THE EXPERIENCES OF CHILD COMPLAINANTS OF SEXUAL ABUSE IN THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

This study focusses on the experiences of child complainants of sexual abuse across three jurisdictions – Queensland, New South Wales and Western Australia. Specifically, the research examines the experiences of child complainants in the criminal justice system as well as the consequences of their involvement in the process. In-depth interviews with children are combined with data gathered from parents, crown prosecutors, defence lawyers, court support personnel and members of the judiciary. On the individual level, the discussion analyses the significant processes in the criminal justice process for child complainants. On the systemic level, the implications for legislators and legal practitioners is presented. From a theoretical perspective, the report examines why decades of reform have achieved limited gains for Australian children, and why the criminal justice system remains the legally sanctioned context for the abuse of children.

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CHAPTER ONE

INTRODUCTION

This report examines the research findings based on data gathered through in-depth interviews with 130 participants across the jurisdictions of Queensland (QLD), New South Wales (NSW) and Western Australia (WA). The main focus is on the experiences of the children who were complainants of sexual abuse across the three jurisdictions.

The current research contributes to a deeper understanding of the problems faced by child complainants of sexual abuse in the criminal justice system. The purpose of the study was to examine the following research questions:

- What are the significant processes in the criminal justice process that impact upon child complainants of sexual abuse?
- What are the consequences of involvement in the criminal justice process as described by children?
- What are the implications for the range of stakeholders including Police, Prosecutors, Defence Lawyers, Magistrates, Judges, Victim Support Groups and Legislators?
- What are the key policy and legislation issues that arise from this research?
- Is there a theoretical analysis that emerges from the intersection of the child complainant with the criminal justice system?

One of the most significant findings to emerge is that on the basis of their experience in the justice system, less than half of the children interviewed in both Queensland and New South Wales *would* report again if sexual abuse were repeated. Only 44% of Queensland children *would* report again. 39% of child complainants said they would *not* report, and 17% said they were *not sure*. Only 33% of children in New South Wales *would* report again while 56% said they would *not* report, and 11% were *not sure.* In Western Australia 64% of child complainants confirmed they *would* report again. 17% said they would *not* report and 19% were *not sure* (see Appendix B). Across all jurisdictions, two-thirds of the children who said they would *not* report again had actually obtained convictions. The reluctance of children to re-enter the criminal justice system is crucial and of concern for many reasons which will be examined in later discussion.

What makes this particular finding even more remarkable is that the response of the children is reflected in the response of the legal personnel. When legal participants (crown prosecutors, defence counsel and judiciary) were asked if they would want their own child in the justice system if the child was a victim of serious sexual abuse, only 33% of them indicated “yes”. Only 18% of legal professionals in Queensland and 33% in New South Wales would encourage their own child into the system. The percentage was higher in Western Australia with 46% who responded affirmatively. The only group of legal professionals who responded entirely “no” (43%) or “not sure” (57%) was defence counsel. Indeed, not one defence lawyer said they would want their child in the court system. The reasons why legal professionals responded in this manner will also be explored in later discussion.

Given the significant number of children and legal participants who would not enter (or re-enter) the justice system, it is perhaps not surprising that the only point on which child complainants and defence counsel agreed was that the process offers neither care nor protection to the child. The child is considered nothing more than a party to the proceeding – a witness in the case from the initial reporting right through to trial and sentencing.

> The Crown don’t care about the child. The police don’t care about the child. And I don’t care about the child. You see the trial is not about the child. It simply makes the child a witness… You’ve got to get around this idea that the criminal justice system is about the child, it shouldn’t be about the child, and hopefully will never be about the child (QLD Defence Lawyer).

> It makes me feel like it is no good going to court or anything. It is just a waste of time. I think it is not even worth doing anything with the courts. They are pathetic really. They don’t look after you. They couldn’t care less. They are not interested… It is the hardest thing and it ruins your life. You never forget it (NSW Child 14yrs).

The outline of the report is as follows. Chapter Two begins with a review of the literature and legislation on child sexual abuse and the criminal justice system. A brief examination of the scope and effects of sexual abuse is followed by a summary of reforms in the area. To facilitate a cross-jurisdictional comparison, a detailed analysis of the key legislation is presented. The chapter concludes with a discussion on the need for a paradigm shift.

Chapter Three discusses the methodological issues and method that underpins the current study. This chapter outlines the constructivist and praxis-oriented frameworks that inform the methodology and also describes the conduct of the research.

Chapter Four presents the findings in three parts. Part One describes the data from the child complainants (63) and parents (39). Part Two presents Chrissie’s story

in a disturbing case study of a committal cross-examination. Part Three introduces data gathered from legal participants (28) including crown prosecutors, defence lawyers and members of the judiciary.

Chapter Five presents the discussion of the findings and analyses the findings on three levels: on the individual level, the systemic level and the theoretical level. Finally recommendations are made for the treatment of child complainants of sexual abuse in the criminal justice system.

CHAPTER TWO

REVIEW OF THE LITERATURE AND LEGISLATION

Introduction

> It might be useful therefore to consider how we arrived in a situation where child sexual abuse is publicly deplored while the criminal law seems designed to make it almost impossible to prosecute, or at least seems to ensure that the child is damaged in the process (Smart, 1989, p 51).

The criminal justice system continues to present the government, courts, judiciary, legal profession and community with the particularly vexatious issue of encouraging child complainants of sexual abuse into a system which further traumatises and abuses the child (Eastwood, Patton & Stacy, 1998; Eastwood, Patton & Stacy, 2000; QLRC, 1998). Recent research indicates that the criminal justice system continues to be a source of upset for children up to 12-14 years after their involvement in the system (Ghetti et al, 2000), particularly when an acquittal is the case outcome. Despite recognition that the child is disadvantaged in the justice process (ALRC & HREOC, 1997), and implementation of a myriad of legislative reforms in Australian jurisdictions - the courts remain the legally sanctioned contexts in which the child is further abused (Eastwood et al, 2000).

By embracing a system which was designed for adults, children take an enormous risk that the justice system will "work against them, rather than for them" (Smart, 1989, p 150). A number of Australian jurisdictions have been extremely slow to implement critical reforms that provide substantial protection for the child. Instead, many legislators have been content to enact only superficial changes and in doing so, have failed to address the real issue of the abuse inflicted by the justice system itself (Eastwood et al, 1998). Part of the problem is that many of the legislative reforms are haphazard and discretionary. Despite the growing body of literature that argues discretionary provisions just add more stress through uncertainty and inconsistency (Plotnikoff & Woolfson, 2002), legislators in some jurisdictions repeatedly take the easy way out when it comes to child protection.

There is little doubt that the adversarial nature of the system has a detrimental effect on the child. Cross-examination is the centrepiece of the adversarial system and has been recognised as one of the most damaging parts of the process. That witnesses, as well as cases, must also be broken down is viewed as unfortunate but necessary (Henderson, 2002). Comments from defence lawyers such as "if in the process of destroying the evidence it is necessary to destroy the child – then so be it" (Eastwood et al, 2000, p 169) serve only to reinforce this notion. Indeed, the purpose of cross-examination has very little, if anything to do with accuracy or truth. Rather the purpose of cross-examination is more a process of manipulating the witness

through suggestive questioning, avoiding unfavourable disclosures, and obtaining jury sympathy (Henderson, 2002).

Cross-examination techniques are specifically designed to damage the effectiveness of the testimony and mute the voice of the complainant. These techniques include ridicule of testimony, character attack, questions which permit only a yes or no answer, frequent interruption and repetitive questioning (Easteal 2001). General insinuations frequently move to more specific accusations that the child is lying or wanted it (Eastwood et al, 2000).

Cashmore (2002) maintains that while technological remedies may be more acceptable, the "need for lawyers to change their style and judges to exercise more control over inappropriate questioning is less accepted" (p 215). Given the reluctance of the legal profession to make any modifications to their ability to control witnesses, pressure to re-evaluate cross-examination may ultimately have to come from both inside and outside the profession (Henderson, 2002).

There are several arguments cited against reform and the notion of a 'fair trial' is one often used. However, proponents of this view ignore that "a fair trial is not to be viewed solely from the perspective of the defendant – but also the complainant and the community" (Easteal, 2001, p 231). The fair trial principle is protected in international law (Article 14(1) *International Covenant on Civil and Political Rights ICCPR*) and ensures "the rights of both the defendant and the victim" (Easteal, 1998, p 206). In addition, judges may be experts in law, but they are not experts in sexuality or child development, and nor are their decisions unbiased. There is also a reluctance to realise that judicial discretion is "too often derived from gender bias, from mythology about rape, male sexuality and female sexuality, and from the belief that the accused's right to a fair trial is paramount" (Easteal, 1998, p 207). Therefore to frame reforms within the realm of the rights of the child vs the rights of the accused is to ignore the question of truth and justice which the community has a right to expect (QLRC, 2000), and to disregard the ways in which the courts repeatedly "neutralise legislative reforms" (Easteal, 1998, p 207).

Clearly if adults encourage children to report sexual abuse – then those very adults who are responsible for legislating, presenting and overseeing the child's case have a responsibility to ensure that the legal process does not add further to the suffering of the child who has been sexually abused (Eastwood et al, 2000). The failure of the justice system to recognise the exquisite vulnerability of children (Summit, 1990), and to take comprehensive steps to protect children in the system has been an ongoing theme in the research literature.

The remainder of this chapter reviews the literature and relevant legislation in relation to child sexual abuse and the criminal justice system. These categories include the scope and effects of child sexual abuse, followed by the call for reform and a detailed analysis of relevant legislation across the jurisdictions. In conclusion, the need for a paradigm shift is discussed.

The Scope of Child Sexual Abuse

There is widespread agreement in the literature that child sexual abuse spans all races, economic classes and ethnic groups (Finkelhor, 1993, 1994; Goldman & Padayachi 1997; Oates, 1990; O'Donnell & Craney, 1982; Peters, Wyatt & Finkelhor, 1986). The prevalence of sexual abuse is so extensive that in “no sub-group is it clearly absent or rare” (Finkelhor, 1993, p 67). Internationally, epidemiological studies estimate prevalence rates of 7 to 36 per cent for females and 3 to 29 per cent for males (Finkelhor, 1994) and confirm that sexual abuse of children is an international problem. It is estimated that females are abused at one and half times to three times the rate for males (Finkelhor, 1994).

According to Bagley (1995), three aspects are clear. The majority of perpetrators are male (in excess of 95 per cent) against male and female children. Around 80 per cent of the time, the offender is known to the child, and a third of sexual offenders are themselves adolescents.

Across all studies it is clear that only about half of the young victims disclosed the abuse to anyone (Finkelhor, 1994; Fleming, 1997). Further compounding the ability of the justice system to prosecute these cases is evidence that for every child who does report, three to five cases are not being reported (Finkelhor, 1991).

Australian literature confirms the magnitude of the problem in this country (Family Law Council, 1988; Fleming, 1997; Goldman & Goldman, 1988; Heath, 1985; James, 2000; Patton & Mannison, 1996; Oates, 1990). The Goldman and Padayachi (1997) study involved 427 university students consisting of 140 males and 287 females. The study reported the figures for child sexual abuse in Queensland are within the upper range of percentages reported in other studies - 45 per cent for females and 19 per cent for males using a broad definition inclusive of non-contact abuse, and 39 per cent for females and 13 per cent for males using the more restrictive definition which excludes non-contact abuse. Girls were two to three times more likely to be abused than boys. In an Australian community-based study of 710 women, Fleming (1997) found 20 per cent of women had experienced childhood sexual abuse, with the age of onset of abuse being under the age of 12 years for 71 per cent of these women.

In summary, as the epidemiological findings from more countries become available, the evidence that child sexual abuse occurs in most places at most times is strengthened (DeMause, 1991; Snyder, 2000). Although complicated by varying definitions and sampling limitations, research indicates that official statistics seriously underestimate the true incidence of sexual abuse. It is estimated that 1 in 4 girls and between 1 in 7 and 1 in 12 boys are victims of sexual abuse (James, 2000).

The Effects of Child Sexual Abuse

The short-term and long-term effects described in the literature cover the entire range of emotional, behavioural, sexual, cognitive and physiological symptoms (Briere & Runtz, 1988; Browne & Finkelhor, 1986; Beitchman et al., 1992). Although there are a variety of mediating factors that may impact on the development of negative symptoms, common emotional, behavioural and other problems continue to feature prominently in the research literature on child sexual abuse.

Emotional effects include depression, fear, anxiety, anger and shame (Beitchman et al., 1992; Conte & Schuerman, 1987; Fromuth 1986; Peters, 1988). Behavioural problems include withdrawal, aggression and inappropriate sexual behaviour and increased sexual risk-taking (Ferguson, Horwood & Lynsky, 1997; McLeer, Deblinger, Henry, & Orvaschel, 1992).

Physical effects which may result from abuse include headaches, stomachaches and sleep disturbances (Peters, 1988). The effect of increased sexual risk-taking also makes victims of child sexual abuse more vulnerable to sexually transmitted diseases, HIV/AIDS, and teenage pregnancy (Ferguson, Horwood & Lynsky, 1997; Mullen et al., 1996; Thompson, Potter, Sanderson, & Maibach, 1997).

Sexually abused children may also develop a distorted cognitive view of themselves and the nature of relationships (Finkelhor, Hotaling, Lewis, & Smith, 1989; Macfarlane, Cockriel, & Dugan, 1990). Effects include extreme distrust of others, self-blame, stigma, self-hatred and self-harming behaviours such as substance abuse, eating disorders, suicide and a subconscious attraction to and revictimisation by abusive partners (Browne & Finkelhor, 1986; Chandy, Blum, & Resnick, 1996; Coffey, Leitenberg, Henning, Turner, & Bennett, 1996; Harrison, Fulkerson, & Beebe, 1997; Mullen et al., 1996; Welch & Fairburn, 1996).

Summit (1983) proposes the “child sexual abuse accommodation syndrome” that offers a conceptualisation of how the child survives the immediate abusive environment and also isolates the victim from acceptance. By arguing that “acceptance and validation are crucial to the psychological survival of the victim” (p 179), Summit's theory offers a significant insight into the manner in which disclosure to family, friends, and the justice system can often exacerbate the effects of abuse. Too frequently, disbelief and blame result in secondary assault to the child. Testing the child's evidence in the adversarial court environment effectively re-abuses the child through the expression of disbelief and by placing blame on the child. By re-abusing the child, the justice process tests the survival and coping strategies of the child to the limit and compounds the already negative effects of the original abuse.

The Call for Reform

During the last fifteen years, significant international knowledge has developed in relation to the needs of child witnesses. Psychological research has also had a positive effect on legislative change. Impressive gains have been made internationally to accommodate the needs of children in legal proceedings. According to Myers (1996), reforms have emerged in twelve categories: children's hearsay statements, competence to testify and the oath, altering the courtroom to accommodate child witnesses, judicial control of proceedings and questioning, support persons, exclusion of witnesses during the child's evidence, closed courtrooms, video testimony, child advocates, the corroboration requirement, jury instructions regarding child witnesses, and a range of ongoing reforms across jurisdictions.

Recent international literature has focussed on comprehensive programs which acknowledge that "those of us in the criminal justice system must learn to do things differently" (US Department of Justice, 1999, p ii). These programs include initiatives which recognise factors which can further traumatise child complainants such as delays and continuances, testifying more than once, face-to-face contact with the defendant, harsh cross-examination, lack of adequate support and developmentally inappropriate language and practices. Recommendations for all criminal justice professionals and judges include in-depth training in child development and the emotional and psychological impact of abuse to ensure children are treated sensitively throughout the investigative and trial process.

The conservatism of the legal profession has been extremely resistant to change even when such change might aid the interests of truth and justice (Hunter & Cronin, 1995). Nevertheless, "if an investigation and a trial are a search for truth, then we must do everything we can to enable children to tell what happened to them as clearly and completely as possible (US Department of Justice, 1999, p 20). The responsibility of adults is clear and unequivocal. "If children cannot participate effectively in the criminal justice system, it may be impossible to protect them from future victimisation and to hold the offenders accountable for their actions" (US Department of Justice, 1999, p 20).

In Australia

The history of the call for reform in Australia for child complainants is no better depicted than in a report to the Queensland Parliament in 1944 by the Committee of Inquiry Regarding Sexual Offences. The Committee reported:

> A serious problem in the administration of the law dealing with sexual offences is the difficulty of proof … where the victims are young children and the offences are indictable offences. …(T)he child concerned … will first have been examined as a witness at the preliminary hearing … and later, after an interval possibly of many

> months, and when perhaps its memory has become blurred, be subjected again to the ordeal of examination and cross-examination before a jury. In the interests of the child it is obviously desirable that the incident … should be blotted from its memory as soon as possible. … It is unavoidable that … their parents would be reluctant to set in train the machinery of the law which would impose such an ordeal on the children concerned. It is inevitable, too, that many offence should fail of proof merely through the inability of young children to retain, for a substantial period time, a clear recollection of the circumstances surrounding the offence, or through the repressive effect on the child of the atmosphere of a jury trial (p 10).

As a consequence, the Committee, not having access to technology, recommended an amendment to s 111 of the *Justices Act 1886* (QLD) to enable the depositions of a child taken in committal proceedings in relation to an indictable sexual offence committed on the child to be read as evidence at the trial, in the discretion of the judge. The three major provisos were that the child witness was not more than 12 years old, the deposition was taken in the presence of the accused, and the accused or his legal representative had a full opportunity to cross-examine the child.

Unfortunately, this provision has rarely, if ever been used in the last 58 years. More than half a century later, child complainants in many jurisdictions (including Queensland and New South Wales) are *still* being subject to the trauma of giving live evidence in a criminal trial.

There is widespread and ongoing agreement that children are disadvantaged in the criminal justice system in Australia (ALRC & HREOC, 1997). The call for reform in the way in which children are treated is nothing new – although some politicians, lawyers, judges and others may argue otherwise. For at least 55 years, the need for reform in the area has been advocated in a myriad of Australian literature and government inquiries (ALRC, 1985, ALRC & HREOC, 1997; Child Sexual Abuse Taskforce, 1987; Committee of Inquiry Regarding Sexual Offences, 1944; Heath, 1985; Law Reform Commission of Western Australia, 1991; New South Wales Taskforce on Child Sexual Assault, 1985; Sturgess, 1985; Victorian Law Reform Commission, 1988; Queensland Crime Commission, 2000; Queensland Law Reform Commission, 2000; West Australian Advisory and Coordinating Committee on Child Sexual Abuse, 1982) .

Reformers are increasingly turning to more inquisitorial modes of adjudication, which to many seem more able to determine the truth in any criminal matter. Certainly many legal theorists agree that the adversarial system fails to deliver on promises of "fair and accurate adjudication, party participation and democracy in law" (Hunter & Cronin, 1995, p 40). According to Easteal (2001), "the process of the legal system and the masculocentric etiquette and adversarial style of

court proceedings run in diametrical opposition to the victim" (p 135). When viewed from the child victim's perspective it is not surprising that "reform has not significantly altered the imbalance in the scales of justice as intended" (Easteal, 2001, p 135).

Child Sexual Abuse and the Criminal Justice System: A Cross-Jurisdictional Comparison

Literature in the area has concentrated on problematic issues in both procedural and evidentiary areas. The literature on significant issues has examined the difficulties associated with the decision to report (Cashmore & Horsky, 1987; Eastwood & Patton, 1993; Finkelhor, 1991, 1994; Whitcomb, 1992); the effects of waiting for trial (Cashmore & Horsky, 1988; Cashmore, 1995; Flin, Bull, Boon & Knox, 1992; Martone, Jaudes & Cavins, 1996); the court environment (ALRC & HREOC, 1997; QLRC, 2000); harsh cross-examination (Brennan & Brennan, 1988; Eastwood et al, 1998); facing the offender (Goodman et al, 1991; Eastwood et al, 1998); the use of CCTV (Cashmore 2002; Cashmore & DeHaas, 1992; Davies & Noon, 1991; Morgan & Zedner, 1992); expert testimony (Myers, 1991); legal language (Whitcomb, Shapiro & Stellwagen, 1985); court preparation (Sas, Austin, Wolfe & Hurley, 1991); judicial attitudes (Cashmore & Busey, 1994; Plotnikoff & Woolfson, 2002, Saunders 1988); reasons for delay in complaint (Cossins, 2000; Flatman & Bargaric, 1999) and corroboration warnings (Mack, 1998; Scutt, 1991).

It is not surprising therefore, that reforms have endeavoured to address these issues. Each Australian jurisdiction has dealt with these problems in a variety of ways – some more effectively than others. Procedures and legislation vary considerably between jurisdictions in relation to complainants of child sexual abuse. To facilitate an understanding of the manner in which each jurisdiction involved in this study (Queensland, New South Wales and Western Australia) has addressed the needs of complainants of child sexual abuse, a comparison of cross-jurisdictional provisions is presented in relation to key areas of legislation. These include: categories of witnesses; CCTV provisions and procedures; screens; support persons; out-of-court statements; pre-recording of evidence; judicial warnings; committal proceedings and the control of cross-examination.

Definitions: Categories of Child Witnesses

Categories of witnesses and ages at which special provisions are applicable, vary considerably between the three states. The following examination of definitions and categories provides the groundwork for analysis of other provisions for child complainants.

Queensland

Children who are complainants of sexual abuse may, at the court's discretion, receive the limited benefit of being a special witness. Under s 21A of the *Evidence Act 1977* (QLD), a "special witness" may include (a) a child under 12 years, or (b) a person who in the court's opinion would be likely (i) to be disadvantaged as a witness as a result of mental, intellectual or physical impairment or other relevant matter; or (ii) to suffer severe emotional trauma or; (iii) to be so intimidated as to be disadvantaged as a witness if, in any of these three instances the witness had to give evidence as required by the court's usual rules and practices. The court *may* make an order that while the witness is giving evidence the accused is to be excluded from the court or obscured; that all persons other than those specified by the court be excluded (see also *Criminal Law (Sexual Offences) 1978* (QLD), s 5); that a person approved by the court be present to give emotional support to the witness; that the witness is to give videotaped evidence; or is to give evidence via CCTV.

Apart from the intermittent use of screens and support persons, these provisions are rarely used (Taskforce on Women and the Criminal Code, 2000). Many judges are known to adopt a 'wait and see' approach, requiring the witness to be examined without the benefit of these evidentiary aids, to 'see if it is really needed'. However, by then damage is likely to be done to the ability of the child to give cogent and reliable evidence. As the provision is discretionary, and as each judge and magistrate has different views and practices, the law is often applied inconsistently from one case to another.

In 2000, Division 6 was inserted in the *Evidence Act 1977* (QLD) to create a new category of "protected witness". The provisions are limited to potentially protecting the witness from cross-examination by an accused who is not legally represented. In such cases the court must advise the accused that he or she may not cross-examine the protected witness and that free legal assistance will be arranged for that purpose by Legal Aid (s 21O). The limited protection applies only in criminal proceedings.

In s 21M a "protected witness" is defined as a witness under 16 years. The definition extends to a witness who is an "intellectually impaired person", or an alleged victim of a "prescribed special offence", or an alleged victim of a "prescribed offence" who the court considers to be disadvantaged as a witness, or likely to suffer severe emotional trauma unless treated as a protected witness. Given that accused persons are rarely unrepresented, and therefore rarely cross-examine child complainants, the "protected witness" provision does little to address the real issues for children.

There is considerable inconsistency in relation to the age at which "special witness" and "protected witness" provisions apply. For most other purposes in Queensland a person is a child until he or she turns 18, yet 16 year-old child complainant in Queensland have no protection from the strain and intimidation of the adult court system. In contrast, if a child defendant is 16 years old (17 once the

regulation is made under *Juvenile Justice Act 1992* (QLD), s 6) he or she is dealt with in the Children's Court and under the "principles of juvenile justice". These include a statutory recognition that "a child tends to be vulnerable in dealings with a person in authority" and should be given the special protection of the *Juvenile Justice Act* not only during an investigation but also during a court proceeding for the offence (s 4). The same recognition and protection is not provided for child victims of sexual abuse as long as arbitrary age distinctions remain in the statutes.

Despite a primary concern of child complainants of sexual abuse being the fear of seeing the accused (Cashmore 2002; Eastwood et al, 2000), the law in Queensland continues to allow the discretion for all children to be confronted and intimidated by the alleged offender.

New South Wales

There are no definitions of special or vulnerable witnesses. The special rights and procedures of the *Evidence (Children) Act 1997* (NSW) simply apply whenever evidence is given by any child who is under 16 years at the time the evidence is given (s 6). Recent amendments have broadened the age to 17 for limited purposes, discussed in following sections. The Act applies only in criminal and certain related proceedings such as bail proceedings.

Western Australia

Under s 106A and Schedule 7 of the *Evidence Act 1906* (WA), an "affected child" is (i) a child, under 16 years on the date the complaint is made (or on the date an ex-officio indictment is presented against an accused person), who is a complainant in an offence of a sexual nature or in certain other offences listed in Part B or C of the Schedule; and (ii) a child under 16 years whose close relative, household member or carer has been charged with a crime of violence listed in Part C, whether or not the child is a complainant.

The offences listed in Parts B and C of the Schedule are split on similar lines to the definitions for "prescribed offences" and "prescribed special offences" for Division 6 of the *Evidence Act 1977* in Queensland, but for wholly different purposes (not relevant here). The protections offered to an "affected child" in Western Australia apply regardless of whether the offence before the court is listed in Part B or C. Parts B and C also cover most offences missed by the "protected witness" provisions in Queensland.

Under s 106R, a category of "special witness" may also apply if a witness would, in the Court's opinion, be unlikely to be able to give evidence at all or satisfactorily, either because of physical disability or mental impairment, or because of severe emotional trauma, intimidation or distress caused by age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter, or any other factor the Court considers relevant. Special witnesses may be

permitted to use CCTV or screening arrangements, to have a support person present, or to have their evidence pre-recorded and presented to the court.

Under s 106G, in any proceeding for an offence, a defendant who is not represented by counsel is not entitled to directly cross-examine a child under 16 years. The defendant must state the question to the judge or a person approved by the Court, and that person is to repeat the question accurately to the child.

Comment

There is considerable inconsistency in relation to special provisions for child complainants across jurisdictions. While the "special witness" provisions in Queensland may only apply to children under 12 years of age, other states apply similar provisions to children up to the age of 16 (WA, NT and NSW) or 17 (Tasmania) or 18 (ACT, Victoria) (Taskforce on Women and the Criminal Code, 2000, p 304). There is no satisfactory reason why all children under the age of 18 years in Australia should not have uniform protection before the courts.

Arbitrary age distinctions, arbitrary witness categories and judicial discretion exercised according to personal practices and erroneous beliefs about children continue to promote uncertainty, confusion and unfairness. It is not clear how children's rights are going to be protected, if at all, from one case and one State to another.

CCTV: Provisions and Procedures

In some jurisdictions the use of CCTV is entirely at the discretion of the court. In others, the facilities are mandated unless the child chooses not to use the CCTV facilities. Despite clear evidence concerning the trauma suffered by the child giving live evidence in court, and recent research which further substantiates the view that "child witnesses who are less stressed are able to provide more complete and more accurate information, particularly when they are protected from the presence of the accused" (Cashmore, 2002, p 208), many jurisdictions continue to demonstrate an inconsistent approach to its use.

Queensland

In Queensland the use of CCTV is discretionary for children under 12 years who are "special witnesses". Only a handful of District and Supreme courts, and only one courtroom in the Brisbane Central Magistrates Court building are equipped with CCTV facilities. Many are unreliable and the facilities are seldom used. The QLRC (2000) reported that the vulnerable witness room with CCTV in the District and Supreme courts was used only 5 times in the 12 months to September 2000.

Despite a direction to prosecutors by the Queensland DPP to make application for CCTV in every case where a child under 12 years is to testify about

sexual or violent matters or except where the child prefers to give evidence in the courtroom, children in Queensland are continually denied the use of CCTV. The direction states "the application must be made regardless of whether the electronic facilities are available… Any resourcing issues which the courts have will become glaringly obvious in the course of persistent applications statewide"(7 February, 2001).

New South Wales

A child witness under 16 (and in certain circumstances under 18 years) in a "personal assault offence" proceeding has a right to give evidence via CCTV or other similar technology (*Evidence (Children) Act 1997* (NSW), s 18(1)). A "personal assault offence" includes offences against the person, stalking, intimidation with intent to cause fear for personal safety, and the offence of contravening an apprehended violence order (each under the *Crimes Act 1900* (NSW)*,* and child abuse under the *Children (Care and Protection) Act 1987* (NSW).

Section 6 (*Evidence (Children) Act 1997* (NSW)) states the Act applies to a child who is under 16 years when giving his or her evidence, unless a contrary intention is shown. Section 18 of the Act was recently amended to state that a child who is 16 or more but less than 18 years at the time evidence is given in a "personal assault offence" proceeding is entitled to give the evidence using CCTV if he/she was under 16 years when the charge was laid. However, under subsection 18(4) of the *Evidence (Children) Act* (NSW) the court may order that such means not be used if satisfied it is not in the interests of justice to do so or that the urgency of the matter makes their use inappropriate. A child may also elect not to give evidence by such means.

Judges must inform jurors it is standard procedure for children's evidence in such cases to be given by CCTV, and warn them not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of its use (*Evidence (Children) Act 1997* (NSW), s 25).

Although there are 94 CCTV systems in 62 courthouses across the state, there are some quality and technical problems. Problems also arise when there are multiple listings but only one CCTV facility available.

Western Australia

The use of CCTV facilities by an "affected child" (under 16 years at time of complaint) is mandatory where they are available (*Evidence Act 1906* (WA), s 106N) unless the judge is satisfied the child is able and wishes to give evidence in the presence of the accused in the courtroom (s 106 0), or unless an order is made that the whole of the evidence of the affected child is to be given at a pre-trial video-taped hearing and that the affected child is not required to be present at the trial (s 106I(1)(b)). Judges must inform jurors the use of such procedures is routine and they

should not draw any inference as to the defendant's guilt from the use of the procedure (*Evidence Act 1906* (WA), s 106P).

CCTV equipment is widely available and the visual and audio quality is very good. The court maintains control of sound and vision, enabling the sound to be muted during legal argument.

Screens

In recognition that children are often fearful of facing the alleged offender in court, many jurisdictions allow children to give evidence with a screen blocking the child's view of the accused.

Queensland

Although children are rarely permitted access to CCTV, screens are also not a guaranteed protection in Queensland. Under "special witness" provisions the use of screens is discretionary. Therefore, children under 12 years may still be refused the use of a screen. Screens are generally viewed as a poor substitute for CCTV facilities (QLRC, 2000).

New South Wales

Under s 24 of the *Evidence (Children) Act 1997* (NSW) children have a right to alternative arrangements for giving evidence if CCTV facilities are not available, or if the child chooses not to give evidence by such means, or if the court orders that the child may not give evidence by such means. Alternative arrangements may include use of screens, planned seating arrangements, or adjournment of the proceeding or part of the proceeding to other premises. If a child chooses not to use such arrangements the court must direct that the child be permitted to give evidence orally in the courtroom. The recent amendment to section 18 of the Act (discussed above) also guarantees the right of a child to use a screen or other arrangement if the child is 16 or more but less than 18 years at the time evidence is given in a "personal assault offence" proceeding if CCTV is unavailable and he/she was under 16 years when the charge was laid.

Judges must inform jurors it is standard procedure to use such arrangements in such cases and warn them not to draw any inference adverse to the accused or give the evidence any greater or lesser weight because of the use of the arrangement (s 25(4)).

Western Australia

In Western Australia, because CCTV is available and mandatory, use of screens is generally not an issue. The CCTV facilities must be used when the "affected child" elects to be present at the trial or if the evidence-in-chief of the

"affected child" is to be given at a pre-trial video-taped hearing but the "affected child" is required to be present at the trial for cross-examination (s 106I(1)(a)). It is only when CCTV and necessary facilities are not available that a screen, one-way glass or other device must be placed so that the "affected child" cannot see the defendant. There is no discretion (*Evidence Act 1906* (WA), s 106N(4)).

As with the use of CCTV, judges must inform jurors that the use of such procedures is routine and they should not draw any inference as to the defendant's guilt from the use of the procedure (*Evidence Act 1906* (WA), s 106P).

Comment

In comparison to the use of CCTV facilities, screens provide inadequate and ineffective protection for child complainants. The ALRC & HREOC (1997) advocated strongly that the decision to "use or not to use CCTV is one for the child" (p 342) and argued against its discretionary use.

> Some of the potential benefits to children of using CCTV 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 (ALRC, 1992, p 6).

Western Australia is the only jurisdiction that offers full protection for the child through the use of CCTV.

Support Persons

Most jurisdictions have enacted legislation that permits the child to have a support person present. This is in recognition of the need to provide emotional support for the child and to help the child to testify effectively. In some states there is an entitlement to a support person, while in others it is at the court's discretion.

Queensland

Under s 21A(2)(d) of the *Evidence Act 1977* (QLD) the court may allow a support person. The Queensland provision applies only to "special witnesses", that is, children under 12. Again, the provision is discretionary and does not offer any certainty to the child that a support person will be permitted to provide the required emotional support.

On 18 June 1997 the former Director of Public Prosecutions, Royce Miller QC, issued the following instruction and guideline to Crown Prosecutors (DPP Guideline, No 6 of 1997).

> It has been brought to my attention that occasionally where an order has been made permitting an approved person to be in court to provide the necessary emotional support the approved person has, nevertheless, been so seated that he or she is obscured from the special witness's view by the person charged being between the witness and the support person, or has been so seated that the special witness in searching for the support person has necessarily to have the person charged in view. Accordingly I now issue the following guideline:
>
> > 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.

The QLRC (2000) also reported that sometimes the support person may be located out of the line of sight of the child or seated in such a way that the child has to look past the accused to make eye contact with the support person.

There is no dedicated child witness service in Queensland, however PACT (Protect All Children Today) receives some government funding for development of court aids. Most of the actual court support work is undertaken by PACT volunteers.

New South Wales

Child witnesses under 16 years have a right to the presence of a support person (*Evidence (Children) Act 1997* (NSW), s 27(2)). The person does not have to be approved by the court. The child may choose the person. More than one support person may be permitted. The section specifies the child is entitled to have the person nearby and within sight.

As in Queensland, there is no dedicated child witness service in New South Wales. The Witness Assistance Service within the office of the DPP provides child witnesses with court support and preparation.

Western Australia

Section 106E(1) of the *Evidence Act 1906* (WA) states that a child under 16 years is entitled to have a support person nearby in any proceeding. The support person must be approved by the court and is not to be a witness in, or a party to, the proceedings. The court does not have discretion whether or not to allow a support person to be present. Since most evidence is now given by CCTV, the support person provides a comforting presence in the remote room and usually sits behind the child (Kennedy, 2000).

The Child Witness Service (CWS) is run by the Ministry of Justice and provides non-evidentiary practical and emotional preparation and support to children on an individual basis. The Service makes a point of emphasising that evidence is never discussed. The CWS facilities are located in the courts building and children are able to give evidence via CCTV from within the Service. The service operates independently of the office of the DPP. The Child Witness Service has been advocated as a model for specialist child witness support units (ALRC & HREOC, 1997).

Comment

New South Wales and Western Australia have enacted legislation to ensure children under 16 years are entitled to a support person. In Queensland, despite the ALRC & HREOC (1997) recommendation that the *child* should "be allowed to choose at least one person who may come into the courtroom" and that "this person should be permitted to sit next to them while the child is giving evidence" (p 671), the provision is still discretionary even for children under 12 years. The QLRC (2000) advocated for a service based within the justice system to implement an educational program and to facilitate court familiarisation and preparation programs to enhance the capacity of children to give evidence effectively. Few of the QLRC recommendations have been acted on to date. Most jurