this Report.

(b) whether the child is able to give an intelligible account of events which he or she has observed or experienced.

15.4 Expert evidence should be admissible in relation to the reliability of the evidence of a child witness.

15.5 Expert evidence should be admissible in relation to whether a child meets the criteria for consideration as a "special witness" under section 21A of the Act.

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

CHAPTER 16

PROPENSITY EVIDENCE

1. INTRODUCTION

It is not uncommon for the prosecution to seek to adduce evidence (other than evidence directly related to the offence or offences with which the accused is charged) that discloses criminal or discreditable conduct on the part of the accused. In cases where a person is charged with having committed a sexual offence against a child, this situation is likely to occur where:

- the accused has a prior conviction for a similar offence or for another offence of a sexual nature;

- another witness in the same proceedings makes other allegations of sexual misconduct against the accused;[1471] or

- the complainant, in giving evidence, recounts incidents of uncharged acts - that is, the complainant gives evidence of criminal conduct in addition to the acts that are the subject of charges against the accused in the proceedings.

In these circumstances, the court must determine whether evidence that discloses other misconduct by the accused should be admitted into evidence to prove the offence with which the accused is charged, or for some other purpose, for example, to explain the context of the complainant's evidence. Evidence of this kind is broadly described as propensity evidence, although it is sometimes referred to according to one of the particular categories of propensity evidence that have been recognised by the courts, for example, similar fact evidence or relationship evidence.[1472]

In the Discussion Paper,[1473] the Commission examined the circumstances in which propensity evidence should be admissible in criminal proceedings concerning the commission of an offence against a child. The Commission's consideration of this issue was in response to several preliminary submissions received by the Commission following the publication of a call for submissions in April 1997.[1474]

1471 In some cases, the other allegations will be made by a person who is also a complainant in the same proceedings: see *Hoch v The Queen* (1988) 165 CLR 292. In other cases, the allegations will be made by a witness who is not a complainant in the proceedings: see *BRS v The Queen* (1997) 191 CLR 275.

1472 See the discussion of this terminology at pp 323-324 of this Report.

1473 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 240-254.

1474 Preliminary submissions 13, 15, 22, 46.

The admission of evidence that discloses criminal or discreditable conduct on the part of an accused person is likely to be sought by the prosecution and resisted by the defence. This is because the admission of such evidence has important implications in terms of the conduct of a criminal trial:

- Where the evidence is held to amount to admissible propensity evidence, the evidence may be used for the purpose of establishing:[1475]

  > … a step in the proof of the prosecution case, namely, that it is to be inferred, according to the criminal standard of proof, that the accused is guilty of the offence charged.

- The application of the rule in relation to the admissibility of propensity evidence is relevant to the question of whether charges involving a number of complainants may be tried together, or whether the charges concerning each complainant must be tried separately. If charges are brought against an accused person concerning two or more complainants, but the evidence of each complainant is held not to be admissible as propensity evidence in relation to the charges concerning the other complainant or complainants, it is likely that, unless there is some other basis on which the evidence is admissible,[1476] the charges concerning each complainant will have to be the subject of a separate trial.[1477]

The law in relation to the admissibility of propensity evidence in criminal proceedings is of general application. It is not confined in its operation to cases involving allegations of offences, or particular types of offences, against children. It is, however, the effect of the law in cases concerning offences allegedly committed against children with which the Commission is concerned in this reference.

2. TERMINOLOGY

In *Pfennig v The Queen*,[1478] a majority of the High Court made the following observation about the terms "propensity evidence" and "similar fact evidence":[1479]

1475 *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 484. Even where the evidence is held not to be sufficiently probative to be admitted as propensity evidence, it may in some circumstances be admissible for some more limited purpose, for example, to corroborate the complainant's evidence in a particular respect. See for example *BRS v The Queen* (1997) 191 CLR 275 per Brennan CJ at 282-285, per Gaudron J at 302-303, per McHugh J at 304 and per Kirby J at 325. In these circumstances, the trial judge must direct the jury as to the purpose or purposes for which they may use the evidence: *BRS v The Queen* (1997) 191 CLR 275 per McHugh J at 305.

1476 See p 382 of this Report.

1477 This issue is discussed in Chapter 17 of this Report.

1478 *Pfennig v The Queen* (1995) 182 CLR 461.

1479 Id per Mason CJ, Deane and Dawson JJ at 464-465.

> This appeal raises questions as to the admissibility of what has been described as propensity or similar fact evidence and the use to which it can be put. There is no one term which satisfactorily describes evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged. It is always propensity evidence but it may be propensity evidence which falls within the category of similar fact evidence, relationship evidence or identity evidence. Those categories are not exhaustive and are not necessarily mutually exclusive. The term "similar fact" evidence is often used in a general but inaccurate sense.

Referring to this passage from *Pfennig v The Queen*, the Full Court of the Federal Court made the following observation about the High Court's inclusion of relationship evidence as a category of propensity evidence:[1480]

> Some commentators have found difficulty with this passage. … The division of "propensity evidence" into categories of "similar fact", "relationship evidence" and "identity evidence", does not accord with traditional usage. Nonetheless, this statement from the majority judgment, though obiter, stands authoritatively for the proposition that "relationship evidence" is to be viewed as a sub-set of "propensity evidence".

The two main types of propensity evidence have been described in the following way:[1481]

> The two main divisions of propensity evidence are similar fact evidence and relationship evidence. There are subdivisions. For example, similar fact evidence may go to the identity of the offender or to the improbability of coincidence if a number of similar accounts are all true. It usually, but not always, involves an offence against a different victim. Relationship evidence is different in that last respect but, like similar fact evidence, its probative value also varies from case to case.

Although a majority of the High Court has described relationship evidence as a category of propensity evidence, the courts have nonetheless tended to distinguish between the basis for the admissibility of relationship evidence and the basis for the admissibility of propensity evidence generally.[1482] Consequently, in this chapter, the Commission has examined the admissibility of propensity evidence separately from the admissibility of the more specific category of relationship evidence.

3. ADMISSIBILITY OF PROPENSITY EVIDENCE

(a) Rationale for the general exclusion of propensity evidence

The common law has developed strict rules about the admissibility of evidence that discloses criminal or discreditable conduct on the part of an accused person. These

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1480 *Conway v The Queen* (2000) 98 FCR 204 at 229.

1481 *R v Best* [1998] 4 VR 603 per Callaway JA at 606.

1482 See pp 334-337 of this Report.

rules apply in Queensland,[1483] except in relation to one issue, where the effect of the common law has been modified by statute.[1484]

Ordinarily, evidence will not be admissible if it proves only that the accused has the propensity or disposition to commit a crime or a particular crime. The main reason for excluding evidence in these circumstances is the prejudicial effect it may have on the mind of the jury. The nature of the prejudicial effect of propensity evidence was described in the following terms in *Pfennig v The Queen*:[1485]

> In this context, the reference to prejudicial effect is a reference to the undue impact, adverse to an accused, that the evidence may have on the mind of the jury over and above the impact that it might be expected to have if consideration were confined to its probative force.
>
> Propensity evidence (including evidence of bad disposition and prior criminality) has always been treated as evidence which has or is likely to have a prejudicial effect in the sense explained. That is because the ordinary person naturally (a) thinks that a person who has an established propensity whenever opportunity arises has therefore yielded to the propensity in the circumstances of the particular case and (b) may ignore the possibility that persons of like propensity may have done the act complained of. Hence, the necessity to find something in the evidence or in its connexion with the events giving rise to the offences charged which endows it with a high level or degree of cogency.

Apart from the question of prejudice, there are also "functional reasons" for restricting the admissibility of propensity evidence:[1486]

> Functional reasons also play a part in excluding evidence of bad character. Trials would be lengthened and expense incurred, often disproportionately so, in litigating the acts of other misconduct; law enforcement officers might be tempted to rely on a suspect's antecedents rather than investigating the facts of the matter; rehabilitation schemes might be undermined if the accused's criminal record could be used in evidence against him or her. [note omitted]

1483 See pp 338-355 of this Report for a discussion of those jurisdictions where the admissibility of propensity evidence is the subject of legislation.

1484 *Evidence Act 1977* (Qld) s 132A. This provision deals with the effect on the admissibility of similar fact evidence of the possibility that the evidence of the witnesses is the result of collusion or suggestion. See p 333 of this Report.

1485 (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 487-488.

1486 Id per McHugh J at 513. See the discussion of these reasons in Smith, the Hon Justice TH and Holdenson OP, QC, "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions - Part I" (1999) 73 *Australian Law Journal* 432 at 435-436.

(b) Admissibility of propensity evidence

(i) Basis for admissibility: no reasonable view of the evidence consistent with the innocence of the accused

The leading case on the admissibility of propensity evidence is *Pfennig v The Queen*.[1487] In that case, the accused was convicted of the murder of a boy, M, whose body was never found. At the trial, evidence was admitted that almost one year after the disappearance of M, the accused had been convicted of the abduction and sexual assault of another boy, H.[1488] The accused appealed against his conviction, arguing that the evidence about his conviction for the abduction and sexual assault of H was wrongly admitted into evidence.

The majority judgment, which was delivered by Mason CJ, Deane and Dawson JJ, analysed the development of the law relating to the admissibility of propensity evidence. Their Honours observed how, in the earlier judgments of the Court, it had been accepted that propensity evidence was not admissible if it showed only that the accused had "a propensity or disposition to commit a crime or that he or she was the sort of person likely to commit the crime charged".[1489] On the other hand, propensity evidence was admitted if it tended to show that the accused was guilty of the offence charged "for some reason other than that he or she [had] committed crimes in the past or [had] a criminal disposition".[1490] This approach was in conformity with the earlier English authorities, under which the admission of similar fact evidence was "based on identifiable categories".[1491] McHugh J also noted that the earlier approach of the courts had been to admit similar fact evidence where it fell within a recognised category, for example, where it "was tendered to prove system, identity, knowledge or intent or rebutted 'defences' such as accident or innocent association".[1492]

The majority approved the shift in more recent decisions towards a more "coherent theoretical foundation" for the admissibility of propensity evidence.[1493] In particular, their Honours endorsed the view expressed by the High Court in *Hoch v The Queen*[1494] that the basis for the admission of similar

1487 (1995) 182 CLR 461.

1488 Id at 487.

1489 Id per Mason CJ, Deane and Dawson JJ at 480-481.

1490 Id at 481.

1491 Id at 477.

1492 Id per McHugh J at 522.

1493 Id per Mason CJ, Deane and Dawson JJ at 481.

1494 (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 294.

fact evidence:[1495]

> … lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.[1496] [note added]

The reason for such a strict test of admissibility was explained in terms of the circumstantial nature of propensity evidence:[1497]

> Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the accused. Here "rational" must be taken to mean "reasonable" and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect. [notes omitted]

The majority in *Pfennig v The Queen* suggested that, unless the tension between probative force and prejudicial effect was governed by such a principle, striking the balance would continue to resemble the exercise of a discretion, rather than the application of a principle.[1498] Although McHugh J in that case rejected the test of the majority as too stringent,[1499] his Honour also referred to the fact that the test for the admissibility of propensity evidence involves the application of a rule of law, rather than the exercise of a discretion:[1500]

1495 *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 481-482, 483. Toohey J (at 506) also endorsed this statement, but added the qualification (at 507) that, to be admissible, the trial judge must consider it just to admit the evidence.

1496 In *R v O'Keefe* [2000] 1 Qd R 564, the Court of Appeal held that it is the evidence as a whole that must be reasonably capable of excluding all innocent hypotheses, rather than merely the propensity evidence. See the discussion of this issue per Pincus JA at 564-565, per Davies JA at 566 and per Thomas JA at 571. In particular, Thomas JA (at 573-574) held that the *Pfennig* test required a trial judge to address two questions:

> (a) Is the propensity evidence of such calibre that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged? … ; and
>
> (b) If the propensity evidence is admitted, is the evidence as a whole reasonably capable of excluding all innocent hypotheses? This would have to be answered on the assumption of the accuracy and truth of the evidence to be led.

1497 *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482-483.

1498 Id at 483.

1499 See p 362 of this Report.

1500 *Pfennig v The Queen* (1995) 182 CLR 461 per McHugh J at 515.

> The recent cases emphasize that as a matter of law and not discretion the probative value of evidence revealing bad character or criminal propensity must be sufficiently strong to outweigh or clearly transcend the prejudicial effect of the evidence.

McHugh J explained the significance of the prejudicial effect of propensity evidence going to the issue of admissibility, and not merely to the exercise of a discretion to reject the evidence:[1501]

> In the practical administration of criminal justice, the difference between these two views is of real significance. If it is a condition of admissibility that the prosecution must show that the probative value of the evidence outweighs its prejudicial effect, the onus is on the prosecution to prove that condition. If the evidence is admissible merely because it has strong probative force, the onus is on the accused to show that evidence otherwise admissible should be rejected. Perhaps even more importantly, if this class of evidence is excluded as a matter of discretion, appellate review of the trial judge's discretion will be more limited than it will be if it is excluded as a matter of law.

The majority judgment then considered the question of what constitutes the probative value of the evidence and, in particular, the following passage from *Hoch v The Queen*:[1502]

> Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force … That strength lies in the fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.

Their Honours emphasised that this passage "should not be understood as asserting that 'striking similarities' or the other characteristics mentioned in relation to propensity or similar fact evidence are essential prerequisites of its admissibility in every case".[1503] Although their Honours acknowledged that evidence that does not possess such characteristics will usually lack the requisite probative force to be admissible,[1504] the statement is nevertheless significant. It leaves open the possibility that, although in a particular case there might not be striking similarities between the act the subject of the charge and the evidence that is sought to be admitted, some other feature of

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1501 Ibid.

1502 Id per Mason CJ, Deane and Dawson JJ at 482, citing *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 294-295.

1503 Ibid. Their Honours had previously noted (at 478) that, in *Director of Public Prosecutions v P* [1991] 2 AC 447 at 460-461, the House of Lords had also rejected the proposition that "striking similarity" was an essential prerequisite for the admissibility of similar fact evidence in all cases.

1504 *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 484.

that evidence might nonetheless lead to the conclusion that there is no reasonable view of it other than the guilt of the accused.[1505]

The test based on there being no reasonable explanation of the evidence that is consistent with the innocence of the accused applies both in cases where the similar facts are not in dispute (for example, where there is a relevant conviction) and in cases where the similar facts are in dispute (for example, where there are several similar allegations of misconduct, all of which are denied).[1506]

A. Application of the test where the facts are not in dispute

Where the propensity or similar fact evidence is not in dispute, the High Court has emphasised the importance of the accused's connection with the events giving rise to the charges as supporting the inference that the accused is guilty of the offence charged:[1507]

> Where the happening of the matters said to constitute similar facts is not in dispute and there is evidence to connect the accused person with one or more of the happenings evidence of those similar facts may render it objectively improbable that a person other than the accused committed the act in question, that the relevant act was unintended, or that it occurred innocently or fortuitously. The similar fact evidence is then admissible as evidence relevant to that issue.

In *Pfennig v The Queen*, it was an undisputed fact that the appellant had a conviction for the abduction and sexual assault of a young boy. On the facts of the case, there were sufficient similarities between the disappearance of M and the abduction of H[1508] that, combined with the other factors connecting the accused with the offence charged,[1509] the Court held that evidence of the

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1505 See the discussion of *Director of Public Prosecutions v P* [1991] 2 AC 447 at pp 351-353 of this Report.

1506 *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482.

1507 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 295.

1508 H gave evidence that he was riding past the appellant's van, that he was inveigled into entering the van and that the appellant refused to let him leave. The appellant brought H's bicycle into the van and subsequently left it at the top of a cliff. In M's case, the Court found that the presence of M's bicycle and neatly stacked belongings at Thiele Reserve strongly suggested that the bicycle and belongings were placed there with the intention of laying a false trail in order to create the impression that M had drowned at Thiele reserve. See *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 469, 486. On the evidence of the case, drowning was excluded as an explanation for M's disappearance: *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 466.

1509 On the prosecution evidence, the appellant was present at Sturt Reserve (the area where M was last seen before his disappearance) when M was present; on his own admission, the appellant engaged in conversation with M, who on one occasion at least was close to the appellant's van; and the appellant left Sturt Reserve at about the same time as M was last seen at Sturt Reserve. In addition, there was evidence from a witness from which it could be inferred that the appellant's van was at Thiele Reserve after M's belongings were placed at that location. See *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 469, 473.

accused's conviction for the abduction and sexual assault of H had been properly admitted.[1510]

B. Application of the test where the facts are in dispute

Where the conduct said to constitute the propensity or similar fact evidence is in dispute, it may nevertheless be relevant to prove the commission of the acts charged.[1511] For example, in *Hoch v The Queen*,[1512] three boys who were living in a children's home made similar allegations of indecent dealing against the accused, who worked at the home.[1513] The accused denied the allegations. The Court made the following observation about the value of similar allegations that are disputed:[1514]

> Where, as here, an accused person disputes the happenings which are said to bear a sufficient similarity to each other as to make evidence on one happening admissible in proof of the others, similar fact evidence bears a different complexion for the issue is whether the acts which are said to be similar occurred at all. … [T]he better view would seem to be that it is relevant to prove the commission of the disputed acts: see *Boardman*, per Lord Hailsham and Lord Cross; *Sutton* per Deane J. Certainly that is the thrust of its probative value. That value lies in the improbability of the witnesses giving accounts of happenings having the requisite degree of similarity unless the happenings occurred. [notes omitted]

(ii) The effect of the possibility of collusion between, or infection of, witnesses

Although one possibility to account for the similarity between allegations made by different witnesses is that the events complained of occurred as alleged, an alternative possibility - which could equally account for the similarity between the allegations made by a number of witnesses - is that the witnesses colluded in their evidence or that their evidence has been infected in some way.

In *Hoch v The Queen*,[1515] although the Court held that the value of disputed similar facts lay in the improbability of witnesses giving accounts with the

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1510 *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 489-490, per Toohey J at 509 and per McHugh J at 536.

1511 *Sutton v The Queen* (1984) 152 CLR 528 at 555-557 and *Hoch v The Queen* (1988) 165 CLR 292 at 295, both cited with approval in *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482.

1512 (1988) 165 CLR 292.

1513 The evidence of each complainant was, for the reasons discussed below, held to be inadmissible in relation to the charges concerning the other complainants. See pp 332-333 of this Report.

1514 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 295. This principle was cited with approval in *Pfennig v The Queen* (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482-483.

1515 (1988) 165 CLR 292.

requisite degree of similarity unless the alleged happenings had occurred,[1516] it qualified that statement by holding that the possibility of concoction could deprive the evidence of its probative value and therefore render it inadmissible:[1517]

> Similar fact evidence which does not raise a question of improbability lacks the requisite probative value that renders it admissible. …
>
> [T]he evidence, being circumstantial evidence, has probative value only if it bears no reasonable explanation other than the happening of the events in issue. In cases where there is a possibility of joint concoction there is another rational view of the evidence. That rational view - viz. joint concoction - is inconsistent both with the guilt of the accused person and with the improbability of the complainants having concocted similar lies. It thus destroys the probative value of the evidence which is a condition precedent to its admissibility.

Referring to the comments of Lord Wilberforce in *Director of Public Prosecutions v Boardman*,[1518] Mason CJ, Wilson and Gaudron JJ stated:[1519]

> His Lordship there posited that the possibility of concoction - not a probability or real chance of concoction - served to render such evidence inadmissible. Indeed we think that must be right.

Their Honours went on to explain how the possibility of concoction would be determined:[1520]

> … in our view, the admissibility of similar fact evidence in cases such as the present depends on that evidence having the quality that it is not reasonably explicable on the basis of concoction. … It is not a matter that necessarily involves an examination on a voir dire. If the depositions of witnesses in committal proceedings or the statements of witnesses indicate that the witnesses had no relationship with each other prior to the making of the various complaints, and that is unchallenged, then, assuming the requisite degree of similarity, common sense and experience will indicate that the evidence bears that probative force which renders it admissible. On the other

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1516 Id per Mason CJ, Wilson and Gaudron JJ at 295.

1517 Id at 295-296. A similar view was expressed by Brennan and Dawson JJ at 300-301. In *R v Colby* [1999] NSWCCA 261 (26 August 1999), Mason P (with whom Grove and Dunford JJ agreed) explained (at para 100) that the "concern based upon the possibility of concoction is really a particular application of a more general principle emphasised in *Pfennig* … . The principle is that propensity evidence is inadmissible if there is a reasonable view of the evidence that is consistent with the innocence of the accused, for otherwise its probative value cannot transcend its prejudicial effect".

1518 [1975] AC 421 at 444.

1519 *Hoch v The Queen* (1988) 165 CLR 292 at 296. Brennan and Dawson JJ expressed their view slightly differently, stating (at 302):

> If there is a real danger of the concoction of similar fact evidence it is consistent with the attitude which the law adopts toward evidence of that kind that it should exclude it upon the basis that its probative value is depreciated to an extent that a jury may be tempted to act upon prejudice rather than proof. [emphasis added]

1520 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 297.

> hand, if the depositions or the statements indicate that the complainants have a sufficient relationship to each other and had opportunity and motive for concoction then, as a matter of common sense and experience, the evidence will lack the degree of probative value necessary to render it admissible.

It was acknowledged that, in some circumstances, it might be necessary to conduct a voir dire.[1521] However, where that was required, it was not the role of the trial judge to decide whether or not the evidence was the result of concoction:[1522]

> Of course there may be cases where an examination on the voir dire is necessary, but that will be for the purpose of ascertaining the facts relevant to the circumstances of the witnesses to permit an assessment of the probative value of the evidence by reference to the consideration whether, in the light of common sense and experience, it is capable of *reasonable* explanation on the basis of concoction. It will not be for the purpose of the trial judge making a preliminary finding whether there was or was not concoction. [original emphasis]

In *Hoch v The Queen*, the evidence of each complainant was strikingly similar to that of the others and, in the absence of any issue about concoction, would have been admissible in relation to the charges concerning the other complainants. However, on the facts of the case, the Court found that the three complainants had a close relationship (two were brothers and the third was a friend), as well as the opportunity to concoct their accounts. There was also evidence that one complainant had antipathy towards the accused even before the events the subject of the charges were alleged to have taken place.

The majority held that, because of the possibility of concoction, the evidence of each of the three complainants lacked the requisite probative force necessary to render it admissible as similar fact evidence in relation to the

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1521 Ibid. Brennan and Dawson JJ also held (at 303-304) that whether it would be necessary for the trial judge to conduct a voir dire would depend on the "the state of the evidence disclosed on the depositions and on the issue for the judge's determination".

1522 Id per Mason CJ, Wilson and Gaudron JJ at 297. In *Robertson v The Queen* (1997) 91 A Crim R 388, Ambrose J considered in some detail the tests enunciated in the two judgments in *Hoch v The Queen* and came to the view (at 400-401) that the two judgments posited the same test. His Honour referred to this passage in the majority judgment in *Hoch v The Queen* and held (at 409) that the language implied that the court could use the same approach as was used in two particular English decisions to determine the question:

> Stated shortly it is necessary for the trial judge to determine whether there is a real chance of concoction or contamination rather than a merely speculative chance. Similar facts could not be reasonably explained on the basis of concoction unless there was a real chance of it. To determine whether there is a real chance the trial judge must look at the facts of the case before him and determine what were the circumstances of the witnesses sought to be called to give similar fact evidence.

In *R v Colby* [1999] NSWCCA 261 (26 August 1999), the New South Wales Court of Criminal Appeal agreed with the view expressed by Ambrose J as to the meaning of "possibility" as used in the majority judgment in *Hoch v The Queen* (see per Mason P (with whom Grove and Dunford JJ agreed) at para 111).

On this analysis of *Hoch v The Queen*, it may be that the effect of that decision on the admissibility of similar fact evidence of witnesses who have some association with each other is not as restrictive as it has sometimes been suggested. See, for example, the concern of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, which is referred to at p 364 of this Report.

offences charged in relation to the other complainants.[1523] Brennan and Dawson JJ held that the failure of the trial judge "to decide for the purposes of determining admissibility whether there was a real chance of a conspiracy among the boys to concoct their allegations was an error in the conduct of the trial" that "resulted in the admission of what may have been inadmissible, prejudicial evidence".[1524]

In Queensland, the effect of the decision in *Hoch v The Queen*, insofar as it concerns the effect of the possibility of collusion or suggestion on the admissibility of similar fact evidence, has been altered by section 132A of the *Evidence Act 1977* (Qld), which provides:

> **Admissibility of similar fact evidence**
>
> In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

Section 132A was inserted in 1997[1525] following a recommendation made in the previous year by the Criminal Code Advisory Working Group that the *Evidence Act 1977* (Qld) should be amended to overcome the decision of the High Court in *Hoch v The Queen*,[1526] insofar as that decision applies to the possibility of concoction by witnesses.[1527]

The effect of section 132A of the *Evidence Act 1977* (Qld) is that the mere possibility of collusion between witnesses does not render the evidence inadmissible. Whether the evidence of witnesses is the result of collusion or suggestion is now a question of fact for the determination of the jury.[1528]

1523 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 297. Because the evidence of each complainant was inadmissible in relation to the other charges, their Honours held (at 297) that there had been a miscarriage of justice in refusing the application by the accused's counsel for the charges concerning each boy to be the subject of a separate trial. See Chapter 17 of this Report for a discussion of the requirement, in certain circumstances, for charges concerning different complainants to be tried separately.

1524 *Hoch v The Queen* (1988) 165 CLR 292 at 305. Although the accused's counsel at trial had sought separate trials in relation to the charges concerning each complainant on the basis that the evidence of each boy was not admissible as similar fact evidence to prove the charges concerning the other boys (an application that was refused), it was not argued at trial that the evidence of each boy was rendered inadmissible in relation to the charges concerning the other boys by reason of the possibility of concoction. Nevertheless, Brennan and Dawson JJ held (at 304) that a trial judge has "a duty to determine whether similar fact evidence is to be accounted for by a cause common to the witnesses … when the circumstances of the case raise it as a real question".

1525 By the *Criminal Law Amendment Act 1997* (Qld) s 122, Sch 2.

1526 (1988) 165 CLR 292.

1527 See *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996) at 114-116. The recommendation of the Advisory Working Group is set out at p 370 of this Report. To the extent that *Hoch v The Queen* enunciated the general test for the admissibility of similar fact evidence that was endorsed by the majority judgment of the High Court in *Pfennig v The Queen*, it is still good law.

1528 See, however, the discussion of the scope of s 132A of the *Evidence Act 1977* (Qld) at pp 368-371 of this Report.

(c) Relationship evidence

In the context of a prosecution of an offence of sexual assault, relationship evidence usually consists of evidence by the complainant of uncharged acts - that is, acts of a sexual nature between the complainant and the accused that are not the subject of any charge in the indictment. The basis for the admissibility of relationship evidence is said to be that it forms part of the essential background against which the complainant's and the accused's evidence falls to be determined.[1529] It allows "the enhancement of a party's case through the presentation of a larger picture, when confinement to the facts directly in issue would present a truncated or unrealistic view".[1530]

For example, in *Cook v The Queen*,[1531] the accused was charged with a number of sexual offences in relation to two complainants. The charges in respect of one of the complainants concerned incidents that occurred while the accused was giving her a piggyback ride in the presence of her father, while she was swimming with the accused, and while the accused was giving her a bath. Both complainants gave evidence of a number of uncharged incidents of sexual misconduct by the accused. The Western Australian Court of Criminal Appeal held that this evidence was admissible on several grounds:[1532]

> It revealed a continuing and strong sexual interest by the applicant in each complainant and showed the actual existence of a sexual relationship between the applicant and each complainant. Insofar as it revealed a process of seduction over a period of time, it helped to explain why there was no immediate complaint by B on the happening of any specific incident. In the case of S with respect to counts 6 and 7, the relationship evidence regarding the applicant and S helps to explain how it was that the applicant might think he would get away with acts of sexual molestation whilst piggybacking S in the presence of her father and whilst in the swimming pool with S. In the case of the bathtub incident, it tended to rule out innocent washing and accident. Likewise, in the case of the piggybacking incident, it tended to rule out accident. In summary, it was evidence which would enable the jury to "understand the context of the incidents that were the subject of the charges", if I might use the words of McHugh and Hayne JJ in *Gipp* (at 132-133).

Although the majority of the High Court in *Pfennig v The Queen* included a reference to "relationship evidence" in its explanation of the term "propensity evidence",[1533] and then proceeded to explain the basis on which "propensity evidence" was admissible, judicial opinion has been divided as to whether the decision in *Pfennig v The Queen*

1529 *B v The Queen* (1992) 175 CLR 599 per Deane J at 610.

1530 *R 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 18.

1531 (2000) 22 WAR 67.

1532 Id per Anderson J at 83-84.

1533 See p 324 of this Report.

had the effect of extending the "no rational explanation" test to the admissibility of relationship evidence.[1534]

Initially, the Queensland Court of Appeal held that the admissibility of relationship evidence was subject to the *Pfennig* test. In *R v Wackerow*,[1535] the accused was convicted of two charges of indecently dealing with a girl, the two offences occurring some years apart. He appealed against the conviction, arguing that the girl should not have been permitted to give evidence of acts of indecent dealing other than those with which he was charged. That argument was rejected by the Court of Appeal, which accepted that the *Pfennig* test was applicable to the admissibility of the uncharged acts.[1536]

> The broad category spoken of is "evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged"; that description includes evidence of the present kind, the relevance of which is to show sexual attraction towards the complainant: … .
>
> What the principal judgment in *Pfennig* does is to extend the reasoning in *Hoch* … to propensity evidence generally; …

Pincus JA referred to the passage in *Pfennig v The Queen*[1537] where the majority endorsed the statement made by the majority in *Hoch v The Queen*[1538] to the effect that "the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged", and explained:[1539]

> This might be thought to mean that there is no reasonable explanation other than that the accused is presumably guilty. But the passage in the principal *Pfennig* reasons which immediately follows proposes a test which is perhaps more favourable to admission:
>
> > "… the objective improbability of [the evidence] having some innocent explanation is such that there is no reasonable view of it other than as *supporting an inference* that the accused is guilty … ".
> > (emphasis added)

1534 For a general discussion of this issue, see Smith, the Hon Justice TH and Holdenson OP, QC, "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions - Part I" (1999) 73 *Australian Law Journal* 432 at 438-440. For a discussion of the approach taken in New South Wales, see *R v Ritter* (Unreported, CCA, Sup Ct of NSW, Gleeson CJ, Handley JA and Hulme J, 60485 of 1994, 31 August 1995), where the Court of Criminal Appeal of the Supreme Court of New South Wales held that the *Pfennig* test did not apply to the admissibility of relationship evidence that was led not on the basis that it was propensity or similar fact evidence, but on the basis that it tended to establish matters relevant to the relationship between accused and the alleged victim. That decision was handed down before the commencement of the *Evidence Act 1995* (NSW).

1535 [1998] 1 Qd R 197.

1536 Id per Pincus JA at 204. See also the comments of Macrossan CJ at 200.

1537 (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 481.

1538 (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 294.

1539 *R v Wackerow* [1998] 1 Qd R 197 at 204.

> Support for an inference may be weak or strong, but other passages in the judgment make it clear that only strong support will do. [original emphasis]

Applying that principle, Pincus JA held that:[1540]

> If the jury believed the evidence about the uncharged occasions, it must have come to the conclusion that the appellant had a marked sexual interest in the complainant child and an inclination to manifest that interest physically; that conclusion, if accepted, must have made a guilty verdict on the offences charged one which a rational jury would much more readily reach.

Subsequently, however, the Queensland Court of Appeal held in *R v W*[1541] that evidence showing the existence of a guilty passion (which it referred to as evidence of the *Witham* type[1542]) did not have to comply with the *Pfennig* test, although it acknowledged that the court did have a discretion to reject the evidence if its prejudicial effect exceeded its probative worth:[1543]

> A question may arise as to whether evidence of the *Witham* type must pass such a test, or the stricter test which may be derived from *Pfennig* …
>
> If the stricter *Pfennig* test is applicable to evidence of the *Witham* kind, it is difficult to see how it could ever be got in, where the evidence provides any sensible reason - for example, a degree of inconsistency in the complainant's story - to reject the Crown case. Partly for that reason, but principally because of the weight of authority favouring that view, we decide this case on the basis that evidence of the *Witham* type may still be admitted, whether or not it passes the test for the admissibility of circumstantial evidence, and that it may be admitted as evidence of the existence of a sexual relationship between the parties. There is of course a discretion to reject such evidence, if its prejudicial effect exceeds its probative worth.

Recently, the Full Court of the Federal Court held that, particularly since the High Court's decision in *Gipp*,[1544] it is clear that the admissibility of relationship evidence "falls outside the parameters of the special rules developed in cases such as *Hoch* … and *Pfennig* to deal with the more difficult, and more dangerous category of 'similar fact evidence'":[1545]

1540 Id at 204-205.

1541 [1998] 2 Qd R 531.

1542 See *R v Witham* [1962] Qd R 49.

1543 *R v W* [1998] 2 Qd R 531 per Pincus JA and Muir J at 533-534. See also the similar view expressed by de Jersey J at 537.

1544 (1998) 194 CLR 106.

1545 *Conway v The Queen* (2000) 98 FCR 204 per Miles, von Doussa and Weinberg JJ at 233. The Court also held that the admissibility of relationship evidence does not fall within the ambit of ss 97 or 98 of the *Evidence Act 1995* (Cth). For a discussion of its admissibility under that legislation, see pp 344-345 of this Report.

> The admissibility of "relationship evidence" turns upon its relevance to the issues in the trial. Such evidence must satisfy the test that its prejudicial nature is outweighed by its probative value. It is not required to satisfy the special test formulated ultimately in *Pfennig* designed to deal with the admissibility of what has traditionally been described as "similar fact evidence". It must be remembered that *Pfennig* had nothing whatever to do with "relationship evidence". … *Pfennig* dealt with the special dangers inherent in propensity reasoning.

Where relationship evidence is admitted, the jury should ordinarily be directed as to the manner in which the evidence may be used. The jury should be told that "its relevance is to show the existence of a sexual passion or relationship",[1546] but that it must not be used to establish a predilection on the part of the accused to commit the offences charged or as proof that the accused committed them.[1547]

4. STATUTORY MODIFICATIONS AND RECOMMENDATIONS FOR REFORM

In several jurisdictions in Australia, the common law rules in relation to the admissibility of propensity and similar fact evidence have been replaced by legislation. The legislation in these jurisdictions is not restricted in its application to the admissibility of propensity evidence in proceedings for offences against children, but applies more generally.[1548] Although it is outside the terms of the Commission's reference to review generally the law in relation to the admissibility of propensity evidence, the legislation in other jurisdictions could form the basis on which new provisions - limited in their application to certain categories of offences - could be modelled.

Consideration has also been given to the recommendations made in the mid-1980s in the Sturgess Report.[1549]

1546 *R v LSS* [2000] 1 Qd R 546 per Pincus JA at 547.

1547 Id per Thomas JA at 555.

1548 With the exception of s 101 of the Commonwealth and New South Wales *Evidence Acts* - which applies only in a criminal proceeding - the provisions of Part 3.6 of those Acts are of general application and apply to both criminal and civil proceedings. Although s 398A of the *Crimes Act 1958* (Vic) applies only to criminal proceedings, its operation is not limited in any way to particular types of indictable or summary offences. These provisions are discussed at pp 338-355 of this Report.

1549 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985). These recommendations are discussed at pp 355-360 of this Report.

(a) Commonwealth and New South Wales

(i) Tendency and coincidence evidence

A. Basis for admissibility

The Commonwealth and New South Wales *Evidence Acts*[1550] provide that evidence that is relevant in a proceeding is admissible, except as otherwise provided by those Acts.[1551] The legislation contains specific provisions that restrict the admissibility of what is referred to as "tendency evidence" and "coincidence evidence".[1552] The New South Wales Court of Criminal Appeal has made the following observation about these terms:[1553]

> The tendency and coincidence provisions of the Evidence Act are intended to cover the field previously occupied by the common law relating to propensity and similar fact evidence.

The effect of sections 97 and 98 of the legislation is that tendency evidence and coincidence evidence are made inadmissible to prove certain specified matters unless the evidence has "significant probative value" and the notice requirements of the legislation have been complied with.[1554] Where the prosecution seeks to adduce tendency evidence[1555] or coincidence evidence[1556] in a criminal proceeding,[1557] the admissibility of that evidence is further restricted. Section 101(2) provides that, in these circumstances, the evidence cannot be used against the defendant "unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant".

1550 The *Evidence Act 1995* (Cth) applies to all proceedings in a federal court or in a court of the Australian Capital Territory: *Evidence Act 1995* (Cth) s 4. The *Evidence Act 1995* (NSW) applies to all proceedings in a New South Wales court: *Evidence Act 1995* (NSW) s 4.

1551 *Evidence Act 1995* (Cth) s 56(1); *Evidence Act 1995* (NSW) s 56(1). Evidence is relevant where, if accepted, it could rationally affect the assessment of the probability of a fact in issue in the proceeding: *Evidence Act 1995* (Cth) s 55(1); *Evidence Act 1995* (NSW) s 55(1).

1552 *Evidence Act 1995* (Cth) ss 94-101; *Evidence Act 1995* (NSW) ss 94-101.

1553 *R v Martin* [2000] NSWCCA 332 (25 August 2000) per Ireland AJ at para 59. See also *R v Lock* (1997) 91 A Crim R 356 per Hunt CJ at CL at 363.

1554 *Evidence Act 1995* (Cth) ss 97(1), 98(1); *Evidence Act 1995* (NSW) ss 97(1), 98(1). For a discussion of the general principles of admissibility under the *Evidence Act 1995* (NSW), see *R v Lockyer* (1996) 89 A Crim R 457 per Hunt CJ at CL at 458-459 and *R v Lock* (1997) 91 A Crim R 356 per Hunt CJ at CL at 360-361.

1555 The term "tendency evidence" is defined to mean "evidence of a kind referred to in section 97(1) that a party seeks to have adduced for the purpose referred to in that subsection": *Evidence Act 1995* (Cth) s 3(1), Dictionary Pt 1; *Evidence Act 1995* (NSW) s 3(1), Dictionary Pt 1.

1556 The term "coincidence evidence" is defined to mean "evidence of a kind referred to in section 98(1) that a party seeks to have adduced for the purpose referred to in that subsection": *Evidence Act 1995* (Cth) s 3(1), Dictionary Pt 1; *Evidence Act 1995* (NSW) s 3(1), Dictionary Pt 1.

1557 Sections 97 and 98 apply to both civil and criminal proceedings.

Sections 97, 98 and 101 provide:[1558]

97. The tendency rule

(1) Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person's character or otherwise) to act in a particular way, or to have a particular state of mind, if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) Paragraph (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict tendency evidence adduced by another party.

Note. The tendency rule is subject to specific exceptions concerning character of and expert opinion about accused persons (sections 110 and 111). Other provisions of this Act, or of other laws, may operate as further exceptions.

98. The coincidence rule

(1) Evidence that 2 or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind if:

(a) the party adducing the evidence has not given reasonable notice in writing to each other party of the party's intention to adduce the evidence, or

(b) the court thinks that the evidence would not, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.

(2) For the purposes of subsection (1), 2 or more events are taken to be related events if and only if:

(a) they are substantially and relevantly similar, and

(b) the circumstances in which they occurred are substantially similar.

1558 The other sections in Part 3.6 of the Commonwealth and New South Wales *Evidence Acts* deal with notice requirements (s 99) and the circumstances in which the court may dispense with the notice requirements (s 100).

(3) Paragraph (1)(a) does not apply if:

(a) the evidence is adduced in accordance with any directions made by the court under section 100, or

(b) the evidence is adduced to explain or contradict coincidence evidence adduced by another party.

Note. Other provisions of this Act, or of other laws, may operate as exceptions to the coincidence rule.

101. Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

(1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.

(2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.

(3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.

(4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.

The "probative value of evidence" is defined as "the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue".[1559] It has been held that the expression "significant probative value" - which is used in both sections 97 and 98, but is not defined in the legislation - means "something more than mere relevance but something less than a 'substantial' degree of relevance",[1560] and that the "use of the word 'significant' in the sections mandates that the evidence must be of importance or of consequence".[1561]

The combined effect of sections 97, 98 and 101 is that, where the prosecution seeks to adduce evidence to prove:

1559 *Evidence Act 1995* (Cth) s 3(1), Dictionary Pt 1; *Evidence Act 1995* (NSW) s 3(1), Dictionary Pt 1.

1560 *R v Lockyer* (1996) 89 A Crim R 457 per Hunt CJ at CL at 459; *R v Lock* (1997) 91 A Crim R 356 per Hunt CJ at CL at 361. As Hunt CJ at CL observed (at 459) in *R v Lockyer*:

> If the Crown has to establish that the probative effect of the evidence "substantially" outweighs the prejudicial effect which it may have on the accused person, it could hardly be supposed that the accused - who has no equivalent obligation - has nevertheless to establish that the evidence has a substantial probative value. [note omitted]

1561 *R v Martin* [2000] NSWCCA 332 (25 August 2000) per Ireland AJ at para 67. See also *R v Lockyer* (1996) 89 A Crim R 457 per Hunt CJ at CL at 459.

- in the case of tendency evidence, that a person has or had a tendency to act in a particular way or to have a particular state of mind;[1562] or

- in the case of coincidence evidence, that, because of the improbability of two or more related events occurring coincidentally, a person did a particular act or had a particular state of mind;[1563]

the tendency evidence or the coincidence evidence will be admissible for that purpose only if:

- the evidence has significant probative value (either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence);[1564] and

- the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant.[1565]

However, where the evidence is tendered for a different purpose, its admissibility is not governed by these provisions. The evidence will be admissible, if relevant, subject to the court's power to exclude the evidence under one or more of the various exclusionary discretions contained in the Act.[1566]

Section 98 applies where it is sought to prove that, because of the improbability of two or more related events occurring coincidentally, a person did a particular act or had a particular state of mind.[1567] However, section 98(2) provides that two or more events are taken to be related only if:

1562 *Evidence Act 1995* (Cth) s 97(1); *Evidence Act 1995* (NSW) s 97(1).

1563 *Evidence Act 1995* (Cth) s 98(1); *Evidence Act 1995* (NSW) s 98(1).

1564 *Evidence Act 1995* (Cth) s 97(1)(b); *Evidence Act 1995* (NSW) s 97(1)(b).

1565 *Evidence Act 1995* (Cth) s 101(2); *Evidence Act 1995* (NSW) s 101(2).

1566 *Conway v The Queen* (2000) 98 FCR 204 per Miles, von Doussa and Weinberg JJ at 234. For example, ss 135 and 137 of the Commonwealth and New South Wales *Evidence Acts* provide:

> **135. General discretion to exclude evidence**
>
> The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:
>
> (a) be unfairly prejudicial to a party; or
>
> (b) be misleading or confusing; or
>
> (c) cause or result in undue waste of time.
>
> **137. Exclusion of prejudicial evidence in criminal proceedings**
>
> In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

1567 Section 98 of the Commonwealth and New South Wales *Evidence Acts* is set out at pp 339-340 of this Report.

(a) they are substantially and relevantly similar, and

(b) the circumstances in which they occurred are substantially similar.

It has been observed that section 98 differs from the Australian Law Reform Commission's recommendation,[1568] which was to the effect that:[1569]

> … where a reasoning process involves reliance on the improbability of events occurring coincidentally, it should only be permitted where it is "reasonably open to find" that "all the events, and the circumstances in which they occurred, are substantially and relevantly similar".

Whereas the recommendation of the Australian Law Reform Commission sought to limit - by reference to the similarity between the events - the circumstances in which it was proper to engage in probability reasoning, section 98 limits the circumstances in which the provision applies. It has been suggested that this produces a result not intended by the drafters of the provision:[1570]

> The apparent result of this approach is that s 98 does not apply to evidence of unrelated events, that is, evidence of events which are not substantially and relevantly similar or where the circumstances are not substantially similar. This would mean that evidence of such events, even when adduced to prove that a person did a particular act or had a particular state of mind via improbability reasoning, need not comply with the requirements of s 98. Presumably, if the evidence meets the test of relevance it may be admissible, subject to discretionary exclusion. This cannot have been the intention of the drafters of the provision. Rather, it is likely that what was intended was that evidence of events would not be treated as satisfying the requirements of the section unless it met the conditions of similarity referred to in s 98(2).

B. Interpretation of the requirement that the probative value of the evidence must substantially outweigh its prejudicial effect

In interpreting the requirement in section 101(2) that evidence will not be admissible under sections 97 or 98 unless "the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant", the courts have imported the test for the admissibility of

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1568 Australian Law Reform Commission, Report, *Evidence* (ALRC 38, 1987) Appendix A, s 88.

1569 Odgers S, *Uniform Evidence Law* (4th ed, 2000) at para 98.2.

1570 Id at para 98.3. See also Smith, the Hon Justice TH and Holdenson OP, QC, "Comparative Evidence: Admission of Evidence of Relationship in Sexual Offence Prosecutions - Part II" (1999) 73 *Australian Law Journal* 494 at 498 where the authors refer to the "probable error" in the drafting of s 98 of the Commonwealth and New South Wales *Evidence Acts*:

> Paradoxically, as a result, s 98 will not apply to coincidence evidence of little or no probative value, but will apply to that which has substantial probative value and is, therefore, not excluded by the section.

propensity evidence that was enunciated by the majority of the High Court in *Pfennig v The Queen*.[1571]

In *R v Lock*,[1572] Hunt CJ at CL equated the test posed by section 101 of the *Evidence Act 1995* (NSW) with "the exercise discussed by the High Court in *Pfennig*".[1573] Referring to the majority view in *Pfennig* that similar fact evidence "(or *coincidence* evidence, as the *Evidence Act* now calls it)"[1574] should be admissible only if there is no rational or reasonable view of the evidence that is consistent with the innocence of the accused, Hunt CJ at CL held:[1575]

> … it is only if there is no such view available that a conclusion can safely be reached that the probative force of the evidence outweighs its prejudicial effect.

Hunt CJ at CL also held that the *Pfennig* test applied to the admissibility of tendency evidence under section 97:[1576]

> Although that was said by the High Court in relation to coincidence evidence (s 98) rather than tendency evidence (s 97), the requirement of s 101 which I am presently considering applies to both types of evidence and, because the High Court dealt with tendency evidence in the same way, it should, in my view, be interpreted in the same way in relation to each.

In determining whether the probative value of tendency evidence or coincidence evidence substantially outweighs any prejudice to the accused that would result from the admission of the evidence, the courts have emphasised that the significance of the probative value of the evidence must depend on the nature of the fact in issue to which it is relevant and the significance that the evidence may have in establishing that fact.[1577] For example, in *R v Lock*,[1578] the accused, who was charged with having murdered her former de facto partner by stabbing him, raised the defence of self-defence. Hunt CJ at CL held that "the relevant fact in issue was whether

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1571 (1995) 182 CLR 461. The *Pfennig* test, which is discussed at pp 326-330 of this Report, has been applied in *R v Lock* (1997) 91 A Crim R 356 per Hunt CJ at CL at 363; *R v AH* (1997) 42 NSWLR 702 per Ireland J (with whom Hunt CJ at CL and Levine J agreed) at 709; *Fordham v The Queen* (1997) 98 A Crim R 359 per Howie AJ at 370; *R v Leask* [1999] NSWCCA 33 (12 March 1999) per Barr J (with whom McInerney J agreed) at para 87; and *R v Phillips* [1999] NSWSC 1175 (17 December 1999) at paras 19, 74. This approach was, however, criticised in *R v Leask* [1999] NSWCCA 33 (12 March 1999) by Hulme J, who expressed the view (at para 53) that the *Pfennig* test should not "be substituted for the test set out in the clear words of s 101(2) of the Evidence Act".

1572 (1997) 91 A Crim R 356.

1573 Id at 363.

1574 Ibid.

1575 Ibid.

1576 Ibid.

1577 Id at 362.

1578 (1997) 91 A Crim R 356.

the stabbing of the deceased was the deliberate act of the accused".[1579] The prosecution sought to adduce, as tendency evidence, evidence about three previous occasions on which the accused had stabbed the deceased. In relation to two of those three incidents, Hunt CJ at CL held that, in the absence of evidence of the immediately surrounding circumstances, the incidents did not have any significant probative force.[1580]

C. The effect of the possibility of collusion between, or infection of, witnesses

It has been held that the approach adopted in *Hoch v The* Queen[1581] should be applied in trials where it is sought to adduce evidence under section 97 to show tendency or under section 98 to rebut coincidence:[1582]

> If the reasonable possibility of concoction suggests that evidence of this nature may be contaminated, it must be withheld from the jury because that risk deprives the evidence of its significant probative value, regardless of its substantial and relevant similarity.

(ii) Relationship evidence

The Commonwealth and New South Wales *Evidence Acts* do not refer to "relationship evidence" as such. Nevertheless, the courts have addressed the question of the admissibility under those Acts of evidence that is adduced to explain the nature of the relationship between a complainant and an accused person, as distinct from evidence that is adduced to prove the commission of the offence charged.

In *R v AH*,[1583] the New South Wales Court of Criminal Appeal explained how evidence of "conduct with a sexual connotation between the complainant and the accused other than that which is the subject of the offence or offences charged is relevant in two different ways":[1584]

> (a) the relationship revealed may place the evidence of the events which give rise to a particular charge into their true context as part of the essential background against which the evidence of the complainant and of the accused necessarily fall to be evaluated … ; and

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1579 Id at 362.

1580 Id at 363. Evidence of the third incident, which Hunt CJ at CL considered to be stronger, did not pass the test posed by s 101. Evidence of all three incidents was, however, held to be admissible as relationship evidence. See pp 344-345 of this Report for a discussion of the admissibility of relationship evidence under the Commonwealth and New South Wales *Evidence Acts*.

1581 (1988) 165 CLR 292.

1582 *R v Colby* [1999] NSWCCA 261 (26 August 1999) per Mason P (with whom Grove and Dunford JJ agreed) at para 107.

1583 (1997) 42 NSWLR 702.

1584 Id per Ireland J (with whom Hunt CJ at CL agreed) at 708.

> (b) the guilty passion of the accused revealed - or, in less inflammatory terms, the sexual desire or feeling of the accused for the complainant - is directly relevant to proving that the offence charged was committed …

In that case, the Court held that, where the Crown introduces evidence for the former purpose, it is not tendency evidence, and the requirements of sections 97 and 101 are irrelevant.[1585]

The Full Court of the Federal Court has also held that the admissibility of relationship evidence does not fall within the ambit of section 97 or 98 of the *Evidence Act 1995* (Cth).[1586] The Court held that the admissibility of such evidence under that Act is governed "by the relevance of that evidence, subject to the exercise by the trial judge of his discretion to exclude it under one or more of the various exclusionary discretions contained in Pt 3.11 of the Act".[1587]

On this basis, in *R v Lock*,[1588] where the accused was charged with the murder of her former de facto by stabbing and pleaded self-defence, the Court admitted, as relationship evidence, evidence of three previous occasions on which the accused had inflicted injuries on the deceased by stabbing him, notwithstanding that the evidence had been held to be inadmissible as tendency evidence:[1589]

> It was … my view that there was a substantial danger in this case that the exclusion of this evidence would require the jury to decide very important issues in the case as if the stabbing had happened in a quite different context to that which (according to the Crown's evidence) was the truth. It was always open to the accused to explain the circumstances in which these stabbings took place. The position so far as relationship evidence of this type is concerned is quite different to that which concerns tendency or coincidence evidence and the requirements of s 101. …
>
> … this evidence was … relevant to rebut self-defence, which was opened to the jury by counsel for the accused as *the* significant issue in the case, one which in turn depended strongly upon the general relationship between the accused and the deceased. The *true* nature of that relationship was therefore of great importance in the case, and the probative value of this evidence upon the accused's state of mind as to the necessity to do this act in self-defence was correspondingly high. [original emphasis; note omitted]

1585 Ibid. On the other hand, Ireland J (at 709) held that, where "the Crown does wish to use the evidence of guilty passion as tending to show that the accused did do the act in question (and thus that the complainant's evidence that the accused did the act in question is more credible), it is tendency evidence and so must comply with s 97 and s 101 before it may be used for that purpose".

1586 *Conway v The Queen* (2000) 98 FCR 204 per Miles, von Doussa and Weinberg JJ at 234.

1587 Ibid. The Court referred (at 234) to the requirement under s 137 of the Act that, in a criminal proceeding, a trial judge must "refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant". Section 137 is set out at p 341 of this Report.

1588 (1997) 91 A Crim R 356.

1589 Id at 364, 365. See the discussion of this case at pp 343-344 of this Report.

(b) Victoria

In Victoria, legislation has been enacted to deal specifically with the admissibility of propensity evidence in criminal proceedings. Like section 132A of the *Evidence Act 1977* (Qld), the Victorian legislation modifies the effect of the High Court's decision in *Hoch v The Queen*,[1590] insofar as that decision dealt with the admissibility of similar fact evidence where there is a possibility of collusion between the prosecution witnesses.[1591] However, the Victorian legislation has effected a more fundamental change than the Queensland legislation, adopting a new test for the admissibility of propensity evidence generally.[1592]

Section 398A of the *Crimes Act 1958* (Vic) provides:[1593]

> **Admissibility of propensity evidence**
>
> (1) This section applies to proceedings for an indictable or summary offence.
>
> (2) Propensity evidence relevant to facts in issue in a proceeding for an offence is admissible if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.
>
> (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
>
> (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.
>
> (5) This section has effect despite any rule of law to the contrary.

The scope of the Victorian provision has been considered by the Court of Appeal of the Supreme Court of Victoria in several recent cases.

In *R v Best*,[1594] the applicant applied for leave to appeal against his convictions for a number of sexual offences. He had been charged with eighteen counts of sexual offences relating to five former students. Of these, he was convicted of four counts

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1590 (1988) 165 CLR 292. See pp 330-333 of this Report.

1591 *Crimes Act 1958* (Vic) s 398A(3).

1592 *Crimes Act 1958* (Vic) s 398A(2).

1593 Section 398A of the *Crimes Act 1958* (Vic) was inserted by s 14 of the *Crimes (Amendment) Act 1997* (Vic), which commenced on 1 January 1998. It applies "to any trial, committal proceeding or hearing of a charge for an offence that commences on or after 1 January 1998, irrespective of when the offence to which the trial, committal proceeding or hearing relates is alleged to have been committed": *Crimes Act 1958* (Vic) s 588(1).

1594 [1998] 4 VR 603. The main judgment was delivered by Callaway JA, with whose reasons Phillips CJ and Buchanan JA agreed.

in relation to one complainant and of two counts in relation to a second complainant, and was acquitted of the remaining counts.

In the course of the trial, the evidence of each complainant had been held to be admissible in relation to the counts concerning the other complainants. One of the grounds of appeal was that the trial judge had erred in ruling that, under section 398A of the *Crimes Act 1958* (Vic), the evidence relating to each individual complainant was admissible as propensity evidence in considering the guilt of the applicant on the counts relating to each of the other complainants.[1595]

Ultimately, the Court held that, because the jury had not been properly directed as to the purpose for which they could use the propensity evidence that had been admitted, it was not necessary for it to decide this particular ground of appeal.[1596] Nevertheless, Callaway JA made a number of observations about the operation of the provision, in particular, about its operation in circumstances where it is argued that the evidence of a number of witnesses is the result of collusion or unconscious suggestion.[1597]

At the outset, his Honour considered the meaning of the expression "propensity evidence", which is used in section 398A(2), but is not defined in the legislation. It was held that this referred to:[1598]

> … evidence which is received notwithstanding that it discloses the commission of offences other than those with which the accused is charged … .

By way of clarification, Callaway JA added:[1599]

> In the case of a trial involving two or more complainants, s. 398A clearly extends, in accord with the pre-existing common law, to the question whether the evidence that the accused committed an offence against A is admissible in relation to an alleged offence against B.

Callaway JA acknowledged that this interpretation of the provision involved the adoption of the "disclosure" approach, rather than the "purpose" approach.[1600] On

1595 Id at 605.

1596 Id at 617. See the discussion at p 351 of this Report of the direction that should have been made.

1597 See the discussion of *Hoch v The Queen* (1988) 165 CLR 292 at pp 330-333 of this Report.

1598 *R v Best* [1998] 4 VR 603 at 607.

1599 Id at 608.

1600 Id at 607.

this approach, subject to two qualifications,[1601] the admissibility of all evidence that discloses the commission of an offence or other discreditable conduct will be determined by section 398A.[1602] Consequently, the admissibility of the evidence of each complainant in relation to the charges concerning the other complainants clearly fell to be determined by section 398A.

Under section 398A(2), relevant propensity evidence is admissible "if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence". In applying that test, section 398A(3) provides that the "possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility" of the evidence. For the applicant, it was argued that it was not just to admit the evidence of each complainant as evidence in proof of the charges concerning the other complainants. The reason given was that, in the circumstances of the particular case, there was "more than a mere possibility of a reasonable explanation consistent with innocence".[1603] The applicant's case was that there was "a substantial risk of concoction or unconscious influence" on the part of the complainants, which was said to have arisen from the extensive media publicity surrounding charges on which the accused had previously stood trial in relation to other former students.[1604] This argument was based on a distinction drawn in the second reading speech between the operation of the provision where there was a mere possibility of concoction and its operation where there was a substantial risk of concoction having occurred.[1605]

This argument was rejected. Callaway JA held that the effect of subsections (3) and (4) was that the "possibility, even a strong possibility, of collusion or any other

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1601 Id at 608. It was suggested that s 398A of the *Crimes Act 1958* (Vic) "may not apply at all where evidence disclosing a relevantly uncharged act or other discreditable conduct forms part of the res gestae". The Court also endorsed a qualification referred to in *Cross on Evidence* to the effect that:

> The exclusionary rule is not directed to evidence of discreditable conduct per se; it is concerned with the impermissible use which may be made of it. Discreditable conduct will therefore not attract the rule unless it has features which may cause the jury to infer that a person who has been responsible for or involved in those acts is likely by reason of that fact to have committed the offence charged.

1602 See the discussion of the admissibility of relationship evidence at pp 354-355 of this Report.

1603 *R v Best* [1998] 4 VR 603 at 609.

1604 Ibid.

1605 Ibid. The distinction was raised in the following passage from the second reading speech, which is set out in the judgment of Callaway JA (at 609):

> The provision also overrules the common law principle that where there exists a "possibility" of concoction, collusion, infection or coincidence of the allegations between the complainants, the allegations are inadmissible as against each other resulting in separate trials occurring. Those matters would fall into the category of "reasonable explanations consistent with the innocence of the accused". …
>
> Accordingly, the mere possibility of concoction, collusion, infection or coincidence will not be a ground for inadmissibility of propensity evidence leading to the separation of trials. However, implicit in the provision is the notion that where the court is satisfied that there is a substantial risk of concoction having occurred it would not be just to admit the evidence in a single trial. [emphasis added]

matter affecting the reliability of the evidence is a matter for the jury".[1606] Consequently, matters concerning the reliability of propensity evidence are not relevant to its admissibility, although they are matters to be considered by a jury when considering what weight to give to the evidence.[1607] In this respect, section 398A abrogates the effect of the decision in *Hoch v The Queen*.[1608]

Callaway JA further held that the test in section 398A(2) should be applied "on the assumption that the evidence will be accepted as true".[1609] His Honour expressed the view that this was the approach adopted by the House of Lords in relation to the English test of admissibility - on which section 398A(2) was based - and that this approach was supported by section 398A(2) and (3).[1610]

His Honour observed that the effect of section 398A was to displace the *Pfennig* test,[1611] which he considered to be a stricter test than the English test on which section 398A was based.[1612] However, Callaway JA did not consider that, when properly applied, the test in section 398A(2) would "greatly alter the conduct of criminal trials".[1613] In particular, his Honour stated that similar fact evidence would "still be received with great caution because … the risk of prejudice is ordinarily at its highest in such cases".[1614]

Callaway JA noted that, on the retrial of the applicant on the charges in respect of which he had been convicted (which related to only two complainants), it would be necessary for the trial judge to determine whether, under section 398A, the evidence of each complainant should be admissible in relation to the charges concerning the other complainant. Although not wishing to pre-empt the trial judge's decision on that issue, Callaway JA made some observations that would suggest that, in cases concerning sexual offences, evidence would need to have high probative value to be admissible under section 398A:[1615]

1606 *R v Best* [1998] 4 VR 603 at 616. In particular, the Court held (at 610) that the references in subss (3) and (4) to "the possibility of a reasonable explanation consistent with the innocence of the person charged" should be understood "to refer only to explanations, like collusion and unconscious influence, that affect the truth of propensity evidence sought to be adduced and not to extend to explanations like coincidence, because so to construe them would make the judge's task impossible in the case of similar fact evidence".

1607 The Court acknowledged (at 612) that the greatest change made by s 398A was made by subss (3) and (4) of that section.

1608 (1988) 165 CLR 292. See the discussion of this decision at pp 330-333 of this Report.

1609 *R v Best* [1998] 4 VR 603 at 607.

1610 Ibid. See *Director of Public Prosecutions v P* [1991] 2 AC 447 and *R v H* [1995] 2 AC 596.

1611 *R v Best* [1998] 4 VR 603 at 613.

1612 Id at 607, 608.

1613 Id at 612.

1614 Ibid.

1615 Id at 619.

> It is fair to observe … that there were significant differences in the allegations made by K and D, with whom alone the new trial or trials will be concerned. The applicant had similar opportunities to commit the offences against each complainant but the offences themselves were different. For myself, I doubt whether the probative value of their evidence would transcend its prejudicial effect.[1616] [note added]

The view expressed by Callaway JA in *R v Best* to the effect that section 398A would "not greatly alter the conduct of criminal trials" was endorsed in *R v Tektonopoulos*.[1617] In that case, the Victorian Court of Appeal also considered the extent to which the test of admissibility prescribed by section 398A differed from the *Pfennig* test. Winneke P held that "the legislative purpose of s. 398A was to abrogate the 'no other reasonable explanation' test for admissibility of propensity evidence, as developed by the High Court … in *Hoch v R.* … and *Pfennig v R.* … , in favour of the 'just to admit the evidence despite its prejudicial effect' test enunciated by the House of Lords in *Director of Public Prosecutions v P*".[1618] It was suggested that the test prescribed by section 398A:[1619]

> … is not far removed from the test which was customarily applied in Australia before *Hoch*. In *Sutton v. R.* (1984) 152 C.L.R. 528, Brennan J. described the test of admissibility as follows at 547-8:
>
> > Before the trial judge is at liberty to admit similar fact evidence he must be satisfied that the probative force of the evidence clearly transcends its merely prejudicial effect … It is the probative force (or cogency) of the evidence in comparison with the impermissible prejudice that it may produce which determines admissibility …

Under section 398A, as under the *Pfennig* test,[1620] the admissibility of propensity evidence is a question of law:[1621]

> The admissibility of propensity evidence under s 398A is a question of law. It does not involve a discretion, albeit that the judge must decide whether it is just to admit the evidence despite any prejudicial effect it may have on the accused. The Crown must satisfy the judge that the evidence is admissible, unlike the Christie discretion, where the onus lies on the accused to satisfy the judge that admissible evidence should be excluded because it is unduly prejudicial. [note omitted]

1616 See, however, the approach subsequently taken by the Victorian Court of Appeal in *Mitchell v The Queen* (2000) 112 A Crim R 315, which is discussed at pp 353-354 of this Report.

1617 [1999] 2 VR 412 per Winneke P (with whom Charles and Batt JJA agreed) at 416.

1618 Ibid.

1619 Ibid.

1620 See pp 326-330 of this Report.

1621 *R v Loguancio* (2000) 110 A Crim R 406 per Callaway JA (with whom Tadgell and Buchanan JJA agreed) at 414.

(i) Permissible use of propensity evidence admitted under section 398A

The appeal in *R v Best* was ultimately upheld on the basis that the trial judge had failed to properly direct the jury as to purposes for which the propensity evidence could, and could not, be used. Callaway JA held that "the language used [by the trial judge] would have conveyed to the jury that the evidence on the counts concerning one victim could be used as tending to prove an inclination towards the relevant conduct".[1622] To avoid the risk of the evidence being used in an impermissible way:[1623]

> … the jury should have been told that it was permissible for the prosecution to identify points of similarity or a pattern of conduct or system … in the allegations of the five complainants and to argue that it was improbable that five men would make those allegations unless they were true, but the jury should have been warned that, if they concluded that the applicant had sexually assaulted one or more of the complainants, they were not to reason from that conclusion that he was the kind of man who was likely to have assaulted the others.

Although, in *R v Best*, the Court was of the view that the probative value of the various allegations was derived from "points of similarity" in the allegations of the various complainants, it is doubtful that that characteristic would be required in all cases for propensity evidence to be admissible. As noted earlier, section 398A is based on the English test for the admissibility of propensity evidence.[1624] In *Director of Public Prosecutions v P*,[1625] the House of Lords rejected the view that "striking similarity" was an essential element in every case for the admissibility of propensity evidence.[1626] Rather, the test for admissibility was expressed in terms of the broader principle now reflected in section 398A:[1627]

> … the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed … . But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle. [emphasis added]

1622 *R v Best* [1998] 4 VR 603 at 614.

1623 Id at 616.

1624 See p 349 of this Report.

1625 [1991] 2 AC 447.

1626 Id per Lord Mackay of Clashfern LC (with whom the other Law Lords agreed) at 460.

1627 Ibid.

In that case, the accused was charged with the offences of rape and incest of his two daughters. The following question was posed for the House of Lords:[1628]

> Where a father or stepfather is charged with sexually abusing a young daughter of the family, is evidence that he also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such charge in the absence of any other 'striking similarities'?

This question was answered in the affirmative, with the House of Lords holding that factors other than "striking similarity" could satisfy the requirement that it is "just to admit the evidence, notwithstanding it is prejudicial to the accused in tending to show that he was guilty of another crime":[1629]

> Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises, demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree.

The Lord Chancellor regarded the relationship between the evidence of the witnesses as critical to the question of admissibility:[1630]

> When a question of the kind raised in this case arises I consider that the judge must first decide whether there is material upon which the jury would be entitled to conclude that the evidence of one victim, about what occurred to that victim, is so related to the evidence given by another victim, about what happened to that other victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence. This relationship, from which support is derived, may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, consisting of unusual characteristics in its execution the necessary relationship is by no means confined to such circumstances. Relationships in time and circumstances other than these may well be important relationships in this connection.

In particular, the Lord Chancellor drew a distinction between the evidence that was likely to satisfy the test for admissibility when identity was in issue and the evidence that was likely to satisfy that test when identity was not in issue:[1631]

1628 Id at 449.

1629 Id at 460-461.

1630 Id at 462. This analysis of the test for admissibility was discussed in the majority judgment in *Pfennig v The Queen* (1995) 182 CLR 461 at 478-479.

1631 *Director of Public Prosecutions v P* [1991] 2 AC 447 per Lord Mackay of Clashfern LC (with whom the other Law Lords agreed) at 462.

> Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle.

The approach taken by the House of Lords in *Director of Public Prosecutions v P*,[1632] was followed by the Victorian Court of Appeal in *Mitchell v The Queen*.[1633] In that case, the accused had been tried on twenty-eight counts relating to nine complainants. One of the grounds of appeal was that separate trials should have been ordered in relation to the counts concerning each complainant.[1634] In support of that ground, it was argued that, although "there was a good deal in the evidence which justified the conclusion that there was a similarity between the various 28 offences which the judge left to the jury", what was required was a "striking similarity" between the offences. It was argued that the similarity "was not sufficiently striking … to justify leaving the 28 counts to be dealt with together".[1635]

That argument was rejected by the Court.[1636] Tadgell JA (with whom the other members of the Court agreed) commented, referring to the substance of the tests found in sections 398A and 372 of the *Crimes Act 1958* (Vic):[1637]

> … what is required before propensity evidence of this kind may be contemplated is merely that the court should consider that in all the circumstances it is just to admit that evidence; or, looking at it from the point of view of severance, that it was just to permit the counts to remain joined despite any prejudicial effect that the joinder might have on the accused.

Tadgell JA considered the speech delivered by the Lord Chancellor in *Director of Public Prosecutions v P* and concluded, in relation to the circumstances in which evidence of an offence against one complainant will be admissible in relation to an offence against another complainant:[1638]

> Certainly there have been cases which have used the words "striking similarity", but the test they provide is more appropriate, as I think, to be used in a case where the question is the identity of an offender rather than whether

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1632 [1991] 2 AC 447.

1633 (2000) 112 A Crim R 315.

1634 Id at 316. Chapter 17 of this Report examines the court's discretion to order a separate trial in respect of a count or counts in an indictment.

1635 (2000) 112 A Crim R 315 at 317.

1636 Id at 318.

1637 Ibid. Section 372 of the *Crimes Act 1958* (Vic) deals with the court's discretion to order a separate trial of any count or counts in an indictment. The section is discussed at pp 387-392 of this Report.

1638 (2000) 112 A Crim R 315 at 318-319.

> a crime has been committed, such as was the problem which confronted the jury in this case. Lord Mackay referred to the distinction between such a case and a case of identity at 462; 280 of the report.

(ii) Applicability of section 398A to relationship evidence

As the decision in *R v Best* concerned the admissibility of propensity evidence that was in the nature of similar fact evidence, the Court did not have to decide whether the admissibility of relationship evidence should also be determined by section 398A of the *Crimes Act 1958* (Vic):[1639]

> I return briefly to the meaning of "[p]ropensity evidence" in subs. (2). I said earlier that the legislature is taken to have intended that expression in the broader of the two senses explained by Mason C.J., Deane and Dawson JJ. in the opening paragraph of their judgment in *Pfennig's* case. … In expressing that view I am not taking sides in the controversy as to whether the *Pfennig* test applies to relationship evidence. Compare *R. v. Ritter* with *R. v. Wackerow* … . That is a controversy into which this court need not enter.

Callaway JA did express the view, however, that the difficulties of applying the *Pfennig* test to relationship evidence did not apply to the test in section 398A(2) and that "legitimate evidence of relationship" would usually be admitted under that test.[1640]

An indication that section 398A might, in the future, be held to determine the admissibility of relationship evidence is found in the decision of Charles JA in *R v FJB*.[1641] His Honour referred to the approach adopted in the Court of Criminal Appeal of New South Wales, where "it has been said that where the Crown introduces evidence for the purpose of establishing the relationship between the complainant and the accused, it is not tendency evidence; and that, once admitted for that purpose, the evidence cannot be used as tendency evidence".[1642] Although Charles JA acknowledged that the New South Wales approach may well be explained by the differences in wording between sections 97 and 101 of the *Evidence Act 1995* (NSW) and section 398A of the *Crimes Act 1958* (Vic),[1643] the New South Wales approach did not find favour with him:[1644]

1639 *R v Best* [1998] 4 VR 603 at 611-612. See the discussion of the "two main divisions of propensity evidence" at 606. That discussion is set out at p 324 of this Report.

1640 *R v Best* [1998] 4 VR 603 at 612.

1641 [1999] 2 VR 425.

1642 Id at 428.

1643 Id at 429.

1644 Id at 428-429.

> It is not necessary to decide the point in this case, but I would need to be persuaded that evidence which, objectively, tends to show a propensity may nevertheless avoid or lose that quality simply because the Crown asserts that the evidence is introduced for a different purpose. If the evidence tends to establish that propensity, the jury is likely to use it for that purpose regardless of any direction they may be given.

These views have been borne out in several recent decisions, where the admissibility of relationship evidence has been held to be within the ambit of section 398A of the *Crimes Act 1958* (Vic).[1645] In *R v GAE*,[1646] relationship evidence was admitted under section 398A for the same reasons as it has been held to be admissible under the common law:

> … the evidence of M of uncharged acts … did have probative value in the sense that it was relevant to the existence of the applicant's sexual passion for M and thereby placed the charged sexual acts of the applicant with him in their proper context. Furthermore, it went to explain why no complaints were made by M about the applicant's behaviour towards him. In this case, there is no reason why the Crown should have been confined to evidence of charged acts for the purpose of establishing such a relationship as was contended for … .

(c) The Sturgess recommendations

In his report on sexual offences involving children,[1647] Mr Des Sturgess QC, the then Queensland Director of Prosecutions, was critical of the law relating to the admissibility of similar fact evidence. He considered the law to be obscure, difficult and uncertain.[1648] He also criticised the law on the basis that:[1649]

> … many times it shuts out evidence of considerable probative value and denies to the prosecution the right to produce the only corroborative evidence available.

The reference in this passage to the exclusion of "the only corroborative evidence available" is important in understanding the impetus for the recommendations made in that report. It is apparent that one of Sturgess's main concerns was the difficulty encountered at that time in prosecuting cases of sexual offences concerning child complainants, especially in the light of the requirements at the time in relation to corroboration.[1650]

1645 See *R v Williamson* [1999] VSC 108 (15 April 1999) per Teague J at paras 12, 16; *R v GAE* (2000) 109 A Crim R 419 per Callaway JA at 425-426 and per Chernov JA at 437; *R v Loguancio* (2000) 110 A Crim R 406 per Callaway JA (with whom Tadgell and Buchanan JJA agreed) at 414.

1646 *R v GAE* (2000) 109 A Crim R 419 per Chernov JA at 436.

1647 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985).

1648 Id at para 7.126.

1649 Ibid.

1650 Id at paras 7.130, 7.132, 7.139.

At the time the Sturgess Report was published, the issue of corroboration was of particular significance in the prosecution of sexual offences, especially in cases involving a child complainant. In relation to certain specified offences, the *Criminal Code* (Qld) provided that a person could not be convicted of the offence on the uncorroborated testimony of one witness.[1651] Although the Code did not have a specific corroboration requirement in relation to every sexual offence,[1652] the effect of section 9 of the *Evidence Act 1977* (Qld) was that, where the complainant was a child whose evidence was admitted under that section, the judge was required to warn the jury of the danger of acting on that evidence unless they found that the child's evidence was corroborated in some material particular by other evidence implicating the accused.[1653]

Sturgess considered the probative value of the evidence in these cases to lie not in "the external similarities between the acts charged and the alleged similar fact", but in what the evidence that was sought to be adduced revealed as to the "mind or feelings" of the accused.[1654] For example, Sturgess contended that, in the prosecution of an incest case:[1655]

> … one would think, the real evidentiary value of the evidence of other acts of incest with other daughters is, if it is accepted, it shows the defendant disregards one of the most strongly and widely held taboos, the incest taboo. If a defendant in an incest case had stated he did not recognise the taboo, no one could argue that that evidence would not be of great probative value. And, as actions often speak louder than words, evidence of other acts of incest involving the other persons would be admissible on the same footing.

The Report recommended that special "similar fact" provisions should apply in prosecutions for incest and for sexual offences involving children. The following provisions were suggested:[1656]

> **Similar fact evidence in incest.**
>
> (1) Subject to subsection (2) in the prosecution of a person for incest or attempted incest evidence of a similar fact involving the person with whom it is alleged the incest occurred or the attempt was made or some other person shall be admitted.

1651 See for example *Criminal Code* (Qld) ss 212 (Defilement of girls under twelve), 215 (Defilement of girls under sixteen and of idiots), 217 (Procuration) and 218 (Procuring defilement of woman by threats, or fraud, or administering drugs).

1652 See for example *Criminal Code* (Qld) s 222 (Incest by man).

1653 This remained the law until the *Criminal Code* (Qld) and s 9 of the *Evidence Act 1977* (Qld) were amended by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).

1654 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985) at para 7.155.

1655 Id at para 7.134.

1656 Id at para 7.161.

(2) Nothing in subsection (1) shall affect the discretion of the court to exclude the evidence on the ground of unfair prejudice.

(3) If it is alleged the person with whom the incest that is charged was committed or attempted was a child the court, when considering whether it should exercise its discretion to exclude the evidence, shall take into account -

(a) the age of the child and any difficulty the child has in appearing in court or giving full evidence;

(b) the requirement for or the desirability of corroboration of the prosecution case and whether there exists other evidence capable of amounting to corroboration; and

(c) whether the circumstances of the alleged offence are such it is impossible for the prosecution to produce other eye witnesses who are not children.

Similar fact evidence in sexual offences involving children.

(1) Subject to subsection (2) in the prosecution of a person for an offence of a sexual nature against a child evidence of a similar fact involving that child or some other person shall be admitted provided it tends to identify the person charged as a person who does not accept or disregards usual community standards with respect to the involvement of children in sexual activity.

(2) Nothing in subsection (1) shall affect the discretion of the court to exclude the evidence on the ground of unfair prejudice.

(3) The court, when considering whether it should exercise its discretion to exclude the evidence, shall take into account -

(a) the age of the child and any difficulty the child has in appearing in court or giving full evidence;

(b) the requirement for or the desirability of corroboration of the prosecution case and whether there exists other evidence capable of amounting to corroboration; and

(c) whether the circumstances of the alleged offence are such it is impossible for the prosecution to produce other eye witnesses who are not children.

It is not entirely clear what the reference to a “similar fact” in clause (1) of each draft provision was intended to encompass. However, given that Sturgess expressly rejected an approach under which admissibility is based on the “external similarities” between the act charged and the alleged similar facts,[1657] it would seem that the reference to a “similar fact” - at least in relation to the provision in relation to incest - was intended to refer simply to another allegation of incest, rather than to an allegation sharing any particular common features with the act charged.

1657 Id at para 7.155.

In the second draft provision, which deals generally with sexual offences involving children, a "similar fact" is to be admitted "provided it tends to identify the person charged as a person who does not accept or disregards usual community standards with respect to the involvement of children in sexual activity". The breadth of this qualification would seem to suggest that the draft provision would enable evidence with a fairly tenuous connection with the acts charged to be admitted.

Neither provision requires, as a ground of admissibility, that the evidence should have a stipulated degree of probative force. It would seem to be sufficient that the evidence identifies the accused as the sort of person who might commit an offence of the kind charged.

In making these recommendations, Sturgess was particularly concerned about the decision of the Queensland Court of Criminal Appeal in *R v Kelly*.[1658] In that case, the Court held that, on the trial of the accused on a charge of incest in relation to one of his daughters, evidence by another daughter of acts of incest upon her had been wrongly admitted. As a result, the conviction was quashed and a new trial was ordered, although the new trial never eventuated.[1659]

R v Kelly was decided well before the decision of the High Court in *Pfennig v The Queen* and it may be that the question of the admissibility of the second sister's allegations of incest would be decided differently today; certainly, it would be decided on different principles. The report of the case does not reveal the circumstances in which the acts of incest were alleged to have been committed. However, all three judges[1660] considered the issue as being settled by the much earlier decision of the Queensland Court of Criminal Appeal in *R v Allen*.[1661] In that case, the accused was charged with indecently dealing with a girl under the age of twelve. The prosecution sought to adduce evidence from another girl who alleged that the accused had also dealt indecently with her. The Court held that the evidence was inadmissible. It is important to note that *R v Allen* was decided at a time when similar fact evidence was admitted only if it fell into one of a number of recognised categories.[1662] As

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1658 [1984] 1 Qd R 474.

1659 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985) at para 7.130.

1660 [1984] 1 Qd R 474 per Andrews SPJ at 474, per McPherson J at 475 and per Thomas J at 476.

1661 [1937] St R Qd 32.

1662 See for example the comments of Henchman J in *R v Allen* [1937] St R Qd 32 at 38, 40:

> It is clear law that evidence which is relevant to some question really in issue in the case is admissible even though it may tend to prove that the accused has been guilty of other offences. Such evidence is frequently admitted either to prove knowledge, intention, design or mens rea in the accused when he did the act, or to rebut some defence which is open to the accused. In such cases the evidence is admissible, not as tending to prove that the accused did the physical act in question, but to prove that if he did it, he did it with the necessary knowledge, intention, or other state of mind.
>
> …
>
> It does not appear to me that any of the evidence here objected to is admissible on any of the principles which have been elucidated in the series of cases to which I have referred.

discussed earlier, the courts have since rejected that restrictive approach in favour of a principle of general application.[1663]

Although it is implicit in the judgment of Thomas J in *R v Kelly*[1664] that there was no "striking similarity" between the evidence of the two sisters,[1665] the High Court held in *Pfennig v The Queen*[1666] that "striking similarity" is not an essential prerequisite for the admissibility of propensity evidence in every case. This leaves open the possibility that, even in the absence of striking similarities between the evidence of a complainant and another witness, there might be other features of their evidence that would satisfy the test that the probative value of the evidence was such that there was no reasonable view of it that was consistent with the innocence of the accused.[1667]

The two draft provisions proposed in the Sturgess Report are expressed not to affect the court's discretion "to exclude evidence on the ground of unfair prejudice".[1668] However, both provisions also stipulate that certain factors are to be taken into account by the court in considering whether it should exercise its discretion to exclude the evidence. These factors are:

- the age of the child and any difficulty the child has in appearing in court or giving full evidence;

- the requirement for or the desirability of corroboration of the prosecution case and whether there exists other evidence capable of amounting to corroboration; and

- whether the circumstances of the alleged offence are such that it is impossible for the prosecution to produce other eye witnesses who are not children.

These factors do not relate to the cogency of the evidence that is sought to be adduced. Rather, the various factors seem to be directed towards circumstances the presence of which, in a particular case, would make it more difficult for the

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1663 See the discussion of this issue at pp 326-330 of this Report.

1664 [1984] 1 Qd R 474.

1665 Id at 476.

1666 (1995) 182 CLR 461 per Mason CJ, Deane and Dawson JJ at 482. See pp 328-329 of this Report.

1667 See the discussion of *Director of Public Prosecutions v P* [1991] 2 AC 447 at pp 351-353 of this Report. In that case, which was decided under the slightly different English test for the admissibility of propensity evidence, the House of Lords held that allegations of rape and incest involving one of the accused's daughters could be admitted in relation to similar charges in relation to the other daughter.

1668 See *Evidence Act 1977* (Qld) s 130, which provides:

> **Rejection of evidence in criminal proceedings**
>
> Nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence.

prosecution to secure a conviction if evidence of the "similar fact" were excluded, especially in the light of the then existing requirements for corroboration of the child complainant's evidence.[1669] Consequently, although the draft provisions purport to preserve the court's discretion to exclude evidence on the ground of unfair prejudice, the stipulation of the various factors to which the court must have regard in exercising that discretion would seem to curtail, to a significant extent, the capacity of the court, through the exercise of its discretion, to ensure a fair trial for the accused.

Neither of the draft similar fact provisions recommended in the Sturgess Report was adopted in 1989 when a number of other recommendations made in that report were implemented by amendments to the *Criminal Code* (Qld) and the *Evidence Act 1977* (Qld).[1670] In the Second Reading Speech for *The Criminal Code, Evidence Act and Other Acts Amendment Bill 1989* (Qld), the Honourable Brian Austin MLA explained the decision not to implement the draft similar fact provisions in terms of the potential prejudice to the accused:[1671]

> As a result of many representations made concerning the proof of propensity to commit offences which was drafted on the basis of recommendations made by the Director of Prosecutions, it has been decided to not continue with this proposal as it had the potential to unfairly prejudice an accused person.

5. ISSUES FOR CONSIDERATION

The legislation outlined above and the recommendations made in the Sturgess Report raise a number of issues for consideration in relation to the admissibility of propensity evidence in cases concerning sexual or other offences against children. These issues include:

- whether the common law test for the admissibility of propensity evidence should be modified and, if so, in what respects;

- whether section 132A of the *Evidence Act 1977* (Qld) in relation to the effect of collusion or suggestion on the admissibility of similar fact evidence should be modified;

- if the common law test for the admissibility of propensity evidence is to be modified, whether that test should apply to the admissibility of all evidence that discloses the commission of criminal or discreditable conduct by the accused or whether the admissibility of relationship evidence should continue to be determined by a different test;

1669 See the discussion of the issue of corroboration at pp 355-356 of this Report.

1670 These Acts were amended by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).

1671 Legislative Assembly (Qld), *Queensland Parliamentary Debates* (24 November 1988) at 3261.

- the proceedings in which a modified test of admissibility should apply.

(a) Modification of the common law test for the admissibility of propensity evidence

As discussed above, three different tests for the admissibility of propensity evidence apply within Australia:

- In those jurisdictions where the common law still determines the admissibility of propensity evidence, such evidence is admissible if its probative value is such that there is no reasonable view of the evidence that is consistent with the innocence of the accused (the *Pfennig* test).[1672] That is the test that applies in Queensland.

- In proceedings to which either the Commonwealth or New South Wales *Evidence Act 1995* applies,[1673] tendency evidence and coincidence evidence are admissible to prove certain matters where that evidence has significant probative value and the probative value substantially outweighs any prejudicial effect it may have on the defendant.[1674]

- In Victoria, propensity evidence is admissible if the court considers that, in all the circumstances, it is just to admit it despite any prejudicial effect it may have on the person charged with the offence.[1675]

The test for the admissibility of tendency evidence under the Commonwealth and New South legislation is expressed in quite different terms from the *Pfennig* test. However, the requirement that the probative value of the evidence must substantially outweigh its prejudicial effect has been interpreted to mean that, as under the *Pfennig* test, there must be no reasonable view of the evidence that is consistent with the innocence of the accused.[1676] The same requirement applies in relation to the admissibility of coincidence evidence under the Commonwealth and New South legislation.[1677]

1672 See the discussion of the *Pfennig* test at pp 326-330 of this Report.

1673 See note 1550 of this Report.

1674 See pp 340-341 of this Report.

1675 See pp 346-350 of this Report.

1676 See pp 342-343 of this Report.

1677 However, as noted at pp 341-342 of this Report, it is arguable that, because of the narrow meaning given to "related events" in s 98 of the *Evidence Act 1995* (Cth) and of the *Evidence Act 1995* (NSW), the admissibility of "coincidence evidence" that does not fall within the definition of "related events" in those provisions does not fall within the ambit of s 98. It has been suggested that such evidence, if relevant, is admissible, subject to the court's power to exclude it, for example, under s 137 of the legislation.

It has been held that the effect of the Victorian provision is to abrogate the *Pfennig* test.[1678] However, it has also been suggested that the new test would not greatly alter the conduct of criminal trials because it is similar to the test that applied under the common law prior to the High Court's decisions in *Hoch v The Queen* and *Pfennig v The Queen* - namely, that propensity evidence is admissible if its probative force clearly transcends its prejudicial effect.[1679] In the case of a prosecution of a sexual offence concerning a child, even on the Victorian test, the propensity evidence in question in a particular case would have to be highly probative to be admissible, as its probative force would not otherwise "clearly transcend" the obvious prejudice that would result from the admission of such evidence.

However, in other types of criminal proceedings,[1680] where the prejudice resulting from the admission of the propensity evidence would not be so great, the Victorian provision would not require, in order to be admitted, that the evidence bear no reasonable explanation that is consistent with the innocence of the accused. This was a point made by McHugh J in *Pfennig v The Queen*, where his Honour doubted that the test for admissibility enunciated by the majority of the Court in that case would always be warranted:[1681]

> If the risk of an unfair trial is very high, the probative value of evidence disclosing criminal propensity may need to be so cogent that it makes the guilt of the accused a virtual certainty. In cases where the risk of an unfair trial is very small, however, the evidence may be admitted although it is merely probative of the accused's guilt. Each case turns on its own facts.

The tests that apply under the common law, the Commonwealth and New South Wales *Evidence Acts* and the *Crimes Act 1958* (Vic) are all expressed in terms of a general principle that can be applied to a variety of different situations. None of the tests requires that propensity evidence must have some particular feature, for example, striking similarities, in order to be admissible. This approach is similar to that which applies in England.

Although the Victorian legislation prescribes a slightly less stringent test for the admissibility of propensity evidence than the tests that apply under the Commonwealth and New South Wales *Evidence Acts* and under the common law, all of these tests require the court, in determining the admissibility of the evidence, to

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1678 See p 349 of this Report.

1679 See p 350 of this Report.

1680 As observed earlier, s 398A of the *Crimes Act 1958* (Vic) applies to the admissibility of propensity evidence in all proceedings for an indictable or summary offence. See note 1548 of this Report.

1681 (1995) 182 CLR 461 at 529. McHugh J (at 530) did accept that, where the prosecution case depends entirely on propensity reasoning, "the evidence will need to be so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with the innocence of the accused".

undertake a comparison between its prejudicial effect and its probative value.[1682] The only real difference between the various tests is in the extent to which the probative value must exceed any prejudicial effect in order for the evidence to be admitted.

The various tests that apply in Australia are therefore quite different from the provisions recommended in the Sturgess Report.[1683] It is not a requirement for the admissibility of similar fact evidence under those recommendations that the probative value of the evidence must exceed its prejudicial effect. On the contrary, evidence of a "similar fact"[1684] is presumptively admissible, subject only to the court's discretion to exclude it on the ground of "unfair prejudice". Consequently, the question of prejudice is relevant only to the exercise of the discretion to exclude, and not to the more fundamental question of the admissibility of the evidence. As McHugh J observed in *Pfennig v The Queen*,[1685] such an approach has significant consequences in terms of shifting the onus to the defence to persuade the court that the probative value of the evidence is outweighed by its prejudicial effect. His Honour also pointed out that, where evidence is admissible subject to the court's discretion to exclude it, appellate review of the exercise of the trial judge's discretion is more limited than when evidence is excluded as a matter of law.[1686]

Further, as has been observed earlier,[1687] the provisions recommended in the Sturgess Report stipulate a number of factors that the court is to take into consideration in exercising its discretion to exclude the evidence. These factors do not relate to the prejudice likely to result if the evidence is admitted, but to factors that are likely to make it more difficult for the prosecution to secure a conviction if

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1682 In *Pfennig v The Queen* (1995) 182 CLR 461, McHugh J (at 528) expressed the view that the probative value of evidence and the prejudicial effect of evidence are "incommensurables":

> They have no standard of comparison. The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial. In criminal trials, the prejudicial effect of evidence is not concerned with the cogency of its proof but with the risk that the jury will use the evidence or be affected by it in a way that the law does not permit. In no sense does the probative value of evidence disclosing propensity, when admitted, outweigh its prejudicial effect. On the contrary, in many cases the probative value either creates or reinforces the prejudicial effect of the evidence. In my view, evidence that discloses the criminal or discreditable propensity of the accused is admitted not because its probative value outweighs its prejudicial effect but because the interests of justice require its admission despite the risk, or in some cases the inevitability, that the fair trial of the charge will be prejudiced. [note omitted]

Consequently, McHugh J (at 529) favoured the following approach:

> The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.

1683 These provisions are set out at pp 356-357 of this Report.

1684 See the discussion of this term at pp 357-358 of this Report.

1685 (1995) 182 CLR 461 at 515. See p 328 of this Report.

1686 Ibid.

1687 See pp 359-360 of this Report.

evidence of the "similar fact" is not admitted. Consequently, the thrust of these provisions would seem to be to enable propensity evidence to be admitted in circumstances where its exclusion would create forensic difficulties for the prosecution, rather than to facilitate its admission only in those circumstances where the probative value of the evidence clearly outweighs its prejudicial effect.

In their joint report on children and the legal process, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission recommended that the law in relation to the admissibility of tendency and coincidence evidence "should be reviewed in light of the hardship they cause to child victim witnesses".[1688] The Commissions expressed the view that these rules, by excluding "evidence about abuse of more than one child", effectively exclude evidence that might support the credibility of a child witness.[1689] They also expressed a concern about how, where there is a possibility of concoction between complainants, the decision in *Hoch v The Queen*[1690] renders the evidence of each complainant inadmissible in relation to the charges concerning the other complainants, with the result that separate trials are generally required in relation to the charges concerning each complainant:[1691]

> … a possibility of joint concoction based solely on a 'sufficient relationship between the victims' as described in *Hoch v R* necessarily arises when the child victims are siblings or friends and are abused by a parent, relative, family friend or teacher. Together, these rules mean that separate trials are usually necessary in these cases and that the children involved may have to give evidence numerous times: in their own trial they must give evidence about what happened to them and in the other trials they must give evidence about what they witnessed happening to other children.

However, as discussed earlier in this chapter, the effect of that aspect of the decision in *Hoch v The Queen* has, in Queensland, been altered by legislation.[1692] The effect of section 132A of the *Evidence Act 1977* (Qld) is that, to a large extent, the question of whether there has been collusion between witnesses will be a question to be determined by the jury, rather than a factor affecting the admissibility of the evidence.[1693]

1688 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at 335 (Recommendation 103).

1689 Id at paras 14.86, 14.89.

1690 See pp 330-333 of this Report.

1691 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.87. The circumstances in which separate trials are likely to be ordered are considered in Chapter 17 of this Report.

1692 See p 333 of this Report. It has also been abrogated in Victoria. See the discussion of s 398A(3) of the *Crimes Act 1958* (Vic) at pp 348-349 of this Report.

1693 See the discussion at pp 368-371 of this Report in relation to the scope of s 132A of the *Evidence Act 1977* (Qld).

Several respondents to the Discussion Paper[1694] commented on the issue of the admissibility of propensity evidence.

Both the former Director of Public Prosecutions[1695] and the Bar Association of Queensland[1696] expressed the view that, in light of the enactment of section 132A of the *Evidence Act 1977* (Qld),[1697] there was no need to change the law in Queensland in relation to the admissibility of propensity evidence. The Bar Association of Queensland commented:[1698]

> It is submitted by the Bar Association that the combined effect of s.132A *Evidence Act 1977 (Q)* and the common law concepts of similar fact evidence set forth in the decision of the High Court in *Pfennig v The Queen* … are sufficient to ensure that all appropriate evidence is heard by a jury in child sexual cases.
> …
>
> The Bar Association is unaware of any inability on the part of the prosecution to adduce appropriate similar fact evidence since the enactment of s.132A *Evidence Act*. The Bar Association is prepared to acknowledge that in the past, the decision in *Hoch v The Queen* … worked to the disadvantage of the prosecution, but that situation no longer obtains.
>
> It is submitted that the current state of the law in Queensland adequately safeguards the interests of the prosecution and the rights of the accused person.

The President of the Childrens Court also expressed the view that "the present position at common law, in combination with statutory provisions such as s. 130 of the *Evidence Act 1977* (Qld),[1699] provide a satisfactory balance between the interests of justice (including the interests of the child witnesses) and the need to ensure that the trial is fair".[1700]

The former Director of Public Prosecutions and the Bar Association of Queensland expressly opposed the enactment of provisions to the effect of those contained in the Commonwealth and New South Wales *Evidence Acts*, as well as the implementation of the recommendations made in the Sturgess Report.[1701]

The Bar Association of Queensland was of the view that the provisions in the Commonwealth and New South Wales *Evidence Acts* were unnecessarily complex,

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1694 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1695 Submission 32.

1696 Submission 53A.

1697 See the discussion of this provision at pp 333, 368-371 of this Report.

1698 Submission 53A.

1699 This provision is set out at note 1668 of this Report.

1700 Submission 45.

1701 Submissions 32, 53A.

and that their application would not ultimately achieve a different result from the application of the common law test for the admissibility of propensity evidence:[1702]

> … it is submitted that the notions of propensity contained in the provisions of the *Evidence Act 1995 (Cth)* are unnecessarily complex and should not be adopted in Queensland. It is appreciated that the Commonwealth evidentiary provisions require a trial judge, before admitting the evidence, to consider that the evidence had "significant probative value", or were "substantially and relevantly similar". The concern is that such concepts are less helpful and less precise than the substantial number of common law decisions which define the concept of similar fact evidence. In any event, as appears to be correctly acknowledged in the discussion paper … , as far as these provisions might relate to sexual offences involving children, the common law test of admissibility would inevitably be imported.

In relation to the provisions recommended in the Sturgess Report, the Bar Association of Queensland was of the view that it would be "dangerous and unnecessary" to introduce the concepts of propensity that are found in those provisions. It was suggested that the implementation of those provisions could erode an accused person's right to a fair trial:[1703]

> Under the current state of the law in Queensland, the defence can hardly complain if probative evidence truly bearing the description "Evidence of similar facts" is admitted against the alleged offender. It is submitted, however, that to "lower the bar" in order to admit less specific and probative evidence tending to establish that the accused person acted in unusual or unacceptable ways, say, towards children, would be to substantially erode the right of the accused to a fair trial.

The implementation of the provisions recommended in the Sturgess Report was also opposed by a judge of the District Court of Western Australia.[1704]

The President of the Childrens Court, although not commenting directly on the recommendations made in the Sturgess Report, disputed the comment in that report to the effect that, in many cases, the law excludes evidence of considerable probative value.[1705] In particular, his Honour considered that the *Pfennig* test, especially as it has been interpreted by the Queensland Court of Appeal in *R v O'Keefe*,[1706] ensures "that justice is done in all respects". His Honour also observed in relation to evidence of uncharged acts of a sexual nature that, in most cases, evidence of this kind is able to be placed before the jury.

On the other hand, the Children's Commission of Queensland and a judge of the District Court of Western Australia supported the recommendation of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission

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1702 Submission 53A.

1703 Ibid.

1704 Submission 54.

1705 Submission 45. The relevant passage is set out at p 355 of this Report.

1706 [2000] 1 Qd R 564. See note 1496 of this Report.

that there should be a review of the law in relation to the admissibility of tendency and coincidence evidence.[1707] The Western Australian judge expressed his concern about the operation of the present law in relation to the admissibility of propensity evidence, suggesting that the law was weighted against its admissibility:[1708]

> It is of great concern that in so many cases the isolation of one child pitted against an adult alleged to be the perpetrator leads to acquittal of the adult, when at the same time there are other allegations of similar behaviour against the adult from other family members not before the Court, or when a history of such offending is known but excluded, or when the conduct is part of an alleged wider course of conduct, but evidence of which for one reason or another is excluded.
>
> …
>
> The fundamental error is the fixation with the concept that admission of prejudicial evidence can be equated with an "unfair trial". "Unfair trial" in this context is implicitly equated with "diminished chance of acquittal". Given those assumptions an undue burden is weighted against admissibility. Exclusion is just as likely to lead to an unfair trial if unfair trial is equated to an unfairly elevated charge of wrongful acquittal.

However, this respondent acknowledged that these comments were made without the knowledge of the operation in practice of section 132A of the *Evidence Act 1977* (Qld).

Two other respondents commented on the general admissibility of propensity evidence.[1709] Both respondents were opposed to having any exclusionary rule of evidence at all in relation to the admissibility of propensity evidence. One of these respondents commented:[1710]

> … to disallow this evidence on the basis that the ordinary person *may* ignore the possibility that a similarly-disposed person might have committed the act presupposes the jury's intention. The jury should be free to access all facts so that they can make an informed determination, on the basis of common sense, of the *likelihood* of one version of events or the other.
>
> There is no doubt that the inadmissibility of similar fact and propensity evidence debilitates the prosecution's case. It is also a wrongful view of the jury's competency. It defies reason that a rule which fetters the jury by concealing evidence from them will result in a more just verdict. [original emphasis]

The other respondent expressed a similar view:[1711]

1707 Submissions 31, 54. See the discussion of this recommendation at p 364 of this Report.

1708 Submission 54.

1709 Submissions 2, 38.

1710 Submission 2.

1711 Submission 38.

> AJA [Australian Justice and Reform Inc] submits that all evidence about the character of the defendant, including other alleged similar acts, be admissible at trial, to be evaluated for what it is worth by the trial court.

(b) Modification of section 132A of the *Evidence Act 1977* (Qld)

As discussed earlier in this chapter, in *Hoch v The Queen*,[1712] the High Court held, in relation to the admissibility of similar fact evidence, that the possibility of concoction destroyed "the probative value of the evidence which is a condition precedent to its admissibility".[1713] That was because concoction provided an explanation for the similarities in the evidence of the witnesses that was inconsistent with the guilt of the accused. However, the effect of that decision has been altered in Queensland by section 132A of the *Evidence Act 1977* (Qld).[1714]

One commentator has made the observation that section 132A "was obviously drafted in response to the decision in *Hoch* and does not account for the more recent decision in *Pfennig*".[1715] It has been suggested that, because of the section's reference to "similar fact evidence", rather than to "propensity evidence":[1716]

> If interpreted literally this could lead to the absurd consequence of the test for admissibility of similar fact evidence being more liberal than that for other types of propensity evidence.

This argument would seem to be based on the suggestion that, where there was a possibility of concoction in relation to propensity evidence - as opposed to similar fact evidence - the admissibility of that evidence would still remain to be determined by the decision in *Hoch v The Queen*, rather than by section 132A of the *Evidence Act 1977* (Qld). However, the possibility of collusion is most likely to be raised in those cases where the probative value of the evidence of a number of witnesses lies in the striking similarities between their various accounts. It would be surprising if, in such a situation, propensity evidence given by the various witnesses was not capable of also being characterised as similar fact evidence.[1717]

A more significant ambiguity might be suggested to arise from the lack of consistency between the formulation of the *Pfennig* test and the drafting of section 132A of the *Evidence Act 1977* (Qld). The fact that the section is expressed to apply to "similar fact evidence, the probative value of which outweighs its potentially

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1712 (1988) 165 CLR 292.

1713 Id at 296. See p 331 of this Report.

1714 Section 132A of the *Evidence Act 1977* (Qld) is set out at p 333 of this Report. See also p 333 for a discussion of the background to the introduction of that provision.

1715 Franco P, "Pfennig Re-visited: Propensity Evidence in Queensland" (1998) 18 *The Queensland Lawyer* 169 at 175.

1716 Ibid.

1717 Note the High Court's observation, set out at pp 323-324 of this Report, that these terms are not necessarily mutually exclusive.

prejudicial effect" raises the question of whether the degree of the possibility that the evidence "may be the result of collusion or suggestion" is a factor to be taken into account in deciding whether similar fact evidence is admissible under that section.

On one view, the effect of the provision is simply that, regardless of whether on the material before the court[1718] it appears that there is a speculative possibility or a reasonable possibility that the evidence is the result of collusion or suggestion, the evidence will not be rendered inadmissible by reason of either possibility. Provided the evidence would, apart from the question of collusion or suggestion, be admissible as propensity evidence, it can be admitted and its weight will be a question for the jury to determine.

This view is consistent with the approach taken by the Victorian Court of Appeal in *R v Best*[1719] in relation to subsections 398A(3) and (4) of the *Crimes Act 1958* (Vic), which provide:

> (3) The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in sub-section (2).
>
> (4) Nothing in this section prevents a court taking into account the possibility of a reasonable explanation consistent with the innocence of the person charged with an offence when considering the weight of the evidence or the credibility of a witness.

The Court held that these subsections referred to explanations like collusion and unconscious influence that affect the truth of the propensity evidence that is sought to be adduced, and that the proper approach is to compare the probative value of the evidence and its prejudicial effect on the basis that the similar fact evidence is true.[1720]

However, on this view of section 132A, it is necessary to construe the phrase "similar fact evidence, the probative value of which outweighs its potentially prejudicial effect", which appears in the section, as merely a shorthand or truncated way of referring to evidence that would, apart from questions of collusion or suggestion, pass the common law test for the admissibility of propensity evidence. The difficulty with that construction is that the phrase in question is not consistent with the formulation of the *Pfennig* test. It suggests a considerably less stringent test for the admissibility of propensity evidence than the *Pfennig* test.

The alternative view of section 132A of the *Evidence Act 1977* (Qld) is that the degree of the possibility that the evidence is the result of collusion or suggestion is a factor to be taken into account in determining the admissibility of similar fact

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1718 This might consist of depositions from the committal or evidence taken on a voir dire. See pp 331-332 of this Report.

1719 [1998] 4 VR 603.

1720 Id per Callaway JA (with whom Phillips CJ and Buchanan JA agreed) at 607, 610. See the discussion of this decision at pp 348-349 of this Report.

evidence. On this view, the phrase "similar fact evidence, the probative value of which outweighs it potentially prejudicial effect" operates to define the extent to which the probative value of similar fact evidence can be depreciated by reason of the possibility of collusion or suggestion and still be admissible.

For example, where the evidence establishes that the witnesses knew each other, but does not raise an opportunity or motive for collusion, it might be said that, in such a case, the possibility of collusion is only speculative. Taking that possibility into account, the probative value of the similar fact evidence might still outweigh its potentially prejudicial effect. In that case, the evidence would be admissible, despite the possibility that it "may be the result of collusion or suggestion". Whether the evidence is the result of either cause would be a matter for the jury to determine.

On the other hand, where the evidence reveals a motive and an opportunity for collusion, it might be said that there is a real or a reasonable possibility of collusion. Where such a possibility is raised on the material before the court, it might be sufficient to deprive the evidence of the character of "similar fact evidence, the probative value of which outweighs its potentially prejudicial effect". In these circumstances, it is arguable that section 132A would not apply to the evidence and, on the basis of *Hoch v The Queen*, the evidence would be inadmissible.

The second view of section 132A of the *Evidence Act 1977* (Qld) would be consistent with the recommendation made by the Criminal Code Advisory Working Group, on which the section was based:[1721]

> **Inadmissibility of similar fact evidence**
>
> Similar fact evidence shall not be admitted if a judge before whom the question arises considers, after a voir dire if he thinks it desirable, that there is a real chance as opposed to a mere possibility, in all the circumstances, that the evidence was concocted or arose from a suggestion or from some other cause common to the witnesses.

The purpose of this recommendation was expressed to be:[1722]

> … to provide that in a criminal proceeding, similar fact evidence from different complainants shall only be inadmissible if there is a *real chance* that the evidence is concocted, thus ensuring that the mere *possibility* that the complainants concocted the evidence does not make the evidence inadmissible. [original emphasis]

Where the evidence before the court raises only a speculative possibility of collusion or suggestion, section 132A will, on either view of it, produce the same result. The similar fact evidence will be admissible and the jury will have to determine what weight should be given to the evidence. It is where a reasonable possibility of collusion or suggestion is raised on the evidence that the section has the potential to

1721 *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996) at 116.

1722 Id at 114.

produce different results in relation to the admissibility of similar fact evidence, depending on which construction is preferred.

The Commission is not aware of any decisions that have considered the effect of section 132A.

(c) Relationship evidence

Under the common law (which determines the question in Queensland), the test for the admissibility of relationship evidence is less stringent than the test for the admissibility of other propensity evidence. Similarly, under the Commonwealth and New South Wales *Evidence Acts*, the test for the admissibility of relationship evidence is also less stringent than the test for the admissibility of tendency evidence or coincidence evidence.[1723] In both cases, relationship evidence is admissible to establish a sexual relationship between the complainant and the accused, but cannot be used by the jury to reason that, if the accused committed the uncharged acts, he or she is more likely to have committed the charged acts. The admissibility of relationship evidence is subject to the court's discretion to exclude it if its prejudicial effect exceeds its probative worth.

In Victoria, the admissibility of relationship evidence has been held to be within the ambit of section 398A of the *Crimes Act 1958* (Vic). Under that provision, it will be admissible "if the court considers that in all the circumstances it is just to admit it despite any prejudicial effect it may have on the person charged with the offence".

In *R v Knuth*,[1724] Lee J referred to the distinction drawn by the courts as to the purpose for which relationship evidence may be admitted:[1725]

> The distinction in cases such as this is usually between evidence which shows that the accused used to do the sort of thing with which he is charged either with the complainant or with others; thus enhancing the probability that he committed the offences the subject of the indictment, as opposed to evidence of conduct of the same sort showing the existence of a sexual relationship between the parties. Evidence of the latter sort may properly be taken into account by a jury to enhance the probability that the accused is guilty of the specific offence. Evidence of the former type may not.

His Honour suggested that "the distinction between the two types of evidence is becoming increasingly artificial":[1726]

1723 See pp 334-337, 344-345 of this Report.

1724 Unreported, CA, Sup Ct of Qld, Pincus JA, Ambrose and Lee JJ, CA No 64 of 1998, 23 June 1998.

1725 Id at 22.

1726 Id at 22-23.

> Evidence which shows the existence of a sexual relationship must surely tend to show that the accused used to do the sort of things the subject of the charge. That is obviously the nature of sexual relationships; they are characterised by sexual acts driven by sexual desire. A desire to do something would seem to found a strong inference that the person who desires is likely to have a propensity. It is not far fetched to suggest that a jury might reason along these lines. If evidence tends to show that an accused used to behave in this fashion then it must surely be encroaching the borders of propensity evidence which is not admissible according to current authority. For present purposes, there is no need to consider a justification for maintaining the distinction because, quite properly in my opinion, there is a strong line of authority which suggests that the type of evidence given by the complainant in this case is admissible.

This raises the question of whether it is appropriate that, in Queensland, relationship evidence should be admissible, subject only to the court's discretion to exclude it, if its prejudicial effect exceeds its probative worth.

Only two respondents to the Discussion Paper[1727] commented on the admissibility of relationship evidence.[1728] Neither of those respondents addressed the issue of what would be an appropriate test for the admissibility of evidence of this kind.

The Queensland Branch of the International Commission of Jurists expressed the view that the admissibility of relationship evidence enables "the child victim to be heard".[1729]

On the other hand, the Queensland Council for Civil Liberties considered that the admissibility of uncharged acts posed a risk to the defendant that the jury would employ a process of propensity reasoning, and use the evidence of the uncharged acts to find the defendant guilty of the charged acts:[1730]

> It is widely accepted that a person's criminal convictions are not generally admissible on their trial simply because a jury will reason that if a person has offended in the past they are more likely to have offended on the subject occasion. Put differently, a jury does not properly focus on the facts of the instant case but reasons that if a person has been convicted in the past then by that fact alone they are more than likely to be 'right for' the subject charge.
>
> I am concerned that similar reasoning is adopted by juries in relation to the evidence of uncharged acts involving the one complainant. There is an unacceptable risk that in jury room discussions any doubt as to whether the accused committed the subject offence is likely to be resolved against him on the basis of jurors reasoning that there are other acts which he hasn't even been charged with and that therefore it is more likely than not by virtue of that fact alone that he is guilty of the subject charge.

1727 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1728 Submissions 37, 40.

1729 Submission 37.

1730 Submission 40.

(d) Proceedings in which a new test for admissibility should apply

If the admissibility of propensity evidence is to be modified by statute, the question arises as to the types of proceedings in which the new test for admissibility should apply. Because of the terms of this reference,[1731] the Commission is confined to making recommendations about proceedings that involve children. However, within those confines, there are still two bases on which the application of the new test could be considered.

(i) The nature of the offence

The application of a new test of admissibility could be limited in its operation to proceedings where the accused is charged with the commission of a sexual offence against a child.

Alternatively, the application of a new test of admissibility could be extended so that it would apply not only to a proceeding concerning the commission of a sexual offence against a child, but also to a proceeding concerning the commission of an offence of violence against a child.

(ii) The age of the witnesses

The application of a new test for the admissibility of propensity evidence in proceedings concerning offences that are alleged to have been committed against children could also be limited by reference to the age of the complainant or the age of the witness from whom it is sought to adduce the propensity evidence in question.

It would be necessary to decide whether a new test should apply where, although the charge is one of an offence against a child, the witness whose evidence is sought to be admitted as propensity evidence is not a child or, by the time of the trial, the complainant is no longer a child.

6. THE COMMISSION'S VIEW

(a) The test for the admissibility of propensity evidence

The Commission has considered whether there should be legislative amendment to establish a rule to deal specifically with the admissibility of propensity evidence in criminal proceedings concerning sexual or other offences that are alleged to have been committed against children.

1731 See p 1 of this Report.

In this Report, the Commission has recommended a number of measures and facilities to assist child witnesses to give their evidence - for example, having a support person present, pre-recording the evidence of the child witness, and giving evidence by closed-circuit television.[1732] In considering the use of those measures and facilities, the Commission has recognised that child witnesses, by reason of their age, are more likely than adult witnesses to experience difficulties in giving evidence. On that basis, the Commission considers that special measures and facilities for child witnesses are justified.

However, the question of legislation to deal specifically with the admissibility of propensity evidence in criminal proceedings concerning sexual or other offences that are alleged to have been committed against children raises quite different considerations. Obviously, the nature of the test for the admissibility of propensity evidence does not directly affect the manner or the environment in which a witness gives evidence. In fact, although an accused person might be charged with committing an offence against a child, the witness whose evidence is sought to be admitted as propensity evidence to prove that offence might not even be a child.

The present test for the admissibility of propensity evidence is concerned with controlling the evidence that can be put before a jury to prove an offence with which an accused person is charged. Evidence that is sufficiently probative is admissible, while evidence that is merely prejudicial is excluded.[1733] Consequently, the fact that an offence is alleged to have been committed against a child has never been a relevant consideration in determining the admissibility of propensity evidence to prove that offence. The critical factors that must be evaluated are the probative value of the propensity evidence and its prejudicial effect. Even in those Australian jurisdictions where legislation has been enacted to deal with the admissibility of propensity evidence, those are still the two factors on which the court's determination is based.[1734]

In the Commission's view, there does not seem to be any proper basis for distinguishing between the test for the admissibility of propensity evidence that should apply where the alleged victim is a child and that which should apply where the alleged victim is an adult. The Commission does not consider the fact that an offence is alleged to have been committed against a child to be relevant to either the probative value of a witness's evidence or the risk that the accused will not receive a fair trial if the evidence is admitted. It cannot make a witness's evidence of that offence more probative than it would be if the offence were alleged to have been committed against an adult; nor can it render the witness's evidence less prejudicial than it would be if the offence were alleged to have been committed against an adult.

1732 See Chapters 5, 9 and 10.

1733 See the discussion of the present test for the admissibility of propensity evidence at pp 326-333 of this Report.

1734 See the discussion of the tests for the admissibility of propensity evidence under Commonwealth, New South Wales and Victorian legislation at pp 338-344, 346-350 of this Report.

The Commission is therefore of the view that legislation that deals only with the admissibility of propensity evidence in criminal proceedings concerning offences that are alleged to have been committed against children cannot be justified in principle.

Because the Commission is confined by the terms of this reference[1735] to making recommendations about issues relating to the evidence of children, the Commission is of the view that it is not appropriate, in the context of this reference, to consider whether the law in relation to the admissibility of propensity evidence generally should be modified. The Commission observes, however, that the submissions received from the former Director of Public Prosecutions, the President of the Childrens Court and the Bar Association of Queensland all support the retention of the existing law in this area.[1736]

As the Commission is not undertaking a general review of the law in relation to the admissibility of propensity evidence, it does not consider it appropriate to recommend any modifications to section 132A of the *Evidence Act 1977* (Qld).

(b) Proceedings in which a new test for the admissibility of propensity evidence should apply

The Commission has also given consideration to two further issues that would need to be addressed if legislation were to be enacted to deal specifically with the admissibility of propensity evidence in proceedings where the accused is charged with having committed an offence against a child.

(i) The nature of the offence

The first issue is whether any new rule should be limited in its operation to proceedings where the offence is one of a sexual nature, or whether it should be extended to other offences committed against children, such as offences of violence.

An advantage of not limiting the application of any new test to proceedings where the accused is charged with the commission of a sexual offence against a child is that it would reduce the possibility of having two different tests of admissibility apply in proceedings where an accused person was charged, in relation to a child, with offences of both a sexual and a non-sexual nature. However, even if a broader approach were adopted in relation to the offences to which a new test of admissibility should apply, the consequence of having a specific rule in relation to offences alleged to have been committed against children is that, if an accused person were charged with committing an offence against both an adult and a child, different tests of admissibility

1735 See p 1 of this Report.

1736 See pp 365-366 of this Report.

would apply in relation to the propensity evidence that was admissible to prove those charges.

(ii) The age of the witness

The second issue concerns the age of the witnesses whose evidence might be subject to a new test for the admissibility of propensity evidence. Even if the Commission favoured a specific test for the admissibility of such evidence in criminal proceedings that concern offences alleged to have been committed against children, it is of the view that there would be considerable difficulties in formulating a proper basis on which to define, in terms of the age of the witnesses, those proceedings to which a new test should apply.

The question of the admissibility of propensity evidence usually arises where it is sought to admit the evidence of one or more witnesses in proof of allegations made by the complainant, or where there are a number of complainants and it is sought to have the evidence of each complainant admitted in proof of the allegations of the other complainants. In these circumstances, it may not necessarily be the case that all of the witnesses whose evidence is sought to be admitted as propensity evidence in proof of an offence will be children. For example, in *R v Colby*,[1737] the complainant was aged twelve or thirteen at the time of the alleged offences and sixteen at the time of the trial. However, the evidence that was sought to be admitted as propensity evidence was evidence of three of the accused's former wives as to his sexual practices. It would seem quite arbitrary to provide that the evidence of the three adult witnesses should be subject to a different (and, presumably, less stringent) test of admissibility because the complainant is a child. Yet if that were not the case, the evidence that could be admitted when a person was charged with committing an offence against a child would vary according to the ages of the witnesses whose evidence was sought to be admitted as propensity evidence - all or some of whom might not be children.

It is also not uncommon for allegations of sexual abuse to be made many years after the events in question are alleged to have occurred. That raises the possibility that, even where the complainant and other witnesses were children at the time of the alleged offence, they might all be adults by the time an allegation is made and the matter proceeds to trial.

In the Commission's view, the difficulties that arise in formulating a rational basis on which to decide which witnesses' evidence should be the subject of a new test for the admissibility of propensity evidence support the Commission's decision that there should not be a separate test for the admissibility of propensity evidence in relation to offences that are alleged to have been committed against children.

1737 [1999] NSWCCA 261 (26 August 1999) at paras 1, 3, 4.

7. RECOMMENDATION

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

CHAPTER 17

THE DISCRETION TO ORDER SEPARATE TRIALS

1. EXISTING QUEENSLAND LEGISLATION

(a) Joinder of charges

Although, as a general rule, an indictment[1738] must contain only one charge against an accused person,[1739] the *Criminal Code* (Qld) expressly provides that, in certain circumstances, an indictment may charge more than one indictable offence against the same person. Section 567(2) 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.

(b) The basis for ordering separate trials

Notwithstanding that a number of charges have been properly joined in the one indictment, the court retains a discretion to order a separate trial of any count[1740] or counts in the indictment. Section 597A of the *Criminal Code* (Qld) provides, in part:[1741]

> (1) Where before a trial or at any time during a trial the court is of opinion that the accused person may be prejudiced or embarrassed in the person's defence by reason of the person's being charged with more than 1 offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any 1 or more than 1 offence charged in an indictment the court may order a separate trial of any count or counts in the indictment.

1738 An indictment is a document that contains details of the charges made against an accused person: *Criminal Code* (Qld) s 1.

1739 *Criminal Code* (Qld) s 567(1).

1740 Where more than one offence is charged in the same indictment, each offence must be set out in the indictment in a separate paragraph called a count: *Criminal Code* (Qld) s 567(3).

1741 Section 597A of the *Criminal Code* (Qld) was inserted in 1976, following a recommendation by the Queensland Law Reform Commission: see Queensland Law Reform Commission, Report, *A Bill to Amend the Criminal Code in Certain Particulars* (R 17, December 1974) at 17, 20-21. Subsection (1AA) was inserted by the *Criminal Law Amendment Act 1997* (Qld). See the discussion of that subsection at pp 383-384 of this Report.

Provisions similar to s 597A(1) of the *Criminal Code* (Qld) are found in all other Australian jurisdictions: *Crimes Act 1900* (ACT) s 365(2); *Criminal Procedure Act 1986* (NSW) s 64(2); *Criminal Code* (NT) s 341(1); *Criminal Law Consolidation Act 1935* (SA) s 278(2); *Criminal Code* (Tas) s 326(3); *Crimes Act 1958* (Vic) s 372(3); *Criminal Code* (WA) s 585.

> (1AA) In considering potential prejudice, embarrassment or other reason for ordering separate trials under this provision in relation to alleged offences of a sexual nature, the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion.

2. THE COMMISSION'S FOCUS

The law in relation to joinder and the ordering of separate trials is of general application. It is not confined in its operation to cases involving sexual offences or, more particularly, to cases involving sexual offences against children. It is, however, the effect of the law in cases concerning sexual offences allegedly committed against children with which the Commission is concerned in this reference.

There are two main ways in which the joinder of charges can be said to prejudice or embarrass an accused person in his or her defence.

The first way is where joinder has the effect that, at least in relation to some of the charges in the indictment, the jury is exposed to evidence that is not admissible in relation to those charges. That situation will arise where the evidence in respect of some or all of the charges in an indictment is not admissible in respect of all the other charges in the indictment. It has been observed that, where the evidence in relation to one charge is admissible to prove the commission of another charge in the same indictment, "there will be nothing to be gained by directing separate trials because the same evidence would be admissible in each trial".[1742]

The second way in which joinder may give rise to prejudice or embarrassment is through the number of counts joined in the one indictment.[1743] It has been observed that:[1744]

> There can plainly be no precise mathematical limit to the number of counts that can be joined in one presentment but it is of the utmost importance that the Crown's reasons for joining a large number of counts in a single presentment should be closely scrutinized with a view to ensuring that the accused is not subjected to improper prejudice.

In cases concerning sexual offences, the question of whether separate trials should be ordered is most likely to arise where an indictment charges a person with

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1742 *De Jesus v R* (1986) 68 ALR 1 per Dawson J at 16.

1743 See for example *R v Smart* [1983] 1 VR 265 where the accused was charged with 63 counts involving commercial fraud. The Full Court of the Supreme Court of Victoria observed (at 282) that "[t]he fact that the applicant was presented on 63 counts was not of itself a conclusive reason for severance, but it strongly suggests an oppressive proceeding" and (at 284):

> … a trial on fewer counts would at least have lessened the difficulty of explaining to the jury what evidence they could use on each particular count and of relating the evidence to the issues that fell for the jury's determination.

1744 *R v Smart* [1983] 1 VR 265 per Young CJ, McInerney and Gobbo JJ at 283.

offences in relation to more than one complainant and the evidence of each complainant is not admissible in relation to the charges concerning the other complainant or complainants. In those circumstances, the court must decide whether the charges concerning each individual complainant should be tried separately from the charges concerning any other complainant. This situation will be the main focus of the Commission's consideration of this issue.

The inadmissibility of evidence is less likely to amount to a reason for ordering separate trials where the charges in an indictment concern the one complainant. In such a case, the evidence concerning each charge in the indictment will usually be admissible in relation to the other charges as relationship evidence.[1745]

3. PREJUDICE AS A FACTOR IN ORDERING SEPARATE TRIALS

(a) The rule in *De Jesus v R*

Where a person is charged with a number of sexual offences and the evidence in relation to charges concerning one complainant is not admissible in relation to the charges concerning the other complainant or complainants, it will generally be the case that the charges concerning each complainant will be ordered to be tried separately from the charges concerning the other complainant or complainants. The purpose of ordering separate trials is to avoid the prejudice that could result if evidence that was not admissible in relation to one offence could nevertheless be placed before a jury by reason only that it was admissible in relation to another offence that was being tried with that offence:[1746]

> The risk of prejudice is, of course, the risk that, notwithstanding any direction to the jury to consider the offences separately, they will treat the evidence upon one charge as evidence of similar facts in support of the other.

Slightly different principles for exercising the discretion to order separate trials have been articulated by the High Court, although, in relation to a trial in which the accused is charged with multiple sexual offences in relation to more than one complainant, the application of these principles will invariably produce the same result.

1745 *Cook v The Queen* (2000) 22 WAR 67 per Anderson J (with whom Pidgeon and Wallwork JJ agreed) at 80. The admissibility of relationship evidence is discussed at pp 334-337 of this Report. There may be circumstances, however, where all the evidence in relation to one charge will not be admissible in relation to another charge concerning the same complainant. For example, in *Iongi v The Queen* (1993) 69 A Crim R 441, the appellant had been convicted of the rape and indecent assault of the one complainant. He appealed, arguing that the two charges should have been the subject of separate trials. Fitzgerald P (at 443) held that evidence of fresh complaint in relation to one of the counts was not admissible in relation to the other count. Davies JA (at 446) and Moynihan SJA (at 447) doubted that evidence of fresh complaint in relation to one of the charges was admissible in relation to the other charge, but nevertheless dismissed the appeal.

1746 *De Jesus v R* (1986) 68 ALR 1 per Dawson J at 16.

In *De Jesus v R*,[1747] the question of separate trials arose under the Western Australian equivalent of section 597A(1) of the *Criminal Code* (Qld).[1748] The accused was charged with the rape of two women and with associated offences. At the trial, counsel for the accused conceded that the charges were properly joined in the indictment, but applied for separate trials in respect of the charges concerning each complainant. It was not part of the prosecution case that the evidence of either complainant was admissible in relation to the charges concerning the other complainant. That application was refused, with the result that the jury heard the evidence of both complainants. The accused sought leave to appeal against his convictions on the basis that the charges concerning the two complainants should have been the subject of separate trials.

Gibbs CJ adhered to the view he had expressed earlier[1749] that, where an accused person is charged with a number of sexual offences, the charges should not be tried together if the evidence on one count is not admissible on another count.[1750] His Honour stated that sexual cases "are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard".[1751]

Brennan J expressed the principle in slightly different terms, framing a rule of general application, rather than one specifically about charges of sexual offences. In his Honour's view, the critical question was not whether the evidence in relation to one count would be admissible in relation to the other count, but whether joinder would result in impermissible prejudice that could not be avoided by appropriate directions to the jury. Brennan J acknowledged, however, that, in relation to sexual offences, the result would invariably be the same as under the view expressed by Gibbs CJ:[1752]

> … when the admission of the evidence admissible on the charges joined in an indictment carries the risk of impermissible prejudice to the accused if the charges are tried together, separate trials should be ordered. … I agree with the Chief Justice that sexual cases are likely to arouse prejudice and that a direction to the jury is unlikely to give sufficient protection to an accused. Though I would not place sexual cases in a special category … , it would be an extremely rare case in which the difference in the view expressed by the Chief Justice and my view would result in a different exercise of discretion.

Dawson J considered that:[1753]

1747 (1986) 68 ALR 1.

1748 See the proviso to s 585 of the *Criminal Code* (WA).

1749 See *Sutton v R* (1984) 152 CLR 528 at 531.

1750 *De Jesus v R* (1986) 68 ALR 1 per Gibbs CJ at 4-5.

1751 Ibid.

1752 Id at 12.

1753 Id at 16.

> … as a general rule sexual offences form a special class of offences which should be tried separately except where the evidence upon one count is admissible upon another count.

However, his Honour preferred to express himself "in a general way rather than categorically, because it is possible to conceive of instances where the high degree of prejudice which can usually be expected to arise from evidence of offences of a sexual nature does not in fact arise or may be adequately overcome by a proper direction".[1754]

Determining whether the evidence of one complainant is admissible in relation to charges concerning another complainant will usually involve the application of the law in relation to the admissibility of propensity evidence.[1755] However, that is not the sole basis on which the evidence of one complainant might be admissible in relation to the charges concerning another complainant. The evidence of one complainant may sometimes be admissible on the basis that it forms part of the res gestae - that is, it is part of the same criminal transaction as the evidence concerning the other complainant. This basis for the admissibility of evidence is most likely to arise where an accused person is alleged to have committed acts on two complainants at the same time, in what is in effect the one incident.[1756]

(b) The effect of the possibility of collusion between, or infection of, witnesses

In *Hoch v The Queen*,[1757] the High Court held that, although the evidence of each complainant bore striking similarities to the evidence of the other two complainants, the possibility that the complainants' evidence was the result of concoction deprived it of its probative force. As a result, the Court held that the evidence of each complainant was not admissible in relation to the charges concerning the other complainants. Applying the rule in *De Jesus v R*,[1758] the majority judgment held that the trial judge's refusal of the application for separate trials in respect of the charges concerning each complainant had resulted in a miscarriage of justice.[1759]

1754 Ibid. Dawson J (at 16) gave as an example the situation where "the sole evidence implicating an accused person in a number of offences of rape is the one confession" and suggested that "it may well be that no unfair prejudice will arise from a joint trial of those offences".

1755 See the discussion of the admissibility of propensity evidence in Chapter 16 of this Report.

1756 *Cook v The Queen* (2000) 22 WAR 67 per Anderson J (with whom Pidgeon and Wallwork JJ agreed) at 80. See also the discussion of *R v B* [1989] 2 Qd R 343 at pp 385-386 of this Report.

1757 (1988) 165 CLR 292. This case is discussed at pp 330-333 of this Report.

1758 (1986) 68 ALR 1. This case is discussed at pp 381-382 of this Report.

1759 *Hoch v The Queen* (1988) 165 CLR 292 per Mason CJ, Wilson and Gaudron JJ at 297. Brennan and Dawson JJ (at 305) expressed the view that the admission of evidence that may have been inadmissible may have caused a substantial miscarriage of justice and also allowed the appeal.

In Chapter 16 of this Report, the Commission considered the effect that section 132A of the *Evidence Act 1977* (Qld) has had in relation to the admissibility of similar fact evidence.[1760] That section provides:

> **Admissibility of similar fact evidence**
>
> In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

The effect of section 132A of the *Evidence Act 1977* (Qld) is that the possibility that the "similar fact evidence" of witnesses may be the result of collusion or suggestion does not render that evidence inadmissible.[1761] Whether the evidence of witnesses is in fact the result of collusion or suggestion is now a question for the jury to decide.

In those cases where the evidence of a number of complainants would - but for the possibility of collusion or suggestion - have been mutually admissible, the indirect effect of section 132A of the *Evidence Act 1977* (Qld) is that the basis for ordering separate trials in respect of the charges concerning each complainant has been removed. Once the evidence of each complainant is rendered admissible in relation to the charges concerning the other complainants, there is nothing to be gained by ordering separate trials, as the same evidence will be admissible in each trial.[1762]

Section 597A(1AA) of the *Criminal Code* (Qld) is expressed in terms that are consistent with section 132A of the *Evidence Act 1977* (Qld). It was inserted by the *Criminal Law Amendment Act 1997* (Qld),[1763] which also inserted section 132A of the *Evidence Act 1977* (Qld).[1764] As noted earlier,[1765] a provision to the general effect of section 132A of the *Evidence Act 1977* (Qld) was recommended by the Criminal Code Advisory Working Group. However, the Advisory Working Group did not consider it necessary, in the light of its proposed amendment to the *Evidence Act 1977* (Qld), to amend section 597A of the *Criminal Code* (Qld) as well.[1766] Presumably the Advisory Working Group was of the view that if, as a result of the amendment of the *Evidence Act 1977* (Qld), the evidence of two complainants in a proceeding would now be mutually admissible, there could be no suggestion that the joinder of the charges resulted in impermissible prejudice so as to justify separate

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1760 See p 333 of this Report.

1761 See the discussion at pp 368-371 of this Report of the scope of this provision.

1762 This point was made in *De Jesus v R* (1986) 68 ALR 1 per Dawson J at 16. See p 379 of this Report.

1763 *Criminal Law Amendment Act 1997* (Qld) s 110.

1764 *Criminal Law Amendment Act 1997* (Qld) s 122, Sch 2.

1765 See p 333 of this Report.

1766 Criminal Code Advisory Working Group, *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996) at 115-116.

trials. Even if separate trials were ordered, the same evidence would be admissible in each trial.

Although, in the light of the enactment of section 132A of the *Evidence Act 1977* (Qld), section 597A(1AA) of the *Criminal Code* (Qld) is probably not strictly necessary, its effect is consistent with that of section 132A of the *Evidence Act 1977* (Qld) and, in the context of the provisions of the Code dealing with procedural matters in relation to indictments, it serves as a reminder of the effect of section 132A.

(c) Application of the rule in *De Jesus v R*

In some cases, the ordering of separate trials in respect of some of the counts in an indictment will have the effect that a child witness is required to give evidence at more than one trial. However, that will not be the result in every case where separate trials are ordered. Whether a child witness will be required to give evidence at more than one trial will depend on the facts of the individual case.

For example, where an accused person is charged in an indictment with a number of sexual offences in relation to the one child, it would be extremely rare for some of those charges to be ordered to be the subject of a separate trial. As noted earlier, the evidence in relation to each charge will usually be admissible as relationship evidence on the other charges in the indictment, so that there is nothing to be gained by ordering separate trials in respect of any of the charges.[1767]

Even where an accused person is charged in an indictment with sexual offences in relation to more than one child and the court orders separate trials in respect of the charges relating to each child, it does not necessarily follow that each child will have to give evidence at more than one trial. That will depend, in part, on whether any complainant is also a witness in relation to charges concerning another complainant. Where that situation does not arise, it will not be necessary for any child to give evidence at more than one trial. Each complainant will give evidence at one trial - namely, at the trial that deals with the charges relating to that child.

On the other hand, if the court orders separate trials in circumstances where a child is a complainant in respect of some of the charges in an indictment and a witness in respect of other charges in the same indictment that relate to another complainant, the child is likely to be required to give evidence at more than one trial. It will be necessary for the child to give evidence at the trial dealing with the charges that relate to himself or herself, and also at the trial dealing with the charges that relate to the other complainant.

1767 See p 380 of this Report.

This situation arose in *R v B*,[1768] where the accused was charged in the one indictment with a number of counts of indecent dealing in relation to his children. Eight counts were ultimately tried together. These consisted of one count in relation to his daughter Cy (count 11), six counts in relation to his daughter S (counts 13 to 18), and one count in relation to his daughter Ca (count 19).[1769]

The prosecution case was that five of the six counts in relation to S related to incidents where S was alone with the accused. However, in relation to count 15, it was alleged that all three sisters were involved in an incident with the accused. In relation to the charges concerning Cy (count 11) and Ca (count 19), it was also alleged that all three sisters were involved. Because of differences between the versions of events given by the three sisters, it was not entirely clear whether, in relation to counts 11, 15 and 19, the sisters were describing the one incident or were describing "similar but distinct episodes in which all three were nevertheless involved".[1770]

The Queensland Court of Criminal Appeal held that all six charges relating to S were properly tried together.[1771] The Court then considered the extent to which the evidence of Cy and Ca about what occurred during the incidents that were the subject of counts 11 and 19 was admissible in relation to the charges concerning S.[1772] The Court held that the evidence of Cy and Ca as to what they observed between S and the accused during each of those incidents was admissible. If the evidence of the three sisters in relation to counts 11, 15 and 19 was referring to the one incident, the evidence of Cy and Ca of their observations of what occurred between S and the accused was direct evidence in proof of count 15.[1773] On the other hand, if the sisters were describing similar but distinct incidents, the evidence of Cy and Ca about the incidents the subject of counts 11 and 19 was still admissible on count 15, but as relationship evidence, rather than as direct evidence:[1774]

> In that case, in terms of legal category, it would be circumstantial rather than direct evidence but still properly admitted as falling within the class of case where guilty passion or special relationship between an accused and a complainant is shown. This explains why the evidence of [Cy] and [Ca] concerning the occasion when all

1768 [1989] 2 Qd R 343.

1769 The indictment originally contained 21 counts, which included charges in relation to three of the accused's other children. At the commencement of the trial, the prosecution sought to proceed only in respect of counts 11 to 21. The trial judge declined to allow counts 12, 20 and 21 to proceed. Accordingly, the appeal was confined to whether the remaining eight counts should have been tried together: *R v B* [1989] 2 Qd R 343 at 344-345.

1770 *R v B* [1989] 2 Qd R 343 per Macrossan CJ (with whom Kelly SPJ and Shepherdson J agreed) at 345.

1771 Id at 348.

1772 It is implicit in the judgment that the evidence of each complainant was not admissible as propensity evidence to prove the charges concerning either of the other complainants. See, in particular, the comments of Macrossan CJ at 349.

1773 *R v B* [1989] 2 Qd R 343 at 349.

1774 Ibid.

> three sisters were jointly involved was properly admissible in proof of the Crown case on the remaining charges relating to the complainant [S] alone. The testimony of [Cy] and [Ca] went to show the existence of the special relationship which supported [S's] claims concerning the accused's treatment of her.

The Court further held that the evidence of Cy and Ca about the incidents that were the subject of counts 11 and 19 should not be confined to what the sisters witnessed in relation to S and the accused, but that the evidence of Cy and Ca as to what occurred to themselves during those two incidents should also be admissible in relation to the charges concerning S. Although the Court did not expressly state that that aspect of the evidence of Cy and Ca was admissible on the ground that it was part of the res gestae,[1775] that was clearly the basis on which the Court upheld the admissibility of the evidence:[1776]

> The evidence of the two girls [Cy and Ca] of what they saw of the actions of the accused with [S] was a vital part of the Crown case and provided the only corroboration of [S's] claims. If it was a fact, as a perusal of the transcript appears to indicate, that it was not reasonably possible for the two sisters, [Cy] and [Ca], to describe what they saw happening between the accused and [S] without referring to their own simultaneous involvement that fact preserves the admissibility of what the two girls had to say. The practical impossibility of restricting each girl's account without losing its essential sense left their total versions admissible in law.

Although the evidence of Cy and Ca about the incidents that were the subject of counts 11 and 19 was admissible in relation to all six counts concerning S (counts 13 to 18), it was only S's evidence about the incident that was the subject of count 15 that was admissible in relation to count 11 with respect to Cy and count 19 with respect to Ca. S's evidence about the incidents that were the subject of counts 13, 14, 16, 17 and 18 was not admissible in relation to either count 11 or count 19.[1777] Accordingly, the fundamental question was whether counts 11 and 19 should have been tried separately from the counts relating to S.[1778]

Macrossan CJ referred to "the accused's entitlement to have his guilt on charges numbered 11 and 19 determined only upon evidence admissible in relation thereto":[1779]

> *De Jesus* considers at some length the particular forces of prejudice which can operate in sexual cases and the necessity of exercising the discretion to ensure that prejudice does not operate in a way which causes an unacceptable risk of injustice to an accused person.

1775 See p 382 of this Report.

1776 *R v B* [1989] 2 Qd R 343 per Macrossan CJ (with whom Kelly SPJ and Shepherdson J agreed) at 348.

1777 Id at 347, 349, 350.

1778 Id at 346-347.

1779 Id at 350.

> In the present case, it is impossible to be confident that the jury would not have taken into account the evidence of [S] on counts numbered 13, 14, 16, 17 and 18, that is, the charges alleging the accused's actions against her in the absence of her sisters, when they were considering the guilt of the accused on counts numbered 11 and 19. Indeed, the danger was that they would have been heavily influenced by that evidence of [S].

Because it was only S's evidence about count 15 that was admissible in relation to counts 11 and 19, the Court held that counts 11 and 19 should not have been tried with the other counts in relation to S:[1780]

> The conclusion is inescapable that counts numbered 11 and 19 should not have been permitted to remain joined upon the indictment because such a large portion of the evidence which was led, that is the evidence of [S] on counts 13, 14, 16, 17 and 18, was inadmissible on counts 11 and 19 and a warning, had it been given, would have provided an insufficient safeguard. It is impossible to assume that injustice did not occur …

The Court ordered a new trial in respect of counts 11 and 19.[1781] Although Cy and Ca would have been the primary witnesses in a new trial, S would also have been a witness because her evidence about the incident that was the subject of count 15 was admissible in relation to counts 11 and 19. Consequently, each of the three sisters would have been required to give evidence at two trials.

However, if the facts of that case had been slightly different and the accused had also been charged with committing a sexual offence in relation to Cy or Ca in the absence of her sisters, that could well have resulted in the ordering of separate trials in respect of each of counts 11 and 19. In that case, there would have been three trials - one in respect of the charges relating to each sister - and it would have been necessary for each of the three sisters to give evidence at each of the three trials.

4. STATUTORY MODIFICATIONS AND RECOMMENDATIONS FOR REFORM

(a) Victoria

Section 372(3) of the *Crimes Act 1958* (Vic) is virtually identical to section 597A(1) of the *Criminal Code* (Qld).[1782] However, the basis upon which the court will exercise its discretion under section 372(3) of the *Crimes Act 1958* (Vic) to order separate trials has been altered by relatively recent amendments to section 372, the effect of which is to create a presumption that, where an indictment charges two or more

1780 Ibid.

1781 Ibid. Counts 11 and 19 were able to be tried together because the evidence of each of Cy and Ca was admissible in relation to both counts. Assuming that the counts related to different incidents, the evidence of each girl as to what she witnessed between the accused and her sister was admissible as relationship evidence on the charge concerning her sister. The evidence of each girl as to what occurred in relation to herself was also admissible on the charge concerning her sister on the basis that it was part of the res gestae. See p 382 of this Report.

1782 Section 597A(1) of the *Criminal Code* (Qld) is set out at p 378 of this Report.

sexual offences, the charges may be tried together.[1783] Section 372 of the *Crimes Act 1958* (Vic) provides, in part:

> **Orders for amendment of presentment, separate trial etc.**
>
> …
>
> (3) Where before trial or at any stage of a trial the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same presentment or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in a presentment the court may order a separate trial of any count or counts of such presentment.
>
> (3AA) Despite sub-section (3) and any rule of law to the contrary, if, in accordance with this Act, 2 or more counts charging sexual offences are joined in the same presentment, it is presumed that those counts are triable together.
>
> (3AB) The presumption created by sub-section (3AA) is not rebutted merely because evidence on one count is inadmissible on another count.
>
> (3AC) In sub-section (3AA) **"sexual offence"** means -
>
> (a) an offence under Subdivision (8A), (8B), (8C), (8D) or (8E) of Division 1 of Part I or under any corresponding previous enactment or an attempt to commit any such offence or an assault with intent to commit any such offence; or
>
> (b) an offence to which clause 1 of Schedule 1 to the *Sentencing Act 1991* applies.

The effect of these amendments was considered by the Victorian Court of Appeal in *R v TJB*.[1784] In that case, the accused had been charged with twenty-four sexual offences in relation to his step-daughter, son and daughter. At his trial, an application for separate trials was made and refused. The trial judge later ruled that the evidence of the three complainants was not mutually admissible.[1785] The accused was convicted on eighteen counts and applied for leave to appeal against his convictions. One of the grounds of appeal was that the trial judge should have ordered separate trials of the counts concerning each complainant.[1786]

Callaway JA held that section 372(3) of the *Crimes Act 1958* (Vic) confers a true discretion, which has not been removed by subsections (3AA) and (3AB), although the new subsections do affect the exercise of that discretion:[1787]

1783 *Crimes Act 1958* (Vic) s 372(3AA), (3AB) and (3AC) were inserted by the *Crimes (Amendment) Act 1997* (Vic) s 7(1) and commenced on 1 January 1998.

1784 [1998] 4 VR 621.

1785 Id at 632.

1786 Id at 623.

1787 Id at 626.

> They simply introduce a new element into its exercise in the case of sexual offences. … It is expressly contemplated that the presumption that the counts are triable together is capable of being rebutted. … The point of substance is that the subsections establish a prima facie rule governing the exercise of the discretion.

Callaway JA expressed the view that the reference to "triable" means "triable consistently with a fair trial of the accused".[1788] On that issue, his Honour made the observation that it is "one of the primary responsibilities of a trial judge at common law to ensure, so far as may be, that the accused has a fair trial".[1789] In the course of considering what constitutes a fair trial, Callaway JA referred to the decision in *R v Christou*,[1790] where the House of Lords had considered the exercise of the court's discretion to order separate trials.[1791] In that case, the House of Lords held, in relation to the factors that the court should take into account in exercising its discretion to order separate trials:[1792]

> They will vary from case to case, but the essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are:- how discrete or inter-related are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully. …
>
> Approaching the question of severance as indicated above, judges will often consider it right to order separate trials. But I reject the argument that either generally or in respect of any class of case, the judge must so order.

Callaway JA noted that the Lord Chief Justice in that decision emphasised the importance of ensuring a fair resolution. However, Callaway JA placed a slightly different emphasis on the various factors that were considered to be relevant in *R v Christou* to ensuring a fair trial, placing a greater emphasis on the importance of securing a fair trial of the accused:[1793]

1788 Ibid.

1789 Id at 628.

1790 [1997] AC 117.

1791 *R v TJB* [1998] 4 VR 621 at 628. Callaway JA noted (at 627-628) that the explanatory memorandum in respect of the amendments in question stated that the provision was in accordance with the approach of the House of Lords in *R v Christou*. However, his Honour expressed the view (at 628) that, although that decision could provide guidance to the court, "[i]t would be quite wrong to say that, as a result of the amendments (still less of the explanatory memorandum), Victorian courts are bound by *R. v. Christou* or any other English authorities".

1792 *R v Christou* [1997] AC 117 per Lord Taylor of Gosforth CJ (with whom Lord Goff of Chieveley, Lord Griffiths, Lord Browne-Wilkinson and Lord Hope of Craighead agreed) at 129.

1793 *R v TJB* [1998] 4 VR 621 at 628.

> His Lordship added that [a fair resolution of the issues] requires fairness to the prosecution and those involved in it as well as fairness to the accused, which is correct, but it must never be forgotten that the position of the Crown and the accused is asymmetric. Quite apart from the burden and standard of proof, the Crown has no interest in securing a conviction. … There can be no fair resolution of the issues, nor is the public interest served, unless there is a fair trial of the accused.

His Honour went on to consider the particular factors referred to by the Lord Chief Justice in *R v Christou*:[1794]

> Some of those factors are clearly more significant than others. If the facts are inter-related, it may be that the evidence on one count is admissible on another, so that the question of severance will not arise. The impact of the judge's decision on the accused and the victims will usually carry more weight than its impact on their respective families or on press publicity. The impact on other witnesses may be taken into account too, so long as the paramount consideration is a fair trial.

Callaway JA offered the following guidance in relation to the exercise of the discretion to order separate trials under section 372(3) of the *Crimes Act 1958* (Vic):[1795]

> 1. A presentment should always be severed where that is both desirable and practicable in order to ensure a fair trial. …
>
> 2. One aspect of a fair trial is the taking of reasonable steps to prevent a jury from misusing evidence. That is not limited to propensity evidence and again is not peculiar to trials of sexual offences. …
>
> 3. It is usually to be assumed that the jury will comply with any directions they are given by the judge. …
>
> 4. There are nevertheless cases where the risk of prejudice is unacceptable. It will often be found that that is so in the case of offences of an unnatural character or offences that arouse strong emotions or excite revulsion.
>
> 5. There is also a greater risk that a direction will be ineffectual if evidence in relation to one complainant *is* probative in relation to another *but* either the Crown does not rely on it for that purpose or the judge rules that it is inadmissible because of prejudice.

Callaway JA held that the present case fell within both points 4 and 5 above, and that the trial judge had therefore erred in failing to order separate trials in respect of the charges concerning each individual complainant.[1796]

However, in the subsequent case of *R v KRA*,[1797] the Victorian Court of Appeal took a more robust approach in relation to the effect of the recent amendments to section

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1794 Id at 630.

1795 Id at 630-631.

1796 Id at 631-632.

1797 [1999] 2 VR 708.

372 of the *Crimes Act 1958* (Vic). In that case, the accused had been charged with a number of counts of sexual assault in relation to two sisters, R and B. Three of the counts concerned R and the other five concerned B. However, in relation to two of the five counts concerning B, the sole evidence relied on by the prosecution was the evidence of R that she had witnessed these incidents. Consequently, if the charges concerning each of R and B had been the subject of separate trials, it would have been necessary for R to give evidence twice - once at the trial concerning the charges relating to herself and on a second occasion at the trial concerning the charges relating to B, at which she would be the principal witness in respect of two of those charges.

Towards the conclusion of the trial judge's direction to the jury, the applicant's counsel applied for the jury to be discharged. It was argued that, as the evidence of each complainant was not admissible in relation to the charges concerning the other complainant, the charges concerning each complainant should have been tried separately. The Crown case had proceeded to that point on the basis that "there should be a joint trial whether or not there was 'cross-admissibility' of the evidence of the several complainants".[1798] The application to discharge the jury was refused. The accused was ultimately convicted of six charges. He sought leave to appeal on the basis that the trial judge "had erroneously exercised his discretion because he was overborne by considerations of procedural convenience rather than by legitimate considerations bearing upon the fair trial of the applicant".[1799]

Winneke P, delivering the judgment of the Court, held that the effect of the amendments to section 372 was that the courts should be guided by the more pragmatic approach adopted by the House of Lords in *R v Christou*.[1800] His Honour elaborated on the approach adopted in that case:[1801]

> The burden of that approach is that severance is a matter for the judge's discretion and that, in exercising it, the judge should bear in mind that juries can be trusted to heed the judge's directions.

Winneke P outlined a number of factors that, in the view of the Court, justified the trial judge's decision to try all the counts together:[1802]

> Quite apart from the fact that these were offences alleged to have been committed by the applicant during a continuous course of conduct against two young girls in his care in the same household, proof of two of those offences against one of the girls depended upon evidence given by the other. It would, we think have been an

1798 Id at 713.

1799 Ibid.

1800 [1997] AC 117. The approach of the House of Lords in terms of the factors that are relevant to the exercise of the discretion to order separate trials is set out at p 389 of this Report.

1801 *R v KRA* [1999] 2 VR 708 at 715.

1802 Ibid.

> unfortunate exercise of the judge's discretion to have required one of the young complainants to have given evidence at two separate trials.

His Honour referred to the statement made by the Court in *R v TJB*[1803] to the effect that, although "it is usually to be assumed that the jury will comply with directions which they are given by a judge, there are 'nevertheless cases where the risk of prejudice is unacceptable' … " and held:[1804]

> Whilst the court suggested that such a risk will often be found in the case of offences "of an unnatural character or offences that arouse strong emotions or excite revulsion" (631), it should not, we think, be forgotten that the amendments to s. 372 of the Crimes Act are specifically directed towards the joint trial of "sexual offences" and that the experience of this court is that a large number of such offences tried in this State are offences which involve young children and, consequently, excite emotion and revulsion. Indeed it is difficult to imagine any such case which would not do so.

In particular, Winneke P held that the presumption in favour of joint trials for sexual offences that is contained in section 372(3AA) of the *Crimes Act 1958* (Vic) "is predicated upon the assumption that juries will heed appropriate warnings given to them by the trial judge".[1805] His Honour did, however, acknowledge that there would inevitably be some cases where the potential for prejudice was so great that separate trials should still be ordered:[1806]

> There will, no doubt, be some cases where the perceived prejudice to the accused will be so great that the trial judge will consider that no judicial direction will overcome that prejudice and that circumstance will play a dominant role in the exercise of his discretion, notwithstanding the legislative policy expressed in the amendments to s. 372. Each case will necessarily depend upon its own facts and, as in the case of all discretionary exercises, rarely will a decision in one case provide a precedent for another.

(b) Recommendation of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission

In their joint report on children and the legal process, the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission criticised the combined effect of the decisions of the High Court in *De Jesus v R* and *Hoch v The Queen*. The Commissions' main concern was that the effect of these decisions might make it necessary for children to give evidence on "numerous" occasions:[1807]

1803 [1998] 4 VR 621 at 631.

1804 *R v KRA* [1999] 2 VR 708 at 716.

1805 Ibid.

1806 Ibid.

1807 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, Report, *Seen and heard: priority for children in the legal process* (ALRC 84, 1997) at para 14.87.

> In *De Jesus v R*, the High Court held that sexual offences form a special class of offences that should almost always be tried separately except where evidence on one count is admissible upon the other count under the 'substantially and relevantly similar' test. In addition, a possibility of joint concoction based solely on a 'sufficient relationship between the victims' as described in *Hoch v R* necessarily arises when the child victims are siblings or friends and are abused by a parent, relative, family friend or teacher. Together, these rules mean that separate trials are usually necessary in these cases and that the children involved may have to give evidence numerous times: in their own trial they must give evidence about what happened to them and in the other trials they must give evidence about what they witnessed happening to other children. [notes omitted]

The other concern expressed by the Commissions was that "these rules mean that when the complainant's credibility is attacked, evidence that would support his or her credibility is disallowed and the jury are kept in ignorance of the fact that there are multiple allegations of abuse against the accused".[1808]

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission made the following recommendation about the issue of separate trials where an accused person is charged with multiple counts of sexual offences:[1809]

> **Recommendation 103.** Multiple proceedings involving more than one incident concerning the same child victim and accused or more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings over long periods of time and the problems associated with rules against tendency and coincidence evidence. To this end, joinder rules and rules against tendency and coincidence evidence should be reviewed in light of the hardship these rules cause to particular child victim witnesses.
>
> **Implementation.** The Attorney-General should recommend to SCAG that it convene a working group to conduct this review.

5. ISSUES FOR CONSIDERATION

The following issues arise for consideration:

- whether there should be a modification of the existing law about the circumstances in which separate trials should be ordered where an accused person is charged with multiple counts of sexual offences;
- the proceedings in which a new rule about the ordering of separate trials should apply.

1808 Id at para 14.89.

1809 Id at 335.

(a) Modification of the existing law in relation to the ordering of separate trials

It can be seen from the earlier discussion in this chapter that the law in relation to the admissibility of propensity evidence has an indirect effect on the question of the separation of trials in that, where the evidence in relation to various counts is mutually admissible, the question of ordering separate trials does not arise.[1810] In Chapter 16, the Commission considered whether legislation should be enacted to establish a rule to deal specifically with the admissibility of propensity evidence in criminal proceedings concerning sexual or other offences that are alleged to have been committed against children. The Commission was of the view that specific provision should not be made to deal with the admissibility of propensity evidence in such cases. Although any changes to the test for the admissibility of propensity evidence would have an impact on whether the question of ordering separate trials was likely to arise in a particular case,[1811] the Commission's consideration of the law in relation to the circumstances when separate trials should be ordered is based on the existing law in relation to the admissibility of propensity evidence.

Given that the purpose of ordering separate trials is to exclude from the jury's considerations evidence that would not be admissible in relation to some of the charges before them, the question arises as to whether any factors can outweigh the importance of that principle.

In *Director of Public Prosecutions v Boardman*,[1812] Lord Cross of Chelsea commented:[1813]

> It is said, I know, that to order separate trials in all these cases would be highly inconvenient. If and so far as this is true it is a reason for doubting the wisdom of the general rule excluding similar fact evidence. But so long as there is that general rule the courts ought to strive to give effect to it loyally and not, while paying lip service to it, in effect let in the inadmissible evidence by trying all the charges together.

It has been observed earlier in this chapter, however, that, in Victoria (as a result of legislative amendment) and in England, a slightly different view now prevails as to the importance of not exposing a jury to evidence that would be inadmissible in relation to some of the charges before them. In both jurisdictions, the courts have been more willing than perhaps they once were to assume that a trial judge's directions to a jury about the purposes for which they can use the evidence before them can protect an accused person from the risk that the jury will treat evidence of one offence as evidence of another offence, even though it might be inadmissible in

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1810 See p 379 of this Report.

1811 The courts have acknowledged that, where the evidence on one count is admissible on another count, there is nothing to be gained by ordering separate trials in relation to each count, as the same evidence will be admissible in each trial. See p 379 of this Report.

1812 [1975] AC 421.

1813 Id at 459. This view was endorsed in *Sutton v The Queen* (1984) 152 CLR 528 per Gibbs CJ at 531 and per Brennan J at 542.

relation to the latter offence. In deciding whether to order separate trials in respect of the charges concerning individual complainants, the courts have also placed a greater importance on other factors, such as the "inter-relatedness" of the charges and the impact on the victims and their families of ordering two or more trials.[1814]

Three submissions received by the Commission in response to the Discussion Paper[1815] opposed any change to the existing law.[1816]

The former Director of Public Prosecutions expressed the view that the rule in *De Jesus* did not cause any injustice.[1817]

The Bar Association of Queensland was also of the view that "the state of the law as it currently stands in Queensland on the question of separate trials adequately safeguards the rights of the Prosecution on the one hand and the rights of the accused on the other".[1818] The Association referred to the effect of section 132A of the *Evidence Act 1977* (Qld) on the question of separate trials:[1819]

> It is conceded that in the period from 1989 to 1997, *Hoch*'s case made it easier for the defence to obtain separate trials of offences allegedly committed against different complainant children, however s.132A *Evidence Act* (Qld) now clearly provides that the test in *Hoch*'s case is not applicable. Under the principle in *Hoch*'s case, all the defence had to show was that the several complainants knew each other and therefore had a theoretical opportunity to collude with each other in respect of their allegations. Since 1997, however, the defence has to show that there is more than a mere possibility of collusion between the various complainants before it will succeed in obtaining separate trials.

The Bar Association of Queensland was particularly concerned about the prejudice to an accused person that would arise if a jury was exposed to evidence that was inadmissible in relation to a particular charge:[1820]

> Impermissible prejudice will occur and the trial process will be rendered unfair if there is a prospect that a jury may be influenced adversely to an accused person on the basis of inadmissible evidence. The danger of such evidence being misused is obviously great in circumstances where emotive and sensitive issues such as sexual offences against children are involved and the well recognised reality of such a situation is that it would be impossible to expect a jury to put aside and not be

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1814 See the view of the House of Lords in *R v Christou* [1997] AC 117 per Lord Taylor of Gosforth CJ (with whom Lord Goff of Chieveley, Lord Griffiths, Lord Browne-Wilkinson and Lord Hope of Craighead agreed) at 129, which is set out at p 389 of this Report.

1815 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1816 Submissions 32, 40, 53A.

1817 Submission 32.

1818 Submission 53A.

1819 Ibid.

1820 Ibid.

> influenced by the inadmissible evidence. This proposition has been expressly recognised by the High Court in De Jesus' case.

The Queensland Council for Civil Liberties was also opposed to any change in the present law. The Council expressed the view that the recommendation of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission did not represent "a balanced consideration of the necessity to prevent miscarriages of justice against accused persons".[1821]

On the other hand, the Commission received a number of submissions that supported a change to the existing law, especially where the law would presently have the effect that it would be necessary for a child to give evidence at more than one trial. These submissions did not generally distinguish between the operation of the law in the different factual situations that can arise. It is therefore important, in considering the submissions, to bear in mind how the law would presently operate and what is really being proposed by way of change.

A number of respondents expressed the view that children should only have to give evidence on one occasion.[1822] Families, Youth and Community Care Queensland advised that it:[1823]

> … supports the implementation of any procedure which streamlines court processes and avoids children having to repeat their evidence in different trials/venues.

The Children's Commission of Queensland considered that section 597A(1) of the *Criminal Code* (Qld), under which the court has the power to order a separate trial of any count or counts in an indictment:[1824]

> … is not in the best interests of justice and causes unnecessary hardship for children who have to face the prospect of being required to give evidence in a number of proceedings.

The Children's Commission expressly endorsed the recommendation made by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission to the effect that "multiple proceedings involving more than one incident concerning the same child victim and accused or more than one child victim and the same accused should be joined in a single trial to avoid the necessity of children giving evidence in numerous proceedings".[1825] This recommendation was also supported by a judge of the District Court of Western Australia[1826] and by the Youth

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1821 Submission 40.

1822 Submissions 19, 31, 49.

1823 Submission 49.

1824 Submission 31.

1825 Ibid.

1826 Submission 54.

Advocacy Centre.[1827]

However, as noted earlier in this chapter, the circumstances in which a child might be required to give evidence at more than one trial are more limited than these submissions would suggest, although that is not to deprecate the concerns raised about the effect on the child in those cases where the child is required to give evidence at more than one trial.[1828]

The first situation referred to in the recommendation of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission is where an accused person is charged with a number of offences in relation to the one child. However, it would be extremely rare in such a situation for some of the counts to be ordered to be the subject of a separate trial, given that the evidence on each count will usually be admissible as relationship evidence on the other counts in the indictment.[1829]

The second situation referred to in the recommendation of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission is where an accused person is charged with sexual offences in relation to more than one child.

Where none of the complainants is a witness in relation to any of the charges concerning the other complainants or in relation to any uncharged acts concerning the accused and the other complainants - the rule in *De Jesus v R* will have the effect that the charges in relation to each complainant will be ordered to be tried separately. However, the rule does not have the effect that the complainants will be required to give evidence on numerous occasions. On the contrary, each complainant will be required to give evidence at only one trial - namely, at the trial in relation to the charges concerning that child.

The real area of difficulty for child witnesses in terms of the present law arises in those cases where a child is both a complainant in respect of some counts in an indictment and a witness in respect of other counts that concern another complainant. For example, in *R v B*,[1830] a separate trial was ordered in respect of two of the eight counts that were initially tried together. The effect of that order was that three sisters would have been required to give evidence at two trials.[1831]

1827 Submission 26.

1828 See pp 384-387 of this Report.

1829 See p 380 of this Report.

1830 [1989] 2 Qd 343. This case is discussed at pp 385-387 of this Report.

1831 A similar situation would have occurred on the facts of *R v KRA* [1999] 2 VR 708 if it had not been possible, as a result of recent amendments to s 372 of the *Crimes Act 1958* (Vic), for the charges concerning one sister to be tried with the charges concerning a second sister. The first sister was a witness in relation to two of the charges concerning her sister. This case is discussed at pp 390-392 of this Report.

Apart from the burden on child witnesses of having to give evidence at more than one trial, one respondent raised a further argument for having the charges concerning a number of child complainants resolved in the one trial. That respondent, a PACT worker, referred to the difficulties that child witnesses sometimes experience in confining their evidence to the matters that are relevant in a particular trial, and to the consequential risk of causing a mis-trial by giving evidence of matters that are inadmissible in the proceedings in question:[1832]

> … having been a support worker on separate trials involving the same children, quite often from one family, against the one accused person, it is very difficult for children to separate what has happened to themselves from their own trial to that of being an eye witness of another child's trial … . [Some children have] … indicated when giving evidence as an eye witness, the same thing has happened to themselves, thus causing a mis-trial. This situation would be alleviated if they all appeared and gave their own evidence of what happened to them, at the one trial.

In those cases where the evidence of each complainant is quite separate from that of any other complainants, and there is no possibility that an order for separate trials will have the effect that a child complainant will be required to give evidence at more than one trial, the real reason for advocating that all the charges against the one accused should be tried together seems to be the view that the ordering of separate trials will result in a forensic disadvantage to the prosecution.

The Children's Commission of Queensland expressed the following view about the ordering of separate trials under section 597A of the *Criminal Code* (Qld):[1833]

> Where a number of children have been offended against by the same person, this provision almost guarantees that the defence will request separate trials to prevent the evidentiary advantage that one trial bestows …

To some extent, the enactment of section 132A of the *Evidence Act 1977* (Qld) and section 597A(1AA) of the *Criminal Code* (Qld) has limited the circumstances in which separate trials are likely to be ordered. Whereas the possibility that the striking similarity between the evidence of a number of complainants was the result of collusion or suggestion would once have rendered the evidence of one complainant inadmissible on the charges concerning another complainant, thereby necessitating separate trials, that is no longer the case.[1834]

Admittedly, these provisions have no application where the evidence of one complainant is inadmissible on the charges concerning another complainant for a reason other than the possibility of collusion or suggestion. It should be borne in mind, however, that, in those circumstances, the evidence that a jury is prevented from hearing when separate trials are ordered is evidence that the law regards as

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1832 Submission 20.

1833 Submission 31.

1834 See the discussion of *Hoch v The Queen* (1988) 165 CLR 292 and s 132A of the *Evidence Act 1977* (Qld) at pp 330-333 of this Report.

insufficiently probative to be admitted,[1835] for where the evidence in relation to the charges concerning two or more complainants is mutually admissible, there will be no reason for separate trials to be ordered.

(b) Proceedings in which a new rule about the ordering of separate trials should apply

If legislation is recommended so that separate trials are not as readily ordered where an accused person is charged with sexual offences against a number of children, the question arises as to the proceedings in which the new rule should apply. As observed in Chapter 16 of this Report, it would be necessary to decide whether a different rule from that which applies to adult complainants should apply in proceedings concerning child sex offences where only some of the complainants were children at the time of the commission of the alleged offences or where, by the time of the trial, some or all of the complainants are no longer children.[1836]

Given that one of the main arguments advanced for changing the law in relation to the ordering of separate trials is the need to avoid the requirement for child witnesses to give evidence at more than one trial, it might seem anomalous if a modified rule were to apply in circumstances where the complainants in question were no longer children. Yet if the modified rule did not apply regardless of the age of the complainant at the time of giving evidence, the evidence to which a jury could be exposed in a case concerning charges of multiple sexual offences would vary according to the ages of the complainants at the time of trial.

6. THE COMMISSION'S VIEW

(a) Modification of the existing law in relation to the ordering of separate trials

The Commission has given consideration to whether there should be legislative amendment to establish a rule to deal specifically with the question of whether, in circumstances where a person is charged in the one indictment with sexual offences in relation to a number of children, the court should order a separate trial of any count or counts in the indictment. In particular, the Commission has considered whether the court should order separate trials of the counts relating to individual complainants where the effect of such an order would be that a child might have to give evidence at more than one trial.

1835 See Chapter 16 of this Report for a discussion of the admissibility requirements for propensity evidence (including similar fact evidence) and for relationship evidence.

1836 Similar issues were considered by the Commission in relation to the modification of the law in relation to the admissibility of propensity evidence. See p 376 of this Report.

The Commission acknowledges the effect that giving evidence and being cross-examined is likely to have on a child witness. It is for that reason that the Commission has made a number of recommendations in this Report that are designed to minimise, to the greatest extent possible, the distress or trauma experienced by a child witness as a result of giving evidence. However, in making those recommendations, the Commission has also sought to ensure that, in a criminal proceeding, an accused person against whom evidence is given by a child complainant or other child witness receives a fair trial.[1837]

The Commission is conscious of the concern expressed by some respondents that separate trials should not be ordered in respect of some counts in an indictment because of the possibility that a child might, as the result of such an order, be required to give evidence at more than one trial.[1838] However, the Commission is equally conscious of the fact that, if the evidence of a number of complainants is not mutually admissible and separate trials are not ordered in respect of the charges concerning the different complainants, a jury will be exposed to evidence that, at least in relation to some of the charges before them, is inadmissible. Although it will not be in every case where separate trials are ordered that a child will be required to give evidence at more than one trial, the Commission accepts that, in some instances, that will be the effect of ordering separate trials.[1839]

In the light of the competing objectives involved in the present context, the Commission is of the view that it is important to consider both the principle underlying the court's discretion to order separate trials and whether it is possible to modify the law in relation to the exercise of the court's discretion without eroding that principle.

The purpose of ordering a separate trial in respect of some of the charges in an indictment is to avoid impermissible prejudice to the accused. The risk of prejudice to the accused is that, if the charges concerning some complainants are not tried separately, the jury will be exposed to inadmissible evidence. The Commission considers that the fundamental question to be addressed is whether, in the context of a trial where an accused person is charged with a number of sexual offences in relation to children, it is possible for the trial judge to ensure a fair trial for the accused simply by directing members of the jury that, in considering certain charges, they must put out of their minds evidence they have heard that was admissible only in relation to certain other charges before them.

The Commission is not satisfied that, in a case involving charges of sexual offences against children, a direction to this effect could adequately protect the interests of an accused person in having his or her guilt on each charge determined only on the

1837 See p 5 of this Report.

1838 See pp 396-397 of this Report.

1839 See pp 384-387 of this Report.

evidence admissible in relation to that charge.[1840] The Commission endorses the comment made by Gibbs CJ in *De Jesus v R*[1841] that "[s]exual cases … are peculiarly likely to arouse prejudice, against which a direction to the jury is unlikely to guard". For this reason, the Commission is of the view that legislation should not be enacted to modify the existing law in relation to the circumstances in which it is appropriate to order separate trials in respect of some of the counts in an indictment.

Although the consequence of not changing the operation of the existing law in this respect is that, in some instances, it might be necessary for a child to give evidence at more than one trial, the Commission considers that that is a result that cannot be avoided if effect is to be given to the principle that, in a criminal proceeding, an accused person is to receive a fair trial.

On the other hand, many of the recommendations made by the Commission in this Report, if implemented, should operate to minimise the distress or trauma experienced by a child who faces the prospect of being a witness at more than one trial.[1842] In particular, the Commission has made recommendations to facilitate the pre-recording of the evidence of a child witness (including the cross-examination of that witness).[1843] In some instances where the court orders separate trials in respect of some of the charges in an indictment, it might be possible, at the one hearing, to pre-record all of the evidence of the child who would otherwise be required to give evidence at more than one trial. It would then be possible to replay the relevant videotape or portion of the videotape at each trial, without the need for the child to appear as a witness at a number of trials.

(b) Proceedings in which a new rule about the ordering of separate trials should apply

The Commission is further of the view that, even if it were considered desirable to have a rule about the ordering of separate trials that applied only in cases concerning child witnesses, there would be considerable difficulties in formulating a proper basis on which to decide in which proceedings such a rule should apply.

If the rationale for modifying the existing law is the desirability of avoiding the situation that a child might be required to give evidence at more than one trial, that does not provide any basis for extending the application of a modified rule to those cases where, although the accused is charged with having committed sexual offences in relation to a number of children, the complainants in question, or at least some of them, are adults by the time of the trial. This is not an uncommon situation

1840 See *R v B* [1989] 2 Qd R 343 per Macrossan CJ at 350.

1841 (1986) 68 ALR 1 at 4-5.

1842 See for example the Commission's recommendations in Chapters 5, 8, 10, 13 and 14 about the use of support persons, out-of-court statements and closed-circuit television and screens, the increased power to restrict inappropriate cross-examination and the procedures that should apply where there is an unrepresented litigant.

1843 See pp 180-182 of this Report.

given that allegations of sexual abuse are sometimes made many years after the events in question are alleged to have occurred.

If the modified rule did not apply where the complainants, or some of them, were adults at the time of the trial, an accused person who was tried while the complainants were still children would face a greater risk of prejudice than an accused person who was tried at a time when the complainants, or some of them, were adults. On the other hand, if the modified rule applied regardless of the age of the complainants at the time of the trial, an accused person against whom adult complainants gave evidence about offences that were allegedly committed when they were children would be exposed to a greater risk of prejudice than an accused person who was tried on charges of committing sexual offences against adults, rather than against children.

In the Commission's view, the difficulties that arise in formulating a rational basis on which to determine which proceedings should be subject to a modified rule about the ordering of separate trials is a further reason for not changing the existing law.

7. RECOMMENDATION

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

CHAPTER 18

IDENTIFICATION ISSUES

1. INTRODUCTION

A child who is a witness in a court proceeding may be required to identify a person alleged to have been involved in the facts giving rise to the proceeding or an object which has been tendered in evidence in the proceeding.

For example, in a criminal trial, the prosecution must establish that the accused person is the person who committed the offence which is the subject of the charge. This is done by means of identification evidence. At common law, identification evidence consists of an assertion by the witness that he or she saw the accused commit the offence.[1844]

In some criminal cases, identification of the accused may be a very contentious issue. This is unlikely to be the situation in a child abuse case, however. In the majority of such cases, the alleged perpetrator of the abuse is related to or in a trusted relationship - for example a family friend, teacher or church leader - with the child.[1845] Given the nature of the alleged offence, the relevant circumstances are unlikely to give rise to a claim of mistaken identity. Nonetheless, a child witness may be required to identify the accused by indicating whether the alleged offender is in court.

There may also be other situations, for example where a child has witnessed the commission of an offence, where it is necessary for the child to identify the accused or items such as a weapon or clothing.

For a child witness, particularly a complainant in an abuse case, confronting an accused person in court may be a distressing experience and the level of distress may affect the child's ability to give evidence effectively.[1846] This problem assumes even greater importance in the situation where the child is the main, or perhaps only, witness against the accused.[1847]

1844 Ligertwood A, *Australian Evidence* (3rd ed, 1998) at 210.

1845 Summit RC, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 *Child Abuse and Neglect* 177 at 179.

1846 See notes 859 and 1255 of this Report.

1847 Typically, child sexual abuse takes place when no one other than the child and the abuser is present, and the abuser may resort to emotional blackmail and threats of violence in an attempt to ensure the child's compliance and continued silence: Summit RC, "The Child Sexual Abuse Accommodation Syndrome" (1983) 7 *Child Abuse and Neglect* 177 at 181.

In this Report, the Commission has recommended a range of options for facilitating the giving of evidence by child witnesses. Some of these options avoid the need for the child to be present in the courtroom while his or her evidence is taken. They include, for example, the use of closed-circuit television, the pre-recording of the evidence of a child witness, and the use of out-of-court statements.[1848] However, implementation of these measures would give rise to the question of how the child should give identification evidence if it is necessary to do so.

2. LEGISLATION

Some Australian jurisdictions have introduced legislation to provide for a child witness whose evidence is to be given by alternative means to identify a person or object.

(a) Western Australia

The *Evidence Act 1906* (WA) facilitates the giving of evidence by a child witness by allowing, in certain circumstances, the child's evidence-in-chief to be videotaped,[1849] or the child's evidence to be given at a pre-trial hearing[1850] and recorded on videotape[1851] or to be given by closed-circuit television[1852] so that the child does not have to testify in the presence of the accused. However, it may not be appropriate for identification of the accused to take place in this way. The use of closed-circuit television for the purpose of identifying the accused may be unsatisfactory, for example, because the child does not have a clear view of the accused or because of possible image distortion.

The Law Reform Commission of Western Australia recommended:[1853]

> In cases where it has been determined that the child will be able to present evidence out of the presence of the accused, and identification of the accused is an issue:
>
> (1) where the accused is a member of the child's family, the identification should if possible be undertaken by another family member or familiar adult;

1848 See Chapters 8, 9 and 10 of this Report.

1849 *Evidence Act 1906* (WA) s 106I(1)(a).

1850 *Evidence Act 1906* (WA) s 106I(1)(b).

1851 *Evidence Act 1906* (WA) s 106K(3)(d). The existing s 106K(3) will be repealed by cl 22(2) of the *Acts Amendment (Evidence) Bill 1999* (WA), and replaced by a new s 106I(1)(b), inserted by cl 20 of the Bill. The Bill has passed both Houses of Parliament but, because of an amendment made in the Legislative Council, had to be referred back to the Legislative Assembly. As of 13 October 2000, it had not been considered further by the Legislative Assembly. This amendment will not cause any substantive change to the law.

1852 *Evidence Act 1906* (WA) s 106N.

1853 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 5.54.

(2) where from the circumstances of the particular case it is necessary for the child to identify the accused at the trial, the child should be able to identify the accused by way of closed-circuit television;

(3) if the use of closed-circuit television for identification of the accused by the child witness is considered by the presiding judicial officer to be inappropriate in the circumstances of the particular case, the child witness should be in the presence of the accused solely for the purpose of identification and only after the child's examination-in-chief, cross-examination and re-examination are complete.

The Commission's recommendations were implemented in part by section 106Q of the *Evidence Act 1906* (WA), which provides that, where identification of the accused is in issue, the child:

… is not to be required to be in the presence of the defendant for that purpose -

(a) for any longer than is necessary for that purpose; and

(b) before the affected child's evidence (including cross-examination and re-examination) is completed.

(b) New South Wales

The Taskforce appointed by the New South Wales Attorney-General to review the law relating to the evidence of children in New South Wales recommended that a provision similar to section 106Q of the *Evidence Act 1906* (WA) should be enacted.[1854]

However, section 21 of the *Evidence (Children) Act 1997* (NSW) specifically prohibits a child who gives evidence by closed-circuit television or other similar technology from using that technology to identify the accused:

Giving identification evidence when closed-circuit television is used

(1) If a child is entitled to give evidence by means of closed-circuit television facilities, or any other similar technology, that child may not give identification evidence by those means.

(2) However, such a child is entitled to refuse to give identification evidence until after the completion of the child's other evidence (including examination-in-chief, cross-examination and re-examination).

(3) In addition, the court must ensure that such a child is not in the presence of the accused for any longer than is necessary for the child to give identification evidence.

(4) …

1854 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at para 8.4.1.

(c) The Australian Capital Territory

The *Evidence (Closed-Circuit Television) Act 1991* (ACT) contains a provision which adopts a much broader approach to the giving of identification evidence by a child witness, where the balance of the child's evidence is given by alternative means.

Section 5(3A) of that Act provides that, where a child[1855] gives evidence by closed-circuit television in a proceeding to which the Act applies,[1856] the court may, if it is satisfied that it is desirable to do so, make such order as it considers appropriate to allow the witness to identify a person or thing.[1857]

3. ISSUES FOR CONSIDERATION

In the Discussion Paper,[1858] the Commission asked a number of questions relating to the identification of an accused by a child witness.

The submissions received by the Commission in response to the Discussion Paper were generally of the view that a child witness should not be required to confront an accused in court for the purpose of identifying the accused.[1859]

1855 Section 5(3A) applies to a "prescribed witness". A "prescribed witness" includes a child: s 3A. A "child" is a person who has not attained the age of 18 years: s 2(1).

1856 Section 4 of the Act states that the Act applies in relation to:

> (a) proceedings in the Supreme Court -
>
> (i) for a trial on indictment in respect of the alleged commission of an offence against a law in force in the Territory;
>
> (ia) for the passing of sentence in respect of the commission of an offence against a law in force in the Territory; or
>
> (ii) by way of an appeal from a conviction, order, sentence or other decision of the Magistrates Court in proceedings in relation to which this Act applies;
>
> (b) proceedings in the Magistrates Court on an information in respect of the alleged commission, or commission, of an offence against a law in force in the Territory;
>
> (c) proceedings under Part 10 of the *Magistrates Court Act 1930*;
>
> (d) proceedings under Chapter 7 (Children and young people in need of care and protection), Part 3 (Care and protection orders and emergency action) of the *Children and Young People Act 1999*;
>
> (e) proceedings under the *Domestic Violence Act 1986*;
>
> (ea) proceedings under the *Victims of Crime (Financial Assistance) Act 1983*; or
>
> (f) proceedings by way of an inquest or inquiry in the Coroner's Court.

1857 *Evidence (Closed-Circuit Television) Act 1991* (ACT) s 5(3A)(b).

1858 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1859 Submissions 2, 12, 19, 30, 32, 33, 40, 49.

Both the former Director of Public Prosecutions[1860] and the Queensland Council for Civil Liberties[1861] criticised the practice of face to face identification by a child witness in court. The Queensland Council for Civil Liberties observed:[1862]

> The practice … of having a child identify an accused person in court has little or no evidentiary weight, is old fashioned and is without merit.

Other proposed methods of identification were by closed-circuit television,[1863] through a one-way mirror,[1864] or with photographs.[1865]

Three respondents considered that identification should take place only after the conclusion of the child's evidence.[1866] However, the former Director of Public Prosecutions was of the view that such a procedure would be prejudicial to an accused person, and that, if face to face identification were necessary in the circumstances of a particular case, it should take place at the end of the child's examination-in-chief.[1867] The Bar Association of Queensland was also of the view that deferring the identification until after the conclusion of the child's evidence could lead to injustice to an accused:[1868]

> One can easily envisage factual circumstances occurring which make it imperative to the proper conduct of the defence case to cross-examine a child witness about that child's alleged identification. Features of the accused person may well need to be referred to and drawn to the child's attention to properly and fairly cross-examine the child.

The Bar Association considered that it should always be for the presiding judge or magistrate to decide, as a matter of discretion, the appropriate manner and timing of any attempted identification.[1869]

1860 Submission 32.

1861 Submission 40.

1862 Ibid.

1863 Submissions 2, 19, 30, 33, 49.

1864 Submissions 19, 33.

1865 Submissions 32, 40.

1866 Submissions 12, 33, 49.

1867 Submission 32.

1868 Submission 53.

1869 Ibid.

4. THE COMMISSION'S VIEW

Of the existing models,[1870] the Commission prefers, with one modification, the broader discretionary approach adopted by the legislation in the Australian Capital Territory, rather than the prohibition on identification by means of closed-circuit television which is expressly stated in the equivalent New South Wales provision.

There are a number of reasons for the Commission's view.

Given the extent of the technological advances that have been made in recent years and the improvement in the quality of closed-circuit television, the Commission does not believe that it should be necessary, in all cases where identification is an issue, for a child witness who gives evidence by means of closed-circuit television to be brought into the courtroom to identify the accused in person. In most cases, the image which the child sees of the accused will be sufficiently clear to enable an identification to be made without risk of prejudice to the accused. The advantage of this approach is not only that it avoids the need for the child to confront the accused, but also that it allows the child's evidence-in-chief and cross-examination to take place without unnecessary interruption. However, the discretionary model would enable the court, if it considered it appropriate, to protect the interests of the accused by ordering that the child make a face-to-face identification.

The ACT provision also has a wider application than its New South Wales and Western Australian counterparts. Whereas, in New South Wales and Western Australia, the provision applies only to identification of the accused in certain criminal prosecutions, the ACT provision also applies to other persons and to objects as well. In the view of the Commission, there may be a number of situations in which a child witness will need the protection of closed-circuit television while giving evidence. For example, the child may be a witness in a civil proceeding arising from the commission of a criminal offence such as assault, or in a domestic violence proceeding. In each of these situations, it is likely to be a frightening or intimidating experience for the child to be required to give evidence in the court in the presence of the alleged perpetrator. It is likely to be equally traumatic, if the child gives evidence by closed-circuit television, for the child to have to go into the courtroom to make an identification. The Commission therefore favours a discretionary approach which would allow the court to make an order appropriate to the circumstances of the particular case.

The New South Wales and Western Australian provisions also state that the identification is not to take place until the completion of the child's evidence. The Commission appreciates that the purpose of this requirement is to postpone any adverse reaction to a confrontation with the accused until after the child has given his or her evidence, so that the quality of the evidence is not affected if the child is distressed by the identification procedure. However, the Commission agrees with

1870 See pp 404-406 of this Report.

the observations made by the former Director of Public Prosecutions and the Bar Association of Queensland that postponement of the identification until after the conclusion of the child's evidence may not be fair to the accused. Where identification is in issue, as it will almost certainly be if the child is required to identify the accused during the course of the proceeding, it is likely that the defence will wish to cross-examine the child about his or her identification evidence. It may be difficult or, in some cases, impossible for the defence to treat the identification evidence as a discrete issue, divorced from the rest of the child's evidence. Further, it will be necessary for the child to undergo cross-examination on two separate occasions - once after the child has completed his or her evidence-in-chief and again after the child has made the identification. The Commission considers this situation to be unnecessarily stressful for the child.

The ACT provision leaves it to the discretion of the court to determine the point at which, if a child who gives evidence by closed-circuit television is to be brought into the courtroom to identify a person or thing, the identification is to take place. This provision also leaves open the possibility that the identification may be postponed until after the completion of the child's evidence.

In the view of the Commission, if a child who has given evidence by means of closed-circuit television is required to make an identification in the courtroom, the identification should take place at the end of the child's examination-in-chief. The child would then return to the remote location for cross-examination by closed-circuit television.

If closed-circuit television facilities are not available, it may be necessary for the child to give his or her evidence in the courtroom but from behind a screen which obscures the child's view of the accused. In such a situation, for the child to be able to identify the accused, it would be necessary at the conclusion of the child's evidence-in-chief for the screen to be removed or for the child to come out from behind the screen.

The Commission accepts that a child witness is likely to be upset by a face-to-face identification of the accused. However, there are a number of ways in which the child's distress could be reduced. In this Report, the Commission has recommended that a child witness should be entitled to the presence of a support person while he or she is giving evidence. The support person's reassurance would help overcome the child's fears.[1871] The Commission has also recommended adequate court preparation for child witnesses.[1872] The Commission believes that the identification procedure would be considerably less stressful for a child witness if the child knew what to expect and was prepared for having to go into the courtroom to make the identification. The court could also order an adjournment to allow the child to regain his or her composure before the cross-examination. The Commission acknowledges that it is unlikely that the stress of a personal identification can be totally eliminated

1871 See Chapter 5 of this Report.

1872 Ibid.

for a child witness. However, it believes that its proposal represents the fairest balance of the competing interests involved.

5. RECOMMENDATIONS

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

18.1 Where a child gives evidence by closed-circuit television, the court may make such order as it considers appropriate to allow the witness to identify a person or thing.

18.2 Where the court requires a child who gives evidence by closed-circuit television to be brought into the courtroom to make an identification of a person or thing, the identification evidence is to be given at the completion of the child's evidence-in-chief.

18.3 Where a child who gives evidence in the courtroom with the aid of a screen is required to identify an accused in person, the identification evidence is to be given at the completion of the child's evidence-in-chief.

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

CHAPTER 19

ALLEGATIONS OF PERSISTENT SEXUAL ABUSE

1. INTRODUCTION

In the Discussion Paper, 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.[1873] 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).[1874]

The Commission's consideration of this provision was in response to several preliminary submissions received by the Commission following the publication of a call for submissions in April 1997.[1875]

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.[1876]

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 indictment[1877] 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.

1873 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at Chapter 19 (Similar Fact Evidence, Separate Trials and Multiple Offences).

1874 Id at 258-267.

1875 Preliminary submissions 15, 22, 44.

1876 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 244.

1877 See note 1738 of this Report.

Ordinarily, an indictment must contain the following particulars of the offences with which the accused is charged:[1878]

> 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 for an offence charged has been described in the following terms:[1879]

> 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:[1880]

> 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 person - for example, that certain conduct occurred "every couple of months for a year",[1881] "every time my mum and dad went out",[1882] or "whatever nights my mum worked".[1883] 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, all or some of which fit the description of the offence charged in the indictment.

1878 *Criminal Code* (Qld) s 564(1).

1879 *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.

1880 Ibid.

1881 See *S v The Queen* (1989) 168 CLR 266 at 268.

1882 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.

1883 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.

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

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

In *S v The Queen*,[1884] 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.[1885] His Honour explained the way in which that type of ambiguity might generally be corrected:[1886]

> … 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]

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"[1887] was explained in the following way:[1888]

> 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

1884 (1989) 168 CLR 266.

1885 Id at 274.

1886 Ibid.

1887 Ibid.

1888 Id per Dawson J at 275.

> 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:[1889]

> 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".[1890]

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.[1891]

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 incident, referable to one of the counts in the indictment, had in fact occurred:[1892]

> 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.

1889 Id at 286.

1890 Ibid.

1891 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 444-447 of this Report.

1892 *S v The Queen* (1989) 168 CLR 266 at 283.

In *Podirsky v The Queen*[1893] - which was decided before Western Australia enacted a provision similar to section 229B of the *Criminal Code* (Qld)[1894] - the Full Court of the Supreme Court of Western Australia discussed the difficulties that arise in prosecutions of this kind. 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".[1895] 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".[1896] 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.[1897]

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".[1898] Accordingly, following the decision in *S v The Queen*,[1899] the Court quashed the conviction in relation to the second count:[1900]

> 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.

The Court outlined the difficulties faced by an accused person against whom allegations of repeated abuse are made:[1901]

> 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

1893 (1990) 3 WAR 128.

1894 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).

1895 *Podirsky v The Queen* (1990) 3 WAR 128 at 130.

1896 Id at 131.

1897 Ibid.

1898 Id at 136.

1899 (1989) 168 CLR 266.

1900 *Podirsky v The Queen* (1990) 3 WAR 128 at 136-137.

1901 Id at 136.

> 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 charged, 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 the 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 committed is such that the complainant is not capable of differentiating between a number of incidents:[1902]

> 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.[1903] He suggested that the younger a child was when the abuse began and the more frequently it occurred, the more difficult it was under the law at that time for the prosecutor to draw charges against the accused with the required degree of particularity.[1904] 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.[1905] It was suggested

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1902 Ibid.

1903 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985) at paras 7.3-7.9.

1904 Id at para 7.6.

1905 Ibid.

that, because of this, prosecutors were more likely to concentrate on the most recent acts.[1906] 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.[1907]

Sturgess recommended that a provision be inserted into the *Criminal Code* (Qld) to create an offence where 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.[1908] The draft 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".[1909]

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.[1910] In the second reading speech for *The Criminal Code,*

1906 Ibid.

1907 See for example *R v D* [1996] 1 Qd R 363 and *R v Wackerow* [1998] 1 Qd R 197.

1908 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 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.

1909 Sturgess DG, QC, Report, *An Inquiry into Sexual Offences Involving Children and Related Matters* (November 1985) at para 7.9.

1910 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).

Evidence Act and Other Acts Amendment Bill 1988 (Qld), the Hon B D Austin explained the reason for the creation of the new offence:[1911]

> 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),[1912] 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.
>
> (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;[1913]

1911 Legislative Assembly (Qld), *Queensland Parliamentary Debates* (24 November 1988) at 3256.

1912 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)).

1913 These sections relate to the offences of “unlawful sodomy” (s 208) and “attempted sodomy” (s 209).

it is a defence to prove that the accused person believed throughout the relationship, on reasonable grounds, that the child was of or above 18 years.

(5) If -

(a) the offence of a sexual nature mentioned in subsection (2) is alleged to have been committed in respect of a child of or above 12 years; and

(b) the offence is one other than one defined under section 208 or 209;

it is a defence to prove that the accused person believed throughout the relationship, on reasonable grounds, that the child was of or above 16 years.

(6) A person may be charged in 1 indictment with an offence defined in this section and with any other offence of a sexual nature alleged to have been committed by him or her in the course of the relationship in issue in the first mentioned offence and he or she may be convicted of and punished for any or all of the offences so charged.

(7) However, where the offender is sentenced to a term of imprisonment for the first mentioned offence and a term of imprisonment for the other offence an order shall not be made directing that 1 of those sentences take effect from the expiration of deprivation of liberty for the other.

(8) A prosecution for an offence defined in this section shall not be commenced without the consent of a Crown Law Officer.[1914]

(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[1915] - 18 years; or

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

The purpose of section 229B has been described in the following terms:[1916]

> 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

1914 The term "Crown Law Officer" is defined in s 1 of the *Criminal Code* (Qld) to mean the Attorney-General or Director of Prosecutions. It has been held in relation to the equivalent provision in Tasmania - s 125A(7) of the *Criminal Code* (Tas) - that, although the "the precondition might be procedural in nature, it is mandatory and its absence does not permit the commencement of valid proceedings": *R v Mihans* [2000] TASSC 107 (1 August 2000) per Slicer J at para 12.

1915 See note 1913 of this Report.

1916 *R v Kemp (No 2)* [1998] 2 Qd R 510 per Mackenzie J at 517-518.

> 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 *KBT v The Queen*,[1917] 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".

Because of the repetitious nature of the conduct giving rise to the offence, the offence is regarded as a particularly serious one:[1918]

> 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.[1919] In this respect, the section differs from the provision recommended in the Sturgess Report. The substance of the offence that was 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".[1920] 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,[1921] explained the purpose of the requirement that three or more acts of a sexual nature must be proved:[1922]

> 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.

1917 (1997) 191 CLR 417 at 428.

1918 *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.

1919 In 1997, s 229B(1A) was renumbered as s 229B(2). See note 1928 of this Report.

1920 The recommended provision is set out in full at note 1908 of this Report.

1921 See pp 417-418 of this Report.

1922 Legislative Assembly (Qld), *Queensland Parliamentary Debates* (24 November 1988) at 3256.

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*,[1923] 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.[1924] Within those categories, however, the complainant's evidence did not identify specific incidents:[1925]

> 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 sexual nature had been established and to reach unanimous verdicts upon the same three offences.[1926]

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 or more illegal acts. This followed from the fact that it was the commission of the three or more acts of a sexual nature that constituted the offence:[1927]

> 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

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1923 (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*.

1924 (1997) 191 CLR 417 per Brennan CJ, Toohey, Gaudron and Gummow JJ at 421.

1925 Id at 422.

1926 Id per Kirby J at 430.

1927 Id per Brennan CJ, Toohey, Gaudron and Gummow JJ at 422.

> of sub-s (1A)[1928] 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,[1929] 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":[1930]

> 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]

It followed that the accused had been deprived of "a chance of acquittal that was fairly open".[1931]

Kirby J, in a separate judgment, also held that the jury must unanimously agree as to the commission of the same three offences of a sexual nature.[1932]

1928 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).

1929 See (1996) 90 A Crim R 416.

1930 (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 decision 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".

1931 (1997) 191 CLR 417 per Brennan CJ, Toohey, Gaudron and Gummow JJ at 424.

1932 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]

(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 to prove the necessary three offences:[1933]

> 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).[1934] 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]

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 found 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,[1935] evidence of a general pattern of unlawful sexual conduct has been held in two recent decisions to be sufficient to found a conviction under section 229B of the *Criminal Code* (Qld) and under the equivalent provision in Victoria.[1936]

1933 (1997) 191 CLR 417 at 423.

1934 See note 1928 of this Report.

1935 (1997) 191 CLR 417 per Brennan CJ, Toohey, Gaudron and Gummow JJ at 423 and per Kirby J at 433.

1936 *Crimes Act 1958* (Vic) s 47A.

In *R v S,*[1937] 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.[1938]

The Queensland Court of Appeal distinguished the decision in *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:[1939]

> 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).[1940] [note added]

The Victorian Court of Appeal has also distinguished the decision in *KBT v The Queen*. In *KRM v The Queen*,[1941] 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.[1942] In relation to that count, the complainant gave evidence of frequent acts of intercourse with the applicant:[1943]

> 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.

1937 [1999] 2 Qd R 89.

1938 Id at 91.

1939 Id at 93.

1940 See note 1928 of this Report.

1941 (1999) 105 A Crim R 437 at 438.

1942 See the *Crimes Act 1958* (Vic) s 47A.

1943 *KRM v The Queen* (1999) 105 A Crim R 437 at 439.

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.[1944]

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.[1945] As in *R v S*,[1946] the Court distinguished the decision in *KBT v The Queen*[1947] 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:[1948]

> 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.

(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*,[1949] the Queensland Court of Appeal 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*:[1950]

1944 Ibid.

1945 Id per Buchanan JA (with whom Phillips CJ and Batt JA agreed) at 441.

1946 [1999] 2 Qd R 89. See the discussion of this decision at p 424 of this Report.

1947 (1997) 191 CLR 417. See the discussion of this decision at pp 421-422 of this Report.

1948 *KRM v The Queen* (1999) 105 A Crim R 437 per Buchanan JA at 440.

1949 [1999] 2 Qd R 89.

1950 Id at 94. See the discussion of *R v S* at p 424 of this Report.

> 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*,[1951] the accused was charged with eight offences of a sexual nature, but not with an offence under section 229B.[1952] Pincus JA made the following comment about the present utility of the section:[1953]

> 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*,[1954] a decision concerning the equivalent provision in the Australian Capital Territory, Crispin J observed:[1955]

> 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.

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,[1956] equivalent provisions were enacted in the

1951 Unreported, CA, Sup Ct of Qld, Pincus JA, Thomas and Dowsett JJ, CA No 476 of 1997, 12 May 1998.

1952 Id per Thomas J at 2 where the 14 charges are set out.

1953 Id per Pincus JA at 9.

1954 (1998) 148 FLR 222.

1955 Id at 228.

1956 See note 1910 of this Report.

Australian Capital Territory and Victoria in 1991,[1957] in Western Australia in 1992,[1958] in the Northern Territory, South Australia and Tasmania in 1994,[1959] and in New South Wales in 1998.[1960]

The provisions were generally said to have been enacted as a response to the decision of the High Court in *S v The Queen*.[1961] 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*.[1962] The Report of Justice Wood included the following recommendation:[1963]

> 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]

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.[1964]

1957 *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).

1958 *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).

1959 *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).

1960 *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).

1961 (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.

1962 Legislative Council (NSW), *Parliamentary Debates* (20 October 1998) at 8541.

1963 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.

1964 See pp 431-449 of this Report.

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.
>
> (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 expressly stipulate that 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 at least three acts constituting sexual offences in relation to a child.[1965]

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.[1966] 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.

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

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1965 *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).

1966 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 1959 and 1960 of this Report.

> (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.[1967] In particular, the Taskforce supported the concept of an offence based on a "course of conduct".[1968]

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:[1969]

> 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.

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.[1970] As Ormiston J of the Victorian Court of Criminal Appeal commented in *Giretti v The Queen*:[1971]

> 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

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1967 Department of Justice and Attorney-General and Department of Equity and Fair Trading (Office of Women's Policy), *Report of the Taskforce on Women and the Criminal Code* (February 2000) at 244.

1968 Ibid.

1969 *Giretti v The Queen* (1986) 24 A Crim R 112 per Crockett J at 117.

1970 Id per Crockett J at 119, per Gray J at 121 and per Ormiston J at 127, 130, 134 and 140.

1971 Id at 140.

> 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:[1972]

> 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[1973] to the Discussion Paper.[1974] One of these respondents, the former 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 a conviction under the section".[1975] This is a similar view to that expressed by the Court of Appeal in *R v S*.[1976] The former Director of Public Prosecutions suggested a new offence in the following terms:[1977]

> 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.

1972 Id at 141.

1973 Submissions 2, 32.

1974 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

1975 Submission 32.

1976 [1999] 2 Qd R 89 at 94. See pp 425-426 of this Report.

1977 Submission 32.

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:[1978]

> 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.[1979]

(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.[1980]

The other Australian jurisdictions do not have such a requirement. However, the Queensland Court of Appeal 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:[1981]

> 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

1978 Submission 53A.

1979 Submission 40.

1980 *Crimes Act 1900* (NSW) s 66EA(1); *Criminal Law Consolidation Act 1935* (SA) s 74(3); *Criminal Code* (WA) s 321A(1).

1981 *R v S* [1999] 2 Qd R 89 at 91-92.

> 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.[1982]

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).[1983]

It would appear that, although section 229B of the *Criminal Code* (Qld) does not contain an express provision of the kind referred to above,[1984] it is possible under the existing provision for a range of sexual offences of varying gravity to be prosecuted together under the section.[1985]

(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".[1986]

1982 *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).

1983 *R v GB* (1998) 148 FLR 222 at 224.

1984 See note 1982 of this Report.

1985 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).

1986 *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.

Such a provision has also been recommended by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General,[1987] which gave the following explanation for its recommendation:[1988]

> 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:[1989]

> 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).

(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.[1990]

1987 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.

1988 Id at 139.

1989 *Crimes Act 1900* (NSW) s 66EA(12)(c).

1990 See the discussion of *S v The Queen* (1989) 168 CLR 266 at pp 413-414 of this Report.

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.[1991] 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.

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:

1991 *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).

> (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 person 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.[1992] 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.

(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.[1993]

(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

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1992 *Crimes Act 1900* (NSW) s 66EA(10); *Crimes Act 1958* (Vic) s 47A(5); *Criminal Code* (WA) s 321A(9).

1993 *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 431-432 of this Report.

committed during the period covered by the charge under section 229B (or its equivalent).[1994] 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.[1995] 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*,[1996] 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".[1997]

Similarly, in *R v Kemp (No 2)*,[1998] 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:[1999]

> 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.

1994 *Criminal Code* (Qld) s 229B(6); *Crimes Act 1900* (ACT) s 92EA(7); *Criminal Code* (NT) s 131A(7).

1995 This limitation is discussed at p 444 of this Report.

1996 [2000] 1 Qd R 546.

1997 Id per Thomas JA at 547.

1998 [1998] 2 Qd R 510.

1999 Id at 514.

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.[2000] 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".[2001]

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.[2002] However, the Court rejected the argument that a person could be 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":[2003]

> 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

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2000 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 at pp 456-457 of this Report and Recommendation 19.2(k) at p 466 of this Report.

2001 *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).

2002 *R v GB* (1998) 148 FLR 222 at 224.

2003 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".

> 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]

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.[2004] 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 charge, regardless of whether the charges are brought in the same indictment or in separate indictments:[2005]

> 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.

2004 *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).

2005 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 p 447 of this Report.

Section 66EA of the *Crimes Act 1900* (NSW) contains specific provisions dealing with the rule against "double jeopardy".[2006] 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.[2007] 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.[2008]

Further, as noted above,[2009] 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 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".[2010] In those circumstances, the offender is liable to imprisonment for life.[2011]

2006 See the discussion of s 66EA(8) and (9) of the *Crimes Act 1900* (NSW) at pp 447, 448 of this Report.

2007 *Crimes Act 1900* (NSW) s 66EA(8), which is discussed at p 447 of this Report.

2008 *Crimes Act 1900* (NSW) s 66EA(9), which is discussed at p 448 of this Report.

2009 See p 438 of this Report.

2010 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).

2011 The Commission is not, as part of this review, examining the question of the appropriate maximum penalty for this offence. See p 462 of this Report.

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 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[2012] 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:

2012 The maximum penalty for such a case of indecent dealing of a child is imprisonment for 10 years: *Criminal Code* (Qld) s 210(1), (2), (4).

> **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.[2013] The legislation provides that the person may be convicted of and punished for any or all of the offences so charged.[2014] However, where the person is convicted of an offence under section 229B and of a specific sexual offence that was 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;[2015] 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).

2013 *Criminal Code* (Qld) s 229B(6). This course is also permitted by legislation in the Australian Capital Territory and in the Northern Territory. See pp 438-439 of this Report.

2014 *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).

2015 *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).

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".[2016] 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.

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.[2017] 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

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2016 Kenny RG, *An Introduction to Criminal Law in Queensland and Western Australia* (5th ed, 2000) at para 7.1

2017 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 456-457 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.

punished twice for the conduct which gave rise to the two offences".[2018]

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.[2019]

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, the conviction in respect of the specific offence will stand, but the person cannot be punished in respect of that offence.[2020]

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

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2018 Kenny RG, *An Introduction to Criminal Law in Queensland and Western Australia* (5th ed, 2000) at para 7.12.

2019 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 on 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 particular act, but because they were not satisfied about the commission of the two additional acts required to found a conviction under s 229B.

2020 *R v Kiripatea* [1991] 2 Qd R 686 per Williams J at 702.

any application to the issues of conviction for, or punishment in respect of, the later specific charge. For example, if in *R v S*[2021] 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,[2022] 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:[2023]

> 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).

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.[2024] However, section 229B does not address the situation where a person who has been convicted or acquitted of a specific sexual offence is subsequently

2021 [1999] 2 Qd 89. The relevant facts are outlined at p 424 of this Report.

2022 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).

2023 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).

2024 *Criminal Code* (Qld) s 229B(7).

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.[2025]

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:

> 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".[2026]

2025 The doctrine of abuse of process is discussed at note 2019 of this Report.

2026 *Acts Interpretation Act 1954* (Qld) s 20C(2).

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[2027] where the relevant acts were committed prior to the repeal or amendment of the legislation or provision,[2028] although the effect of the *Acts Interpretation Act 1954* (Qld) in that respect may be displaced by a contrary intention in particular legislation.[2029]

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.

2027 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).

2028 *Acts Interpretation Act 1954* (Qld) s 20(2). See the discussion of the effect of the equivalent Victorian provision 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.

2029 *Acts Interpretation Act 1954* (Qld) s 4.

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 a majority of the Taskforce on Women and the Criminal Code recommended that such a change should be made.[2030]

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.[2031] As noted above in the context of drug trafficking, proof of only several incidents might be insufficient to prove the continuing offence over the period alleged.[2032]

More importantly, however, the Commission is of the view that, despite the criticism levelled at section 229B,[2033] 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[2034] 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*[2035] - the

2030 See p 432 of this Report.

2031 See the discussion of the offence of drug trafficking at pp 432-433 of this Report.

2032 Ibid.

2033 See pp 425-426 of this Report.

2034 See the explanation of the term "count" at note 1740 of this Report.

2035 (1989) 168 CLR 266. This decision is discussed at pp 413-414 of this Report.

prosecution was then faced with the prospect of correcting the "latent ambiguity".[2036]

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.[2037] 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.

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*,[2038] 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;[2039]
- reduces the accused to a "general denial" of the charges;[2040]
- precludes the accused from raising more specific and effective defences, such as the defence of alibi;[2041]
- requires the accused to defend himself or herself in respect of each occasion on which an offence might have been committed;[2042]

2036 See the discussion of this issue at p 413 of this Report.

2037 That is, it is not necessary to give particulars of the dates between which each individual act is alleged to have occurred.

2038 (1989) 168 CLR 266.

2039 Id per Toohey J 281-282.

2040 Id per Dawson J at 275.

2041 Ibid.

2042 Id per Gaudron and McHugh JJ at 286.

- has the result that the accused is effectively denied an opportunity to test the credit of the complainant by reference to surrounding circumstances.[2043]

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.

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.[2044] Prior to the decision of the High Court in *KBT v The Queen*,[2045] 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)*,[2046] Pincus JA made the following comment when discussing the provision that is now section 229B(2):[2047]

2043 Ibid.

2044 See note 1965 of this Report.

2045 (1997) 191 CLR 417. This decision is discussed at pp 421-422 of this Report.

2046 [1998] 2 Qd R 510.

2047 Id at 512.

> 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.[2048] In the Commission's view, the requirement that the prosecution must prove the commission of three or more separate acts and the further 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.[2049] 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 longer 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

2048 *Crimes Act 1900* (NSW) s 66EA(6)(b); *Criminal Law Consolidation Act 1935* (SA) s 74(5)(b). These provisions are set out at pp 431-432 of this Report.

2049 See note 1980 of this Report.

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.

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.[2050] 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.[2051]

(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).[2052]

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.

2050 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 448 of this Report.

2051 See pp 462-463 of this Report.

2052 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

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.[2053]

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.[2054] Section 66EA(3) of the *Crimes Act 1900* (NSW) would be an appropriate model for such a provision.[2055]

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.[2056]

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)[2057] 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,[2058] 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.

2053 See note 1986 of this Report.

2054 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.

2055 This provision is set out at p 428 of this Report.

2056 See p 456 of this Report.

2057 This provision is set out at p 436 of this Report.

2058 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 1912 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 p 462 of this Report.

(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.[2059]

Although section 66EA(4) of the *Crimes Act 1900* (NSW) is in substantially similar terms to section 229B(2),[2060] 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,[2061] 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 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).[2062]

(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.[2063] 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

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2059 See the discussion of *S v The Queen* (1989) 168 CLR 266 at pp 413-414 of this Report.

2060 These provisions are set out at pp 436-437 of this Report.

2061 See the Commission's view on this issue at pp 450-452 of this Report.

2062 This provision is set out at p 437 of this Report.

2063 See p 453 of this Report.

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 in Queensland.[2064] 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.[2065]

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

2064 See p 455 of this Report.

2065 See p 438 of this Report.

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.[2066]

The Commission considers that, if section 229B were amended to allow the return of an alternative verdict,[2067] 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.

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.[2068]

(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,[2069] 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.[2070]

2066 See the discussion of *R v Kemp (No 2)* [1998] 2 Qd R 510 at p 439 of this Report.

2067 See the Commission's view at pp 456-457 of this Report.

2068 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.

2069 See the discussion of s 229B(3) of the *Criminal Code* (Qld) at p 442 of this Report.

2070 See p 443 of this Report for a discussion of the situations in which it might be necessary for the trial judge to seek such a finding.

However, given that section 624 of the *Criminal Code* (Qld),[2071] 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 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.[2072] 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.[2073] However, as the Commission has observed, that restriction does not seem to apply where the charges are brought in separate indictments.[2074]

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.[2075]

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

2071 This provision is set out at p 444 of this Report.

2072 See pp 457-458 of this Report.

2073 See p 444 of this Report.

2074 Ibid.

2075 See pp 444-447 of this Report.

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.[2076]

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 the later specific charge concerns an act that was relied on for the section 229B charge or an unrelated act.[2077]

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.

2076 See note 2019 of this Report.

2077 See the discussion of this issue at pp 446-447 of this Report.

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.[2078]

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 that include 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

2078 These difficulties are discussed at pp 447-448 of this Report.

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:

- the maximum term of imprisonment for a person convicted under the section;[2079]
- the relevant sexual offences for the purposes of the section;[2080]
- the "prescribed age" of the child for the purposes of the section;[2081]
- the defences to a charge under the section;[2082]
- the requirement for the consent of a Crown Law Officer to be obtained before commencing a prosecution under the section.[2083]

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

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2079 *Criminal Code* (Qld) s 229B(1), (3).

2080 *Criminal Code* (Qld) s 229B(2).

2081 *Criminal Code* (Qld) s 229B(9).

2082 *Criminal Code* (Qld) s 229B(4), (5).

2083 *Criminal Code* (Qld) s 229B(8). The definition of "Crown Law Officer" is set out at note 1914 of this Report.

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.[2084]

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 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,[2085] 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.

2084 See pp 448-449 of this Report.

2085 See p 455 of this Report.

7. RECOMMENDATIONS

In Part 1 of this Report,[2086] the Commission made the following recommendations.[2087]

The Commission recommends that:

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

19.2 The new provision should provide that:

(a) a person who, on three or more separate occasions occurring on separate days during any period, engages in conduct, in relation to a particular child under the prescribed age, that constitutes a sexual offence commits a crime;[2088]

(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

2086 Queensland Law Reform Commission, Report, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (R 55 Part 1, June 2000).

2087 Id at 112-116.

2088 The Commission makes no recommendation about the maximum term of imprisonment that may be imposed in respect of the crime.

(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;

(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;[2089]

(i) the recommendation in paragraph (h) does not prevent an alternative verdict under the recommendation in paragraph (k);

2089 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 460 of this Report.

(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;[2090]

(k) if, on the trial of a person charged with an offence against the new section, the jury is not satisfied that the offence is proven but is satisfied that the person has, in respect of any of the occasions relied on as evidence of the commission of the offence against that section, committed a sexual offence, the jury may acquit the person of the offence charged and find the person guilty of that sexual offence, provided that the jury is also satisfied that that offence was committed in Queensland.

19.3 It should continue to be a requirement under the new provision that a prosecution for an offence defined in that provision must not be commenced without the consent of a Crown Law Officer.[2091]

19.4 The new provision should contain the following definitions:

(a) "prescribed age" means:[2092]

(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);[2093] or

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2090 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 pp 461-462 of this Report.

2091 See note 1914 of this Report.

2092 See *Criminal Code* (Qld) s 229B(9).

2093 See *Criminal Code* (Qld) s 229B(2).

(ii) an offence under the law of a place outside Queensland that would, if it had been committed in Queensland, be an offence referred to in paragraph (i).

19.5 The defences presently available under section 229B(4) and (5) of the *Criminal Code* (Qld) should continue to apply to a charge brought under the new provision. Those provisions should be incorporated into the new provision with such modifications as are necessary to reflect the fact that the new provision is no longer to refer to "the maintaining of a relationship".

19.6 The Commission makes no recommendation for any change to the term of imprisonment that may be imposed in respect of an offence under the new provision. Accordingly, those aspects of section 229B(1) and (3) that relate to the question of punishment should be incorporated into the new provision with such modifications as are necessary to reflect the fact that the new provision is no longer to refer to "the maintaining of a relationship".

19.7 The new provision should provide that, after the commencement of that provision:

(a) no further prosecutions may be brought under section 229B in its form prior to the commencement of the new provision; and

(b) any act that could have been relied on to prosecute a charge under section 229B before its repeal and replacement should be able to be relied on as evidence of the commission of a relevant act for the purposes of the new provision, regardless of whether the act is alleged to have been committed before or after the commencement of the new provision.[2094]

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

2094 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 463 of this Report.

8. *CRIMINAL LAW AMENDMENT ACT 2000* (QLD)

The *Criminal Law Amendment Act 2000* (Qld) received Royal Assent on 13 October 2000. The Act does not amend section 229B of the *Criminal Code* (Qld).

CHAPTER 20

PROFESSIONAL EDUCATION AND AWARENESS

1. THE NEED FOR EDUCATION AND AWARENESS

Children involved in the litigation process face a number of obstacles which, in most cases, do not confront adults to nearly the same extent. Particular issues which arise for child witnesses include lack of familiarity with and apprehension about the legal process, the need to face a test of competency to give evidence, differing levels of cognitive, linguistic and social development and, in child abuse cases, the complexity and psychological effect of intra-familial relationships, and the trauma of facing the alleged abuser.

Unless the legal professionals who participate in cases involving child witnesses are aware of, and sensitive to, the factors which may detrimentally affect the ability of a child to give evidence, the evidence may not be forthcoming or may be given in such a way that its value is significantly compromised. However, some judicial officers and members of the legal profession may not be familiar with the issues which can arise in relation to the giving of evidence by child witnesses:[2095]

> … for those not conversant with issues of child development, the difficulties and disadvantages that children encounter when giving evidence are not easily visible or generally recognised.

The need for judicial awareness is particularly important, since it is the judge or magistrate who controls the way in which a proceeding is conducted. For example, in this Report, the Commission has made a number of recommendations about the way in which children should be able to give evidence, and about facilities to assist children to give evidence. In situations where the use of those facilities is to be the subject of judicial discretion, it is arguable that awareness of the need for the various facilities is important to assist judges and magistrates to understand when those facilities might be appropriately used.

The success of any legislative measures to facilitate the giving of evidence by child witnesses will depend, to a large degree, on a recognition by legal professionals of the disadvantages confronting children who give evidence:[2096]

2095 Submission 31.

2096 Sas LD, Wolfe DA and Gowdey K, "Children and the Courts in Canada" in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) 77 at 86.

> … just because the law recognizes that children's needs are different from those of adults and that accommodations made for children can ensure they are good witnesses, it does not mean that the judiciary, crown attorneys, and defense lawyers necessarily act in accordance with those principles.

Australia is a signatory to the *Convention on the Rights of the Child*. This Convention is intended to heighten awareness of issues concerning children. In particular, Article 4 of the Convention provides that signatories to the Convention:[2097]

> … shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.

Article 42 further requires signatories to:[2098]

> … make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Programs for legal professional education and awareness are one method of equipping legal professionals with information about child development, child psychology and child sexual abuse. Even if legal professionals are currently familiar with these issues, the amount of continuing, recent research justifies the reception of information as on-going legal education.

2. INITIATIVES AND PROPOSALS FOR PROFESSIONAL DEVELOPMENT

(a) Canada

The Canadian National Judicial Institute has initiated a judicial training program on issues of child sexual abuse. It has been noted that the number of federally-appointed judges attending the program indicated that "judges are willing to participate in formal training programs and are not as concerned that the training will interfere with their judicial independence".[2099]

(b) England

The recommendation of the Cleveland Report[2100] in 1988 that "all lawyers engaged in this type of work including Judges and Magistrates should have a greater awareness of and inform themselves about the nature of child abuse and the

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2097 (New York, 20 November 1989): entry into force for Australia 16 January 1991, Australian Treaty Series 1991 No 4.

2098 Ibid.

2099 Sas LD, Wolfe DA and Gowdey K, "Children and the Courts in Canada" in Bottoms B and Goodman G (eds), *International Perspectives on Child Abuse and Children's Testimony: Psychological Research and Law* (1996) 77 at 86.

2100 *Report of the Inquiry into Child Abuse in Cleveland 1987* (UK) (Cmnd 412).

management of children subjected to abuse and in particular sexual abuse,"[2101] resulted in a training program for civil judges to prepare them for the *Children Act 1989* (UK).[2102]

The Report included guidelines for interviewing allegedly abused children. The guidelines strongly endorse the necessity for people involved in conducting such interviews to be trained in appropriate interviewing techniques.

Lay magistrates sitting in family proceedings or the youth court receive special training.[2103]

(c) Ireland

The Irish Law Reform Commission made a number of recommendations relating to the issue of professional awareness in cases involving children. These recommendations included:[2104]

- the need for special care in selecting prosecuting counsel in child sexual abuse cases;
- the adoption by the legal profession of special codes of practice relating to representation in, and the conduct of, cases involving children;
- consideration of ways of ensuring that lawyers involved in such cases have appropriate training or experience;
- the provision of opportunities for judges and justices who may be dealing with child sexual abuse cases to acquire information by way of training courses and otherwise as to the special problems posed by such cases.

(d) Australia

The Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission, in their Report on issues concerning children in the legal process, called for training for those in the legal profession who have regular dealings with child witnesses about issues such as communication skills and the

2101 Id at 252.

2102 Spencer JR and Flin RH, *The Evidence of Children: The Law and the Psychology* (2nd ed, 1993) at 248.

2103 Ibid.

2104 The Law Reform Commission (Ireland), *Report on Child Sexual Abuse* (LRC 32, 1990) at 97.

physical and emotional capacities of children to give evidence over long periods of time.[2105]

A number of recommendations contained in the Report support the development of "guidelines and training programs" by the Australian Institute of Judicial Administration (AIJA) in consultation with child witness experts. Specific training for the judiciary and magistrates is recommended in relation to factors such as:[2106]

- standard periods of time beyond which child witnesses of various ages should not be expected to give evidence in chief or to manage continuous cross-examination without a break
- standard length of breaks needed by child witnesses of various ages
- examples of aggressive or confusing examination tactics so as to enable judges and magistrates to recognise and prevent aggressive, intimidating and confusing questioning
- examples of language and grammar inappropriate to the age and comprehension of child witnesses so as to enable judges and magistrates to ensure questions are stated in language that is appropriate to the age and comprehension of the child witness.

The Report recommends that judicial training be complemented by training for legal professionals and practitioners. Prosecution staff with contact with child witnesses should be trained "in the use of age appropriate language for child witnesses, children's developmental stages and the possible effects of giving evidence on children of various ages".[2107] Prosecutors in juvenile justice matters should be trained "in children's issues particularly concerning the exercise of the discretion to withdraw charges in minor matters".[2108] Barristers' and Solicitors' Rules "should specifically proscribe intimidating and harassing questioning of child witnesses. Lawyers should be encouraged to use age appropriate language when questioning child witnesses".[2109]

2105 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) para 14.113 at 345.

2106 Id, Recommendation 110 at 346.

2107 Id, Recommendation 111 at 346.

2108 Id, Recommendation 231 at 529.

2109 Id, Recommendation 112 at 347.

(e) Western Australia

The Law Reform Commission of Western Australia in its Report on Children's Evidence[2110] analysed and responded to comments on the following two proposals from its earlier Discussion Paper:[2111]

- the development of a written guide for legal personnel in dealing with child witnesses;

- the issue of guidelines to the judiciary, to magistrates and court officials in relation to the appropriate procedures and terminology for dealing with child witnesses.

The Commission recorded a "very supportive" public response to the proposals.[2112] It recommended the adoption of four modes of education:[2113]

- university undergraduate interdisciplinary courses relevant to child witnesses;

- continuing legal education at regular intervals, noting that:[2114]

> Doctors, psychologists and social workers, as well as legal professionals, are likely to have significant contact with child witnesses. Specialized training for legal professionals with staff from other disciplines will prove mutually beneficial …;

- seminars for judges and magistrates, providing material similar to that for the legal profession;

- guidelines for judicial personnel to assist them in dealing with children. The Commission suggested that the guidelines could include matters concerning:[2115]

> … the law as to competence; directions as to appropriate questioning of children; the conduct of a voir dire examination; and suggestions in relation to discretionary matters such as the presence of support persons, arrangements within the court room and other special adjustments to

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2110 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991).

2111 Law Reform Commission of Western Australia, Discussion Paper, *Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1990) at para 6.8.

2112 Law Reform Commission of Western Australia, *Report on Evidence of Children and Other Vulnerable Witnesses* (Project No 87, 1991) at para 11.5.

2113 Id at para 11.13.

2114 Id at para 11.9.

2115 Id at para 11.12.

> procedure that may be necessary when children and other vulnerable witnesses testify. [note omitted]

(f) New South Wales

The New South Wales Children's Evidence Taskforce recommended:[2116]

> … that the matter of judicial and legal profession education relating to communicating with children and the effective use of CCTV be referred for consideration by the appropriate agencies and associations. Consideration should also be given to the development of practice directions to Counsel, when dealing with a witness who is a child or young person …

This recommendation followed from the Taskforce's discussions which considered the following to be significant in the process of taking evidence from child witnesses:

- an understanding of the degree of children's cognitive and emotional development and their communication skills:[2117]

  > Development among the judiciary and legal profession of knowledge, skills and communication techniques (including the use of appropriate language) specific to child witnesses may result in evidence being better ascertained and may also reduce the intimidation suffered by child witnesses when called upon to give evidence in criminal proceedings.

- the development of "training courses" by appropriate bodies:[2118]

  > It may be appropriate for relevant bodies such as the Judicial Commission, the Child Protection Council and the Law Society to develop training courses in child specific communication techniques and techniques in conducting proceedings using CCTV. In developing education packages for lawyers and the judiciary, emphasis should be given to workshops and practical exercises.

(g) Queensland

In 1996, the Criminal Justice Commission published a report entitled *Aboriginal Witnesses in Queensland's Criminal Courts*. Some of the issues considered in the report are also relevant in the context of child witnesses. For example, the report recommended the following:

2116 NSW Attorney General's Department, *Report of the Children's Evidence Taskforce* (1995-96) at 7.

2117 Id at para 5.4.5.

2118 Id at para 5.4.7.

- development and maintenance of a judicial officer's resource kit "concerning the aspects of language and culture that affect the way Aboriginal people in Queensland give evidence and the way that evidence is interpreted and understood in court";[2119]

- development for new judicial officers of a national judicial orientation program including information upon indigenous cross-cultural issues;[2120]

- information be included in cross-cultural awareness training relating to Aboriginal special witnesses under section 21A of the *Evidence Act 1977* (Qld);[2121]

- regional symposia involving various legal professionals and members of local Aboriginal communities;[2122]

- cross-cultural awareness training for lawyers,[2123] police prosecutors,[2124] and for court staff who have contact with Aboriginal people.[2125]

This Commission will consider issues relating to indigenous child witnesses in Part 3 of this Report, to be published in 2001.

3. ISSUES FOR CONSIDERATION

The principal issues raised for consideration are the existence of a need for greater professional awareness of factors affecting the receipt of children's evidence and the ways in which this need, if any, could best be met.

2119 Criminal Justice Commission, Report, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Recommendation 3.1 at 36.

2120 Id, Recommendation 3.2 at 37.

2121 Id, Recommendation 6.8 at 91. Section 21A of the *Evidence Act 1977* (Qld) deems a person who would be disadvantaged as a witness as a result of "cultural differences" to be a "special witness".

2122 Id, Recommendation 3.3 at 37.

2123 Id, Recommendation 3.4 at 40.

2124 Id, Recommendation 3.5 at 40.

2125 Id, Recommendation 6.7 at 88.

(a) Perception of the need for greater awareness

The submissions received by the Commission in response to its Discussion Paper[2126] identified a significant degree of public concern about the level of awareness of judicial officers and members of the legal profession of issues relating to the giving of evidence by child witnesses. An overwhelming majority of the submissions referred to a need for greater awareness by individuals involved in the process of obtaining and presenting the evidence of child witnesses of factors which might adversely affect the quality of that evidence.[2127]

Queensland Health expressed the view that:[2128]

> It would certainly seem appropriate that judges and the legal profession be informed as to the present state of knowledge in relation to the cognitive abilities and potential limitations of children. This is a rapidly expanding clinical field with considerable inherent complexity. It cannot be assumed that officers of the court are in a position to make informed decisions in regard to these issues, using personal experience as their predominant guide.

The Children's Commission co-ordinated a submission on behalf of a number of non-government organisations and agencies concerned with issues affecting children, and consulted with children and young people who had experienced giving evidence. The submission reported that:[2129]

> The organisations and children consulted were almost unanimous in their view that the majority of magistrates or judges have little or no knowledge of child development, children's thinking, or how best to communicate with children.

It explained the effect of inadequate awareness of these issues:[2130]

> If judges and lawyers are unaware of the difficulties that children have comprehending certain question forms, or the legal language, or their compliance to adult authority under certain questioning techniques, or their difficulty in assessing age or time, then they will not be supportive of the suggestion that questioning guidelines for children need to be developed.
>
> If they [are] unaware of how intimidating being confronted by the offender or counsel is for a child, they will not be supportive of recommendations that are designed to prevent the child coming into contact with the offender.

2126 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

2127 Submissions 1, 2, 5, 6, 7, 10, 12, 20, 23, 25, 26, 27, 29, 30, 31, 32, 33, 34, 37, 39, 41, 42, 46, 47, 48, 49, 50.

2128 Submission 30.

2129 Submission 33.

2130 Ibid.

> If they are unaware of the overwhelming effect that the formal court environment with its heavy furniture, formal attire and large proportions has on children, they will not be supportive of modifying the environment, or allowing the child to give evidence from another location.

The submission concluded that:[2131]

> There is an underlying assumption that individuals will develop expertise in an area simply because they are exposed to that situation on a number of occasions. This assumption is fallacious. The fact that judges or counsel have handled a number of matters where children have given evidence does not give them insight into child development or child behaviour.

A number of telling observations were made by the children and young people consulted:[2132]

> The most salient concern related to the "frightening", "oppressive" and "scary" atmosphere of the court. Children said they felt unsafe and unable to give their best evidence. They felt the judges neither understand them or how to get the best evidence from them.

In relation to determining the competence of a child witness to give evidence, the former Director of Public Prosecutions referred to a paper presented to the Third Annual Conference of the International Association of Prosecutors. The authors of the paper observed:[2133]

> … the most common practice is simply to assess the child on the basis of his or her responses to the judges' questioning. Few judges have had training in this area and though some do manage to communicate reasonably effectively with the child, others do not and the matter can turn on the judge's competence rather than that of the child.

Several respondents were of the view that the need for greater awareness applied not only to the judiciary, but also to lawyers and police prosecutors and to investigators involved in gathering evidence from potential child witnesses.[2134] One submission noted:[2135]

> The legal profession needs to be aware of the intimidating effect that the adversarial system and court proceedings have on children. It also needs to be aware that these factors impact differently on different children. Children's life experiences, language capacity and cultural background, as well as the offence involved and their knowledge and understanding of the legal process, influence the way they give evidence and how that evidence should be interpreted and understood.

2131 Ibid.

2132 Ibid.

2133 Submission 32A, citing Brown DA and Bott B, "Crimes against Children: Procedure and Practice in Scotland" (Dublin, 1998).

2134 Submissions 27, 31, 32, 33, 41, 47, 49.

2135 Submission 33.

Two respondents referred specifically to the need for specially trained prosecutors within the Office of the Director of Public Prosecutions.[2136]

Some respondents emphasised the particular need for greater awareness of issues confronting child witnesses in cases of alleged child abuse.[2137] These submissions echoed the views expressed by the Irish Law Reform Commission:[2138]

> A lawyer involved in such a case requires skills and faces demands which go beyond purely legal ones. This is true whether the lawyer is representing a child or parents, or prosecuting or defending an alleged abuser. In order to do his or her job effectively, the lawyer needs to know something about the capacity of children at different stages in their development, about the effects on children of child sexual abuse, and about the typical ways in which children react to it. The lawyer needs to understand the language of children and to be able to communicate with children, not in the esoteric language of the law, but in the language appropriate to the particular stage of the child's development. The lawyer needs to know something about family dynamics, and the impact on, and likely reactions of, family members when an allegation of abuse is made.

(b) Implications for judicial independence

Independence of the judiciary in the context of the Australian constitutional and political framework has been described variously as "… a fundamental principle of the constitutional arrangements",[2139] "a cornerstone of our society",[2140] "a necessary guarantee of democracy",[2141] and "a constitutional principle with a sound practical rationale … and … the primary source of assurance of judicial impartiality".[2142]

In the Discussion Paper, the Commission expressed the view that the government is a major litigant before the courts and that, if public confidence in the independence of the judiciary is to be maintained, the judiciary must not be or be seen to be subject to direction or influence by the executive arm of government in matters which bear upon the determination of litigation.[2143]

2136 Submissions 31, 32.

2137 Submissions 6, 30, 33, 42.

2138 Law Reform Commission (Ireland), Consultation Paper, *Child Sexual Abuse* (1989) at 194-195.

2139 King, the Hon Mr Justice LJ, "Minimum Standards of Judicial Independence" (1984) 58 *Australian Law Journal* 340 at 342.

2140 Brennan, the Hon Sir G, "Courts for the people - not people's courts", *The Inaugural Deakin Law School Oration* (26 July 1995) at 25.

2141 Marks, the Hon Mr Justice K, "Judicial Independence" (1994) 68 *Australian Law Journal* 173 at 181.

2142 Gleeson, the Hon Mr Justice M, "Who do Judges think they are?", *The Sir Earl Page Memorial Oration* (Sydney, 22 October 1997) at 2.

2143 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 104.

Only two of the submissions received by the Commission in response to the Discussion Paper referred to the issue of judicial independence.[2144] Neither of these submissions considered that judicial independence would be compromised by the attendance of judicial officers at training sessions on matters relating to the evidence of children. One respondent expressed the view that, as judicial awareness programs would provide judicial officers with information and understanding, but not direct judges how to make decisions, they would not infringe the independence of the judiciary.[2145]

The Australian Law Reform Commission has noted an increasing acceptance of the importance of and need for judicial education:[2146]

> Judicial education, once the subject of controversy, is now well accepted as a natural part of the professional development of judicial officers.
>
> Much of the impetus to secure formal judicial education has come from judges and magistrates themselves. The spur to implement such courses and programs has come in response to the changing roles and responsibilities of judges and decision makers, and the increased public demands, expectations and scrutiny of the justice system. [notes omitted]

However, the Commission qualified this observation by adding that, in common law countries, it was also accepted that, as a condition of maintaining judicial independence, judicial education programs should be controlled by the judiciary[2147] and that attendance at such programs should not be compulsory.[2148]

(c) Implementation of awareness programs

Few of the submissions which identified a need for greater professional awareness indicated how they considered such awareness should be achieved.

Those respondents who specifically addressed the question of whether awareness programs should be mandatory were fairly evenly divided on the issue. Four submissions expressed the view that such programs should be mandatory,[2149] while three considered that they should be optional.[2150]

2144 Submissions 41, 49.

2145 Submission 41.

2146 Australian Law Reform Commission, Report, *Managing Justice: A review of the federal civil justice system* (R 89, January 2000) at 161.

2147 Id at 165-167. The Commission favoured a model which, while controlled by the judiciary, was "leavened" by appropriate external (for example academic, professional and community) representation.

2148 Id at 164-165.

2149 Submissions 2, 25, 32, 49.

2150 Submissions 7, 34, 40.

There were differing views as to who should conduct the programs. One respondent, the Queensland Council for Civil Liberties, favoured the Australian Institute of Judicial Administration.[2151] The Bar Association of Queensland indicated its willingness to initiate Continuing Legal Education seminars, involving the free exchange of information and ideas between barristers and other professionals, to inform its members of the special difficulties which confront young witnesses.[2152] Three organisations specialising in early childhood education also indicated willingness to become involved in the development and delivery of programs aimed at increasing the knowledge and skills of legal personnel working with young children involved in the court situation.[2153] Three further submissions pointed to the benefits of an interdisciplinary approach to awareness programs to foster common knowledge and understanding of children's issues across professions involved with child protection and child witnesses.[2154]

4. THE COMMISSION'S VIEW

(a) Judicial officers

In the Discussion Paper, the Commission acknowledged that it is now generally accepted by the judiciary in Australia that the complexity of matters coming before the courts requires not only the appointment of suitable persons to judicial office but the participation by judges in continuing educational programs.[2155]

For example, all levels of the court system in Queensland hold regular conferences where issues relevant to professional awareness are discussed. Both the Magistrates Court and the District Court have devoted time at their conferences to consideration of matters related to the giving of evidence by child witnesses. The Commission supports these initiatives, and urges the heads of each of the jurisdictions to continue to foster programs promoting an appreciation by judicial officers at all levels of factors affecting the ability of a child witness to give evidence.

While the Commission is in favour of continuing education programs for judicial officers, it is strongly of the view that such programs should be independent of the executive arm of government. It supports the proposition that awareness programs should be controlled by the judiciary, but agrees with the Australian Law Reform Commission that it would be desirable for the programs to include input from

2151 Submission 40.

2152 Submission 53.

2153 Submission 29.

2154 Submissions 31, 33, 47.

2155 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998) at 104-105.

appropriate external sources of expertise or experience from which judicial officers could benefit.[2156]

Further, the Commission is not persuaded that attendance by judicial officers at professional awareness programs should be made mandatory. It acknowledges that legislation passed by the executive arm of government requiring judicial officers to take part in educational programs could be seen to be inconsistent with judicial independence. It also believes that the increasing acceptance by judicial officers of the need for continuing education is an indication that individual officers will take the opportunity to participate if appropriate programs are made available.

(b) The legal profession

The Commission agrees with the observations made by the Irish Law Commission about the need for members of the legal profession who are involved in cases where children give evidence to have some knowledge about matters such as childhood development and communication with children. It is particularly important that lawyers in child abuse cases, whether as prosecutors or as defence representatives, are familiar not only with these issues, but also with the effects of and reactions to abuse, and with potential family dynamics in such a situation.[2157]

As both the Queensland Law Society and the Bar Association of Queensland conduct continuing legal education programs for members of the profession, the Commission is of the view that it would be desirable for these programs to include components addressing the ability of children to give evidence, and facilitating the development by lawyers of skills in working with child witnesses. The Commission considers that the exchange of information between lawyers and members of professions with expertise in issues relating to children as witnesses would be valuable.

Although, in the view of the Commission, it is outside the scope of its terms of reference to comment on practices within the Office of the Director of Public Prosecutions, the Commission believes it would be desirable for consideration to be given to providing an opportunity for prosecutors in cases involving children as complainants or other significant prosecution witnesses to participate in ongoing professional education about relevant issues.

(c) Undergraduate legal studies

Legal education begins at law school, and the attitudes which young lawyers take with them into the profession can be heavily influenced by the nature of the training which they receive at university. The Commission is therefore of the view that it

2156 See note 2147 of this Report.

2157 See p 478 of this Report.

would be desirable for consideration to be given to ways in which awareness of issues affecting children as witnesses could be incorporated into law school curricula. For example, substantive subjects such as criminal law and the law of evidence could include reference to these issues, as could courses on professional ethics and responsibility.

5. RECOMMENDATIONS

The Commission recommends that:

20.1 The Chief Justice of the Supreme Court of Queensland, the Chief Judge of the District Court and the Chief Magistrate should give consideration to continuing to provide information about issues relating to the ability of children to give evidence as part of the program of ongoing legal education for judicial officers in their respective jurisdictions.

20.2 The Queensland Law Society Incorporated and the Bar Association of Queensland should conduct continuing legal education programs for the members of the profession about issues relating to children as witnesses, and that such programs include input from members of other relevant professions.

20.3 Deans of Queensland Law Schools should give consideration to the ways in which issues relating to children as witnesses can be included in law school undergraduate curricula.

CHAPTER 21

INAPPROPRIATE USE OF EVIDENTIARY MATERIAL

1. INTRODUCTION

As can be seen from the preceding chapters of this Report, the evidence given by a child witness may take a number of forms. In addition to oral evidence given by the child during the proceeding, part of the child's evidence may be tendered as a written statement made by the child or as a video or audio recording made by the child prior to the commencement of the proceeding.

In some kinds of proceedings, there may also be evidence which has been given by other witnesses about a child. In a case involving allegations of child abuse, this evidence may take the form of, for example, photographs or medical reports.

While there may be a legitimate reason for another party to the proceeding to obtain evidence of this kind in order to, for example, prepare a defence or lodge an appeal, concern has been expressed about the possible access to and subsequent misuse of evidence tendered in court proceedings involving child witnesses, in particular the use of such evidence for purposes not connected with the court proceeding.

2. FREEDOM OF INFORMATION

The *Freedom of Information Act 1992* (Qld) creates a legally enforceable right of access to certain documents held by government or government agencies.[2158] The stated objective of the Act is to "extend as far as possible the right of the community to have access to information held by Queensland government".[2159] The right of access is general in its application and does not depend on the person seeking access to information having a particular interest in that information. Indeed, the reason or motive for a person seeking information is irrelevant to the decision whether or not the information should be released, and there is no discretion to stop the disclosure of information because of any particular motivation in the applicant.[2160]

However, the right of access provided by the Act is not absolute. For example, an application for access to a document may be refused if the document is reasonably open to public access under other legislation (whether or not the access is subject to

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2158 *Freedom of Information Act 1992* (Qld) s 21.

2159 *Freedom of Information Act 1992* (Qld) s 4.

2160 See for example *State of Queensland v Albeitz* [1996] 1 Qd R 215 per de Jersey J at 222.

a fee or charge).[2161] The Act also recognises that disclosure of some kinds of information involves competing interests, and may have a prejudicial effect which cannot be justified.[2162] Accordingly, the Act exempts some kinds of material from disclosure.

One ground of exemption relates to the disclosure of matter concerning the "personal affairs" of a person.[2163] The term "personal affairs" is not defined by the Act, and it has been held that it would be "inappropriate" for a court to attempt to formulate an exhaustive definition.[2164] It has been held to include, for example, affairs relating to family and marital relationships, health or ill-health, relationships and emotional ties with other people and domestic responsibilities or financial obligations.[2165]

For the exemption to apply, the information to which access is sought must "refer to matters of private concern to an individual".[2166] It is not necessary that the information be confidential or not widely known.[2167] However, if information concerning the personal affairs of a person has become widely known in the community or has become a matter of public record, it may be a question of degree as to whether the person's affairs have become so widely known that they ought to cease to be eligible for protection.[2168]

The personal affairs exemption is subject to a public interest exception, and the prima facie entitlement to exemption from disclosure can be displaced by countervailing considerations of such weight that disclosure of the information would, on balance, be in the public interest notwithstanding the personal nature of the information.[2169]

A further ground of exemption relates to law enforcement and public safety. One of the specific grounds for exemption is that disclosure of the material could reasonably be expected to endanger a person's life or physical safety.[2170] However, danger to a person's life or physical safety does not encompass mental distress resulting from

2161 *Freedom of Information Act 1992* (Qld) s 22(a).

2162 *Freedom of Information Act 1992* (Qld) s 5(2).

2163 *Freedom of Information Act 1992* (Qld) s 44(1).

2164 *Department of Social Security v Dyrenfurth* (1988) 80 ALR 533 at 539; *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 per Lockhart J (with whom Jenkinson and Heerey JJ agreed) at 119.

2165 *Re Stewart and Department of Transport* (1993) 1 QAR 227 at 257.

2166 *Re Williams and Registrar of the Federal Court of Australia* (1985) 8 ALD 219 per Beaumont J at 221.

2167 *Colakovski v Australian Telecommunications Corporation* (1991) 100 ALR 111 per Lockhart J (with whom Jenkinson and Heerey JJ agreed) at 119.

2168 *Re Stewart and Department of Transport* (1993) 1 QAR 227 at 251.

2169 Id at 235.

2170 *Freedom of Information Act 1992* (Qld) s 42(1)(c).

harassment[2171] or intimidation caused by disclosure of material, unless the extent of the distress is likely to drive the person to commit suicide or to harm himself or herself in some way.[2172]

Disclosure of material which may reasonably be expected to be of substantial concern to a person may be granted under the *Freedom of Information Act 1992* (Qld) only if reasonable steps have been taken to obtain the person's views as to whether the material is exempt.[2173] If it is decided to disclose the material notwithstanding that the person believes the material is exempt, the person must be notified in writing of the decision, the reasons for the decision and the person's rights of review in relation to the decision. Access to the material must be deferred until the expiration of the period in which an application for review may be made.[2174]

Potentially, the process created by the *Freedom of Information Act 1992* (Qld) allows access to be sought to information concerning evidence given by or about children in court proceedings involving children. In the past, applications have been made for material such as photographs,[2175] witness statements[2176] and transcripts of court proceedings.[2177] Although the Information Commissioner has apparently been reluctant to find, where children are involved, a public interest in disclosure which overrides the prima facie right to exemption,[2178] nonetheless situations might arise in which the right to exemption is outweighed by public interest considerations in favour of disclosure.[2179]

3. INAPPROPRIATE USE OF MATERIAL INVOLVED IN COURT PROCEEDINGS

In 1998, the then Minister for Police and Corrective Services raised concerns about the wrongful use made by some offenders of material obtained by the Police Service

2171 *Re Murphy and Queensland Treasury and Others* (1995) 2 QAR 744.

2172 *Re Toren and Secretary, Department of Immigration and Ethnic Affairs* (Unreported, Commonwealth Administrative Appeals Tribunal, Q93/578, 8 March 1995).

2173 *Freedom of Information Act 1992* (Qld) s 51(1).

2174 *Freedom of Information Act 1992* (Qld) s 51(2).

2175 *Re Ferguson and Director of Public Prosecutions* (Unreported, Decision of the Information Commissioner, 96013, 31 July 1996).

2176 *Re Godwin and Queensland Police Service* (Unreported, Decision of the Information Commissioner, 97011, 11 July 1997).

2177 *Re JM and Queensland Police Service* (Unreported, Decision of the Information Commissioner, 95008, 12 May 1995).

2178 See for example *Re Ferguson and Director of Public Prosecutions* (Unreported, Decision of the Information Commissioner, 96013, 31 July 1996).

2179 See for example *Re Godwin and Queensland Police Service* (Unreported, Decision of the Information Commissioner, 97011, 11 July 1997).

in the course of investigating an offence. The Minister referred to two instances, identified by members of the Office of the Director of Public Prosecutions, in which offenders retained police photographs:[2180]

> In the first instance, a prisoner was found to have a police photograph of his victim displayed on his cell wall. In another instance, a male attacker showed a police photograph of an injured victim to his female victim in a bid to scare her into submission.

As a result of this kind of inappropriate use of material, legislation was introduced to "provide conditions that protect the information from wrongful use and send a clear message to the community that the release of information provided to the service is subject to strict control".[2181] The legislation created an offence of unlawfully possessing or supplying a print, video recording or a transcript of an audio or video recording which is the property of the Commissioner of Police.

Section 10.21A of the *Police Service Administration Act 1990* (Qld) now provides:

> **Unlawful possession of prescribed articles**
>
> (1) A person must not unlawfully possess a prescribed article.
>
> Maximum penalty - 40 penalty units.
>
> (2) A person must not unlawfully supply to someone else a prescribed article that is evidence of the commission of an offence.
>
> Maximum penalty - 40 penalty units.
>
> (3) Subsection (2) does not prevent a person supplying a print, an audio recording, or a transcript of an audio or video recording, to a person charged with an offence of which the article is evidence or the person's lawyer, for the purpose of enabling the person to defend the charge.
>
> (4) A person must not possess a print, an audio recording, or a transcript of an audio or video recording supplied under subsection (3) after the time allowed for any appeal against a conviction for an offence of which the relevant article is evidence ends, unless the article is kept as part of court records or the records of a lawyer acting for the person charged with the offence.
>
> Maximum penalty - 40 penalty units.
>
> (5) In this section -
>
> **"prescribed article"** means any of the following that is the property of the commissioner -
>
> (a) a print;

2180 Legislative Assembly (Qld), *Queensland Parliamentary Debates* (5 March 1998) at 265.

2181 Ibid.

(b) a video recording;

(c) a transcript of an audio or video recording.

The legislation also specifies the circumstances in which a copy may be made of a print which has been tendered as an exhibit in a proceeding before a court or tribunal.[2182]

In Western Australia, legislation restricts the use that can be made of videotaped evidence given by children and other vulnerable witnesses, and the possession of the material after a trial. For example, it is an offence to possess, supply or offer to supply videotaped evidence without authority.[2183] It is also an offence to play, copy or erase videotaped evidence without authority.[2184] Broadcasting videotaped evidence without the approval of the Supreme Court of Western Australia incurs a substantial penalty.[2185]

4. ISSUES FOR CONSIDERATION

Concerns about access to and inappropriate use of evidence given by and about children raise for consideration the adequacy of the exemption provisions in the *Freedom of Information Act 1992* (Qld). They also give rise to questions about the need for restrictions on the use which may be made of material which has been used as evidence in proceedings involving children or collected during the course of an investigation which results in such proceedings.

(a) Access to material

The Queensland Police Service has repeatedly attempted to draw attention to the use of the *Freedom of Information Act 1992* (Qld) to obtain, or to attempt to obtain, copies of documents, videotapes or photographs relating to child abuse and sexual offences against children.[2186]

In a submission to the Legal, Constitutional and Administrative Review Committee of the Legislative Assembly of Queensland, to which the Queensland Parliament had

2182 *Police Service Administration Act 1990* (Qld) ss 9A.2, 9A.3, 9A.4.

2183 *Evidence Act 1906* (WA) s 106MA(1).

2184 *Evidence Act 1906* (WA) s 106MA(2).

2185 *Evidence Act 1906* (WA) s 106MB: $100,000 or 12 months imprisonment or both.

2186 Queensland Department of Justice and Attorney-General, *Freedom of Information Annual Report 1994-1995* (1995) at 20; Queensland Department of Justice, *Freedom of Information Annual Report 1995-1996* (1996) at 26; Queensland Department of Justice and Attorney-General, *Freedom of Information Annual Report 1996-1997* (1997) at 22.

referred the *Freedom of Information Act 1992* (Qld) for review, the Queensland Police Service observed:[2187]

> The deficiencies in the present legislation are highlighted when FOI applications are made to this Unit for apparently no other purpose than to revictimise the victim.

The submission noted further:[2188]

> There are indications that groups such as paedophiles are endeavouring to use the FOI process to gain access to evidence in court proceedings for their own gratification.
>
> A significant proportion of prisoners who apply to the QPS under the FOI Act have been convicted on sexual offences. If evidence such as statements and tape recordings have been presented in court it is difficult to rely on the current exemption provisions contained in the FOI Act to exempt these documents from release. The view of the Information Commissioner (Qld) is that evidence presented in open court has lost its confidentiality and privacy.

To overcome this problem, the Queensland Police Service suggested that an additional ground of exemption from disclosure should be included in the *Freedom of Information Act 1992* (Qld). At present, section 42 of the Act exempts certain material from disclosure because it relates to law enforcement or public safety. According to the QPS submission, this current provision does not give appropriate consideration to the release of documents which could prejudicially affect a person's mental wellbeing rather than his or her physical safety.[2189] The submission argued:[2190]

> Whilst government accountability is a cornerstone of the FOI Act it should not be achieved by sacrificing the personal liberty of citizens to be free from unnecessary harassment or intimidation. The FOI Act should not be able to be used as a mechanism to facilitate, or further any form of harassment, intimidation or stalking.
> Processing FOI applications should not have the undesirable by-product of reviving memories that individuals may have of personal traumas that they have suffered earlier. Simply stated, the FOI Act should not *'revictimise the victim'.* Moreover, it is essential that FOI applicants are prevented from utilising the FOI Act as another avenue to further harass victims. Lawful mechanisms should not be available as a means of harassment.

However, as noted previously, mere harassment is not a sufficient reason for refusing to release material under the *Freedom of Information Act 1992* (Qld), unless the harassment is of such a degree that it endangers a person's life or physical

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2187 Queensland Police Service, Submission to the Legal, Constitutional and Administrative Review Committee (14 May 1999) at 1.

2188 Id at 18.

2189 Id at 16.

2190 Id at 14.

safety,[2191] for example, by driving the person to commit suicide or to harm himself or herself in some way.[2192]

The Queensland Police Service expressed the view that:[2193]

> It should not be necessary that the harassment or intimidation of a person should be of such gravity, that section 42(1)(c) of the FOI Act could have no operation unless a person could inflict some personal physical harm as a result of the harassment or intimidation. If the harassment or intimidation of a person was of such magnitude that the release of documents could reasonably be expected to endanger a person's mental well being then those documents should be exempt from release.

It recommended that section 42(1)(c) should be extended to provide that material is exempt if its disclosure could reasonably be expected not only to endanger a person's life or physical safety, but also to substantially prejudice the mental wellbeing of a person.[2194]

There was some support in the submissions received by the Commission in response to its Discussion Paper[2195] for an extension of the "personal affairs" exemption provided by section 44(1) of the *Freedom of Information Act 1992* (Qld).[2196] Queensland Health submitted that that the "personal affairs" exemption should apply to recordings of a child's evidence, including videotapes, photos, witness statements and other forms of material and new technologies such as CD-ROMS.[2197] But, on the other hand, Families, Youth and Community Care Queensland opposed any extension of section 44(1), expressing the view that there may be cases where disclosure of material relating to the evidence of a child witness may be in the public interest, and that the merits of applications in such cases should be able to be considered on an individual basis.[2198]

2191 *Re Murphy and Queensland Treasury and Others* (1995) 2 QAR 744.

2192 *Re Toren and Secretary, Department of Immigration and Ethnic Affairs* (Unreported, Commonwealth Administrative Appeals Tribunal, Q93/578, 8 March 1995).

2193 Queensland Police Service, Submission to the Legal, Constitutional and Administrative Review Committee (14 May 1999) at 16.

2194 Id, Recommendation 6 at 19.

2195 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

2196 Submissions 30, 32.

2197 Submission 30.

2198 Submission 49.

(b) Restrictions on the use of evidentiary material

In the submissions received by the Commission in response to the Discussion Paper, there was recognition of both the existence of legitimate reasons for seeking access to evidentiary material in cases involving child witnesses, and the need to protect the privacy and safety of children alleged to have been abused.[2199]

The Queensland Council for Civil Liberties, while supporting the enactment of section 10.21A of the *Police Service Administration Act 1990* (Qld),[2200] submitted that the implementation of the legislation was overly restrictive:[2201]

> … the frequent practice of the Queensland Police Service requiring defence lawyers to go to a police station to view such relevant material is insulting to the integrity of lawyers and unnecessary.
>
> If it was underlined to defence lawyers by a Practice Direction that they were not to give such material to their clients or allow material of interviews with child witnesses to be taken out of their office, the current unsatisfactory practice of having to attend at the police station with one's client to view a video interview with a child could be ceased.

However, the former Director of Public Prosecutions was of the view that section 10.21A should be further strengthened, and that there was a need for additional restrictions on the use of witness statements, medical examination reports and other such materials.[2202]

This concern would appear to be reflected in the submission of the Queensland Police Service to the Legal, Constitutional and Administrative Review Committee. That submission indicates a belief that, notwithstanding the provisions of section 10.21A, material relating to child abuse cases continues to be disseminated by convicted sex offenders to other prisoners as a form of "jail porn".[2203]

2199 Submissions 19, 30, 32, 34, 40, 49.

2200 See pp 486-487 of this Report.

2201 Submission 40.

2202 Submission 32.

2203 Queensland Police Service, Submission to the Legal, Constitutional and Administrative Review Committee (14 May 1999) at 1, 18.

5. THE COMMISSION'S VIEW

(a) Access to material

(i) A restriction on access to "prescribed matter"

The Commission acknowledges the significance of the *Freedom of Information Act 1992* (Qld) for open and accountable government, and it supports the aims and objectives of the Act.

However, the Commission is concerned by reports that attempts have been made to misuse the Act to obtain sensitive material relating to incidents of alleged child abuse for improper purposes such as circulation as pornography or intimidation or harassment of a victim of abuse. In the view of the Commission, while it is imperative to ensure that legitimate requests made under the Act are given due consideration, there is also a need for a mechanism by which access to material for purposes such as those noted above is able to be restricted. The Commission is persuaded that the existing grounds of exemption from disclosure provided by the Act do not adequately provide such a mechanism.

Proposals have been made for amendment of two of the present grounds of exemption. It has been suggested that the "personal affairs" exemption and the "public safety exemption" should both be strengthened to reduce the likelihood of access being granted to materials related to child abuse prosecutions.

With respect to the suggestion that the "personal affairs" exemption should be defined to include evidence given by or about children in abuse cases, the Commission is of the view that cases should continue to be decided on their individual facts. It believes, consistently with the existing case law,[2204] that it would be inappropriate to specify by way of definition that particular kinds of information are always within or outside the meaning of the expression. In any event, even if such a definition were attempted, the exemption would remain subject to the public interest test in section 44(1) of the *Freedom of Information Act 1992* (Qld).

The other proposed amendment concerns section 42(1)(c) of the Act, which exempts material the disclosure of which might reasonably be expected to endanger a person's life or physical safety. The Commission sees merit in the proposal that this ground of exemption should be extended to include a threat to the mental wellbeing of a person if material is disclosed. It agrees that it should not be necessary, in order for material to be exempted from disclosure, that there be an expectation that a person would be so distressed

2204 See note 2164 of this Report.

by the disclosure of the information that he or she would contemplate suicide or physical self-harm. However, in the view of the Commission, such a change would not be practicable or desirable in the limited context of this reference and should be considered in the context of a wider review of the terms of the *Freedom of Information Act 1992* (Qld).

Further, the Commission believes that, even in an amended form, sections 42(1)(c) and 44(1) would not provide sufficient protection if access were sought for an improper purpose to material relating to the investigation and prosecution of an alleged offence of child abuse. The reason for the application is irrelevant to the question of whether access should be granted under these sections. Unless the material is exempt from disclosure, access to it will be granted. Because the decision as to whether material is exempt inevitably involves the exercise of individual discretion, there cannot be any guarantee that the material will be exempted. Indeed, in the case of section 44(1), access may be granted even to exempt material if it is in the public interest to do so.

In addition, both section 42 and section 44 of the Act are subject to the notification provision contained in section 51. Section 51 requires that, before access is given to material the disclosure of which may reasonably be expected to be of substantial concern to a person, reasonable steps must be taken to obtain the person's views as to whether the material is exempt from disclosure. The Commission acknowledges that this provision confers an important right. It notifies a person about whom information has been sought that an application for access to the material has been made, so that the person may argue that the material should not be released. In the case of material relating to an allegation of child abuse, however, the mere fact of notification of the application may serve as an unwelcome reminder of an earlier trauma that the victim wishes to put behind him or her. The Commission's concern is that, if an application for access to the material has been made for the purpose of intimidating or harassing the victim, the requirements of section 51 may themselves give effect to that purpose.

The Commission is therefore of the view that a new provision should be inserted in the *Freedom of Information Act 1992* (Qld) specifically dealing with applications for access to the kind of material under consideration. The provision should prohibit access to prescribed material unless the applicant shows cause why access should be granted. The effect of such a provision would be to deny disclosure of certain material unless there is a reason why it should be made available. The onus would then be on the applicant to demonstrate a legitimate interest in the material. If the applicant were unable to do so, then access to it would be refused.

The Commission is aware that a provision of this nature would reverse the general thrust of the Act that information should generally be accessible unless there is a reason why it should not be disclosed. However, in the Commission's view, a provision of this kind is necessary to prevent the

Freedom of Information Act 1992 (Qld) being misused to obtain material for an improper purpose.

(ii) Determining an application for "prescribed matter"

The Commission considers that the new provision should state that, where the person deciding the application comes to the view that an applicant has succeeded in showing cause, the person is then to consider the application in accordance with the procedure set out in the *Freedom of Information Act 1992* (Qld). This would mean that, even though an applicant had been able to persuade the decision-maker that the applicant had demonstrated sufficient interest in the "prescribed matter", disclosure of the material would not automatically follow. Once the applicant had established a sufficient interest in the material, the application would then be determined in the usual way, with consideration being given to the question of whether the material came within any of the existing grounds of exemption in the Act. If the decision-maker considered the material to be exempt, the material would not be disclosed.

If, on the other hand, the decision-maker came to the view that the material was not exempt, a question would arise as to the procedure to be followed before the material was disclosed. Under the existing provisions of the *Freedom of Information Act 1992* (Qld), access is not to be given to material the disclosure of which may reasonably be expected to be of substantial concern to a person unless reasonable steps have been taken to obtain the person's views as to whether the material is exempt from disclosure.[2205] The Commission is conscious of concerns that, under these provisions, the mere fact of notification may of itself serve the purpose of an application that is made in order to harass or intimidate. However, the Commission considers that its proposed new provision would significantly reduce the chance of the notification process resulting in harassment or intimidation, since, before the issue of notification arose, the applicant would have to demonstrate a legitimate reason for requesting access to the material. Further, in the Commission's view, it would be highly undesirable for a person deciding an application to have power to make a unilateral decision about allowing access to material the disclosure of which is likely to be a matter of significant concern to a person, without the benefit of relevant information that might be available to that person.

The Commission therefore considers that the new provision should require the person deciding the application, before allowing access to "prescribed matter", to notify a person likely to be concerned about the disclosure of the material that, in the view of the decision-maker, the applicant has shown cause why access should be granted to the material and the material is not exempt from disclosure. The Commission acknowledges that notification of

2205 *Freedom of Information Act 1992* (Qld) s 51.

the application may be distressing in some cases. Nonetheless, it remains of the view that it is essential to provide an opportunity for a person likely to be concerned about the disclosure of "prescribed matter" to persuade the decision-maker that the applicant has failed to show cause or that the material is exempt.

The obligation to notify should be based on section 51 of the Act, and should specify the procedure to be followed if it is decided to disclose the material notwithstanding that the person believes that the applicant has not shown cause or that the material is exempt.

(iii) Definition of "prescribed matter"

The Commission believes that the new provision should define the material to which access should be restricted.

It is of the view that, in accordance with the definition of "prescribed article" in section 10.21A of the *Police Service Administration Act 1990* (Qld),[2206] the definition in the new provision should include audio or video recorded statements made by a child complainant in an abuse case, and photographs relating to the alleged offence. However, the Commission considers that the definition should be extended to also include witness statements relating to the alleged offence and medical reports about the complainant.

Some of the recommendations made by the Commission in this Report concern not only proceedings which relate to charges of sexual offences, but also certain other kinds of proceedings which are likely to involve sensitive material or in which a child witness is likely to feel particularly vulnerable.[2207] Consistently with these recommendations, the Commission is of the view that the definition in the new provision should include materials of the kinds specified above which relate not only to proceedings which involve a charge of a sexual offence, but also to proceedings for offences of violence, to civil proceedings arising from the commission of an offence of a violent or sexual nature and to proceedings for domestic violence orders.

(iv) Transcripts of evidence

A. The *Freedom of Information Act 1992* (Qld)

The Commission has also considered whether the new provision in the *Freedom of Information Act 1992* (Qld) should apply to transcripts of oral evidence in certain court proceedings involving a child witness.

2206 See pp 486-487 of this Report.

2207 See for example pp 25, 88, 220-221, 260, and 296 of this Report.

The Commission is of the view that transcripts of evidence, where a child witness is involved in a proceeding for a sexual offence or an offence of violence, a civil proceeding arising from the commission of such an offence, or a proceeding for a domestic violence order, may well contain sensitive and personal material which could be used for purposes such as intimidation or harassment of the child, or circulation as pornography. The possibility that access to transcripts of evidence may be sought under the *Freedom of Information Act 1992* (Qld) for these purposes gives rise to concerns similar to those already considered in relation to access to other material such as photographs or medical records relating to these proceedings. The Commission has already stated its view that it is necessary to ensure that the Act, while an integral element of open and accountable government, is not able to be used for such improper purposes.

At present, an application under the *Freedom of Information Act 1992* (Qld) for access to a document may be refused if the document is reasonably open to public access under other legislation (whether or not the access is subject to a fee or charge).[2208] This means that, if a document is reasonably accessible under another Act, it will be exempt from disclosure under the *Freedom of Information Act 1992* (Qld). Conversely, if a document is not reasonably accessible under other legislation, access may be granted to it under the *Freedom of Information Act 1992* (Qld) providing that it is not otherwise exempt under that Act. In other words, access to a document may be available under either the *Freedom of Information Act 1992* (Qld) or some other piece of legislation.

There are a number of legislative provisions relating to access to court transcripts.

The power to order the recording of court proceedings is conferred by the *Recording of Evidence Act 1962* (Qld). Section 5 of that Act provides:

> (1) In any legal proceeding in or before any court or judicial person, the court or judicial person may in its or the judicial person's discretion, with or without any application for the purpose, direct that any evidence to be given and any ruling, direction, address, summing up, and other matter in the legal proceeding (or of any part of the legal proceeding in question) be recorded …

"Court" is defined to include the Supreme Court and any Judge thereof, a District Court and any Judge thereof, and a Magistrates Court. "Judicial person" includes Stipendiary Magistrates and justices of the peace. "Legal proceeding" includes any proceeding whether civil or criminal in any court and any proceeding before justices of the peace.[2209]

2208 *Freedom of Information Act 1992* (Qld) s 22(a).

2209 *Recording of Evidence Act 1962* (Qld) s 4.

The Act also confers on the Governor in Council power to make regulations convenient for the administration of the Act or necessary or convenient for carrying out the objects and purposes of the Act.[2210] In particular, regulations may be made "providing for and regulating and controlling the making and issuing of transcriptions of any record … and prescribing the persons to whom the same may be issued"[2211] and "providing for and fixing the fees to be paid in respect of … transcriptions and copies of transcriptions".[2212] However, although the regulations made under the Act prescribe the fees payable for copies of transcripts,[2213] the power to make regulations about access to transcripts has not been exercised.

The terms of the *Recording of Evidence Act 1962* (Qld) are very broad. They encompass transcripts of all proceedings, whether of a civil or criminal nature, in all jurisdictions.

In relation to civil proceedings, neither they, nor the regulations made under the Act, impose any restriction on who may obtain a copy of a transcript. Since court transcripts of these proceedings are reasonably open to public access under the *Recording of Evidence Act 1962* (Qld), they will at present be exempt from disclosure under the *Freedom of Information Act 1992* (Qld).

In addition to the provisions of the *Recording of Evidence Act 1962* (Qld), access to transcripts of criminal proceedings in the Magistrates Court is covered by section 154 of the *Justices Act 1886* (Qld), which provides that, as well as paying the prescribed fee, a person requesting a copy of the record of a proceeding must have a "sufficient interest" in the proceeding or in obtaining a copy of the record.[2214] The records of certain proceedings, including proceedings in the Childrens Court, are available only to a person who wishes to appeal against the outcome of the proceeding.[2215]

In the view of the Commission, these provisions make it difficult to argue that the transcript of a criminal proceeding in the Magistrates Court is "reasonably open to public access" under another enactment, or that an application under the *Freedom of Information Act 1992* (Qld) for access to such a transcript could be refused on this basis. Transcripts of criminal proceedings in the Magistrates Court may therefore be subject to disclosure under the *Freedom*

2210 *Recording of Evidence Act 1962* (Qld) s 13(1).

2211 *Recording of Evidence Act 1962* (Qld) s 13(2)(e).

2212 *Recording of Evidence Act 1962* (Qld) s 13(2)(f).

2213 *Recording of Evidence Regulation 1992* (Qld) s 3(1).

2214 *Justices Act 1886* (Qld) s 154(1).

2215 *Justices Act 1886* (Qld) s 154(2).

of Information Act 1992 (Qld).[2216] If transcripts of evidence relating to child witnesses in certain kinds of proceedings were to be included in the definition of "prescribed matter", the effect of the new provision proposed by the Commission would be to restrict access under the *Freedom of Information Act 1992* (Qld) to those transcripts for criminal proceedings in the Magistrates Court that fell within the definition.

However, the Commission does not consider that this result would necessarily be inconsistent with the policy underlying the Act. The *Freedom of Information Act 1992* (Qld) itself recognises that disclosure of some kinds of information involves competing interests, and may have a prejudicial effect which cannot be justified.[2217] In any event, the Commission's recommendation would not restrict all access to transcripts that fell within the definition. Rather, an applicant would have to show why he or she should be able to gain access to the transcript. The test to be applied in determining an application under the *Freedom of Information Act 1992* (Qld) would thus be consistent with that which presently applies, in relation to certain transcripts, under section 154(1) of the *Justices Act 1886* (Qld).

The Queensland *Criminal Code* also contains provisions relating to access to transcripts. It requires that a record of proceedings in trials for indictable offences in the Supreme Court and the District Court be recorded if practicable.[2218] A copy of such a record of proceedings may be furnished to any interested party in accordance with the provisions of the Criminal Practice Rules.[2219] The Criminal Practice Rules state that a person may request in writing a copy of the trial transcript for a proceeding and that, unless otherwise ordered by the court, the State Reporting Bureau must, on receipt of the request and relevant fee, give a copy of the transcript to the person.[2220] The defendant in a criminal proceeding in the Supreme Court or the District Court is entitled to a free copy of the transcript of the trial, even if the proceeding has ended.[2221]

In relation to criminal trials in the District Court and the Supreme Court, the position is therefore that, unless the court orders otherwise, a copy of the transcript of any trial must be given to any person who makes a written

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2216 See for example *Re JM and the Queensland Police Service* (Unreported, Decision of the Information Commissioner, 95008, 12 May 1995).

2217 *Freedom of Information Act 1992* (Qld) s 5(2).

2218 *Criminal Code* (Qld) s 671K(1).

2219 *Criminal Code* (Qld) s 671K(3).

2220 *Criminal Practice Rules 1999* (Qld) r 60. The judge may order that evidence be excluded from the transcript if, for example, the evidence is given in closed court under s 5 of the *Criminal Law (Sexual Offences) Act 1978* (Qld) or that information that would disclose the identity of the complainant be suppressed in accordance with s 6 of that Act.

2221 *Recording of Evidence Regulation 1992* (Qld) s 3(2), (3).

request and pays the relevant fee.[2222] There are no further restrictions on obtaining a copy of the transcript. Although the *Criminal Law (Sexual Offences) Act 1978* (Qld) allows a judge to exclude the public from the court while a complainant is giving evidence in a trial for an offence of a sexual nature,[2223] there is no express provision relating to obtaining a copy of the transcript of the evidence given at the trial. Similarly, the Act restricts the extent to which a published report of the trial, including the transcript of the evidence, may reveal details of particulars likely to lead to the identification of the complainant,[2224] but does not impose any restriction on obtaining a copy of the transcript. The *Child Protection Act 1999* (Qld) also restricts publication of details about children who are complainants or witnesses in a proceeding for an offence of a sexual nature and allows a judge to prohibit publication of details about children who give evidence in other criminal proceedings. However, these provisions do not apply to transcripts of the evidence given in the proceeding.[2225] The effect of the existing legislation is that, unless the trial judge orders to the contrary, a copy of the transcript of the evidence of a child complainant or witness in any criminal trial in the Supreme Court or the District Court may be purchased by any person who requests the copy in writing and pays the fee, although, if the trial is for an offence of a sexual nature, the identity of the child is protected by the *Criminal Law (Sexual Offences) Act 1978* (Qld).

As there is no restriction on who may obtain a copy of the transcript of a criminal trial in the Supreme Court or the District Court, these transcripts are reasonably open to public access under legislation other than the *Freedom of Information Act 1992* (Qld), and are therefore presently exempt from disclosure under that Act.[2226]

In relation to transcripts to which access may presently be refused under the *Freedom of Information Act 1992* (Qld), inclusion of certain transcripts in the definition of "prescribed matter" for which an applicant would be required to show cause why access to such material should be granted would not further restrict their availability under that Act.

The Commission is therefore of the view that the definition of "prescribed matter" should include transcripts of evidence given by or in relation to a child witness in a proceeding which involves a charge for a sexual offence or an offence of violence, or in a civil claim arising out of such an offence or in an application for a domestic violence order.

2222 *Criminal Practice Rules 1999* (Qld) r 60.

2223 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5(1).

2224 *Criminal Law (Sexual Offences) Act 1978* (Qld) ss 6(1), 8(1).

2225 *Child Protection Act 1999* (Qld) s 193(1), (2), (5)(a).

2226 See for example *Re Ferguson and the Director of Public Prosecutions* (Unreported, Decision of the Information Commissioner, 96013, 31 July 1996).

B. Other legislation

The Commission's proposed amendment to the *Freedom of Information Act 1992* (Qld) would not, by itself, be sufficient to prevent transcripts of evidence being obtained for an improper purpose. Some transcripts falling within the definition of "prescribed matter" would remain accessible under other legislation. The Commission has therefore also given consideration to the question of whether access under legislation other than the *Freedom of Information Act 1992* (Qld) to such transcripts should also be restricted.

The Commission acknowledges that public access to the courts is fundamental to the transparency of the justice system.[2227] The Commission is of the view that members of the community should be entitled to obtain a copy of the transcript of trials which are open to the public if they wish to do so. However, there are some cases where other considerations override the importance of open court hearings.

The power conferred on the court by the *Criminal Law (Sexual Offences) Act 1978* (Qld) to exclude members of the public during the evidence of a complainant in an offence of a sexual nature is an example of such a situation.[2228] So too are sections 70 and 71 of the *Justices Act 1886* (Qld), which allow proceedings in a Magistrates Court to be closed in certain circumstances. In this Report, the Commission has recommended that the court should be able to exclude people from the court while a child gives evidence in certain other proceedings. These are criminal proceedings for an offence of violence, civil proceedings arising from the commission of an offence of a sexual or violent nature, and proceedings for domestic violence orders.[2229] A question therefore arises about the extent to which members of the public should be able to obtain a copy of the transcript of evidence in proceedings of this kind.[2230]

In the view of the Commission, it is desirable that a transcript which may contain sensitive material of a highly personal nature relating to a child witness and to which access may be sought for an improper purpose should be available only to those who are able to demonstrate a legitimate interest in obtaining access to the transcript.

Accordingly, the Commission is of the view that the Criminal Practice Rules should be amended in relation to transcripts which fall within the definition of "prescribed matter". They should provide that, in addition to payment of the

2227 See the discussion of public access to court proceedings at p 15 of this Report.

2228 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 5(1). See p 498 of this Report.

2229 See Chapter 2 of this Report.

2230 Section 154(1) of the *Justices Act 1886* (Qld), which provides for access to the transcript of evidence in a criminal proceeding in the Magistrates Court, does not apply to a transcript of evidence given while the court was closed under s 70 or s 71 of the Act: *Justices Act 1886* (Qld) s 154(2).

relevant fee, a person requesting a copy of the transcript of evidence given by or relating to a child witness in a trial in the Supreme Court or the District Court for an offence of a sexual nature or an offence of violence must be able to demonstrate sufficient interest in the proceeding or in securing a copy of the transcript.

The Commission is also of the view that access to transcripts of proceedings in the civil jurisdiction of the Supreme Court, the District Court and the Magistrates Court that fall within the definition of "prescribed matter" should be similarly restricted. It considers that, under the power to make regulations prescribing the persons to whom transcripts of evidence may be issued,[2231] the *Recording of Evidence Regulation 1992* (Qld) should be amended to correspond with its proposed amendment to the Criminal Practice Rules.

(b) Restrictions on the use of evidentiary material

The Commission agrees that it would be appropriate to amend the definition of "prescribed article" in section 10.21A of the *Police Service Administration Act 1990* (Qld) to include other forms of evidence used in child abuse cases, such as witness statements and reports of medical examinations.

6. RECOMMENDATIONS

The Commission recommends that:

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

21.2 The provision should state that, where a person deciding an application for access to "prescribed matter" forms the view that the applicant has shown cause why access should be granted, the application should be decided in accordance with the procedure specified in the *Freedom of Information Act 1992* (Qld).

21.3 The provision should state that access to prescribed material is not to be granted unless reasonable steps have been taken to ascertain whether a person to whom disclosure of the matter is likely to be of substantial concern is of the view that:

2231 *Recording of Evidence Act 1962* (Qld) s 13(2)(e).

(a) the applicant has shown cause why access should be granted; or

(b) the matter is exempt.

21.4 "Prescribed matter" should be defined as the following items in relation to the prosecution of a sexual offence or an offence of violence, or to a civil proceeding arising from the commission of such an offence or to an application for a domestic violence order:

- **audio and videotapes of the statements of a child or pre-recorded videotapes of the child's evidence;**
- **medical records relating to a child;**
- **photographs of a child;**
- **witness statements relating to a child; and**
- **a transcript of evidence given by or relating to a child witness.**

21.5 The definition should provide that an item listed in Recommendation 21.4 is "prescribed matter" if it was used or intended to be used as evidence in the proceeding or collected during the course of the investigation of an offence.

21.6 The Criminal Practice Rules should be amended to restrict access to transcripts of evidence given by or relating to a child witness in a proceeding listed in Recommendation 21.4 unless the person requesting a copy of the transcript demonstrates a sufficient interest in the proceeding or in obtaining a copy of the record.

21.7 The *Recording of Evidence Regulation 1962* (Qld) should be correspondingly amended.

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

CHAPTER 22

EVALUATION OF LEGISLATIVE REFORM

1. INTRODUCTION

In the Discussion Paper,[2232] the Commission expressed the view that implementation of any legislative reform of the law relating to the evidence of child witnesses should be accompanied by the introduction of a mechanism for evaluating the effect of the changes. The Commission noted the importance of establishing procedures to enable relevant data to be collected from the time the legislation is implemented so that the success or otherwise of the reforms is able to be monitored and any necessary refinement of the legislation carried out.[2233]

As an example of a statutory evaluation requirement, the Commission referred to the *Victims of Crime Act 1994* (WA).[2234] Section 6 of that Act requires the Minister for Justice in Western Australia to "cause reviews of the operation and effectiveness of the Act to be carried out annually". There are currently a number of existing Queensland Acts which contain a similar provision.[2235]

2. EVALUATIONS IN OTHER JURISDICTIONS

Changes to the way that children give evidence in court proceedings have been implemented in a number of jurisdictions both in Australia and overseas. In some of those jurisdictions, evaluations have been conducted to assist in determining the impact of the changes.

The aims and objectives of two such evaluation projects and the methods used in the evaluation process are summarised below.

(a) The Scottish Live Television Link

This study was conducted between October 1991 and December 1993. The purpose of the study was to evaluate and monitor the introduction of closed-circuit

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2232 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland Courts: The Evidence of Children* (WP 53, December 1998).

2233 Id at 278.

2234 Id at 281.

2235 See for example *Wheat Marketing (Facilitation) Act 1989* (Qld) s 10, *Police Service Administration Act 1990* (Qld) s 10.27 and *National Environmental Protection Council (Queensland) Act 1994* (Qld) s 64.

television in some Scottish criminal courts and to note the use that was made of other measures to facilitate children's testimony.[2236]

The evaluation employed a range of techniques. Data gathering methods included survey of court records, personal interviews, questionnaires and systematic observation.[2237]

Interviews were conducted with parents or parent substitutes (pre- and post-trial), children who had given evidence, accused persons against whom children had given evidence, judges, prosecution and defence lawyers, support persons, expert witnesses and social workers who had provided professional support to the child and family.[2238]

Children were observed giving evidence by means of closed-circuit television and in the conventional manner.[2239] Where a child was observed giving evidence by closed-circuit television, the main features recorded were: duration; the length and strength of cross-examination; impact on the child manifested by mood, demeanour, audibility, willingness to respond and emotional distress; technical problems such as sound interference and the effect of the location of the equipment on the ability of parties to communicate effectively in the courtroom; the number of people present in the room with the child and their role in the case. The observation also included measures designed to ascertain the impact on the accused, effect on the jury and other court participants.[2240]

Child witnesses over the age of 8 years were invited to complete two short questionnaires, one prior to trial and the other post-trial. The questionnaires were administered either by the parents or by the person within the legal or child care system who was responsible for preparing the child for trial. A third questionnaire was completed by a parent. The purpose of the questionnaires was to facilitate an effective assessment of the impact of the use of closed-circuit television by obtaining both pre- and post-trial information on the perceptions and emotional state of the child, without the need for the child to have any contact with the evaluation team prior to the trial.[2241]

2236 Murray K, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trials* (The Scottish Office Central Research Office, 1995) at i.

2237 Id, Appendix C.

2238 Id at 49.

2239 Ibid.

2240 Id, Appendix C.

2241 Ibid.

(b) Evaluation of the 1992 amendments to the *Evidence Act 1906* (WA)

This Western Australian evaluation, conducted at the request of the Attorney-General by the government department charged with administering the *Evidence Act 1906* (WA), followed amendments to the Act which created a presumption requiring the use of closed-circuit television for child witnesses. Where closed-circuit television facilities were not available, the legislation required the use of removable screens. The survey took place approximately two years after the implementation of the new provisions.

The terms of reference of the evaluation were aimed at obtaining information about how often the new procedures were being used, the reactions of participants in trials where they were used, the need for improvements or modification and the effect of the new procedures on the administration of justice.[2242]

The evaluation involved observation over a sixteen month period of trials where children gave evidence about alleged sexual acts directed at them or alleged sexual offences committed against them, as well as interviews with child witnesses, prosecutors, defence counsel and the presiding judges in some of the trials.[2243]

As part of the reference, the Attorney-General requested an evaluation of the jurors' responses to the changes. This part of the evaluation was conducted by means of a survey. The aims of the jury survey were listed as obtaining information about:[2244]

- jurors' reactions to the use of CCTV and removable screens;
- jurors' confidence in their ability to judge the size and age of child witnesses when evidence was given by CCTV; and
- the effect the equipment had on the ease of reaching a verdict.

Survey forms were sent, with the approval of the presiding judge, to jurors in seventeen trials held over a three month period. In some trials the child witness gave evidence by CCTV from a separate room. In others, the child gave evidence in court, but a screen was provided.[2245]

The jurors were not contacted until after the jury had given its verdict and had been dismissed. All contact with jurors was by mail, to satisfy jury confidentiality requirements.[2246]

2242 Ministry of Justice (WA), *Evaluation Report, Child Witnesses and Jury Trials: An Evaluation of the Use of Closed Circuit Television and Removable Screens in Western Australia* (1996) at 137.

2243 Ibid.

2244 Ministry of Justice (WA) (Strategic and Specialist Services Division), *Jurors' Responses to Children's Evidence Given by Closed Circuit Television or with the Aid of Removable Screens* (November 1995) at i-ii.

2245 Id at ii.

2246 Ibid.

3. ISSUES FOR CONSIDERATION

In the Discussion Paper, the Commission raised a number of issues for consideration in relation to a process of evaluating any legislative changes resulting from its recommendations. These issues included responsibility for conducting the evaluation, the timing of the evaluation and the identification of appropriate performance indicators for the evaluation.[2247]

Very few of the submissions received by the Commission in response to the Discussion Paper addressed the question of the evaluation of legislative change. Those which did consider the issue were generally in favour of the establishment of a formal mechanism to monitor and review the effects of implemented changes.[2248] However, apart from suggestions that the evaluation mechanism should be independent[2249] and should have a multi-disciplinary focus,[2250] and should be within the responsibility of the Minister for Justice[2251] or the Criminal Justice Commission,[2252] these respondents did not consider the detail of the form and structure of the evaluation process.

The existing legislative models for a statutory evaluation requirement are generally very broadly framed. For example, the *National Environmental Protection Council (Queensland) Act 1994* (Qld) simply provides that the Council established by the Act must cause a review to be undertaken of the operation of the Act and the extent to which the objective set out in the Act has been achieved.[2253] The *Police Service Administration Act 1990* (Qld) contains a similar provision requiring the relevant Minister to carry out or cause to be carried out a review of the operation of the Act and, in so doing, to have regard to:[2254]

> (a) the effectiveness of the operation of this Act and of the operations of the Police Service;
>
> (b) the views and comments of persons having an interest in the operation of this Act and the operations of the Police Service;
>
> (c) such other matters as the Minister considers to be relevant to the effectiveness of this Act.

2247 Queensland Law Reform Commission, Discussion Paper, *The Receipt of Evidence by Queensland* Courts*: The Evidence of Children* (WP 53, December 1998) at 279.

2248 Submissions 5, 19, 20, 30, 44.

2249 Submissions 44, 54.

2250 Submissions 20, 30, 44.

2251 Submission 20.

2252 Submission 19.

2253 *National Environmental Protection Council (Queensland) Act 1994* (Qld) s 64.

2254 *Police Service Administration Act 1990* (Qld) s 10.27.

4. THE COMMISSION'S VIEW

The Commission remains of the view that it is important for the effect of any changes implemented as a result of the recommendations made in this Report to be monitored.

The Commission agrees that it would be appropriate for the Attorney-General and Minister for Justice to have responsibility for ensuring that the operation of the legislative changes is reviewed, and that it would be desirable for a multi-disciplinary approach to be adopted towards such a review.

In the view of the Commission, the legislation should require the Minister to institute a review process to evaluate the operation of the legislation. The review should address both quantitative issues such as the extent to which measures introduced by the legislation to facilitate the giving of evidence by child witnesses are in fact used, and qualitative issues such as factors influencing the use of such measures and the impact of such measures in enabling courts to communicate as effectively as possible with child witnesses.

With respect to the timing of the review, the Commission recognises that it is important to allow sufficient time for the collection of data. As most legislative amendments experience some time lag before any meaningful changes become evident, a review which takes place too soon may not give a reliable indication of the effect of the reforms. On the other hand, however, delaying the review for too long may result in undesirable consequences remaining undetected or in inappropriate practices becoming entrenched and difficult to eradicate.

The Commission therefore considers that a period of two years from the commencement of the operation of the reforms until the review is carried out would strike a suitable balance. Further, the Commission would favour the imposition of a time limit for the conduct of the review.

The Commission is also of the view that the mechanism for conducting the review should be determined and established prior to the commencement of the changes, so that data collection can take place from the time the changes are implemented. The Commission also considers that it would be desirable, even without the legislative requirement, for stakeholders to begin collecting relevant data as soon as possible, in order to provide a benchmark against which the impact of the reforms can be measured.

5. RECOMMENDATION

22.1 The Commission recommends that the legislation implementing the changes set out in this Report include a provision to the effect that:

(a) the Attorney-General and Minister for Justice must cause a review of the operation of the changes to be carried out;

(b) the review is to be conducted by a multi-disciplinary panel;

(c) the panel is to be constituted prior to the commencement of the changes;

(d) the review is to take place two years after the commencement of the changes; and

(e) the review is to be completed within a period of six months.

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
Confidential
Connolly, Mr FG
Cox, Ms M
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
Confidential
Cox, Dr J (Consulting Paediatrician)
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 HH (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 (Families, Youth and Community Care Queensland)
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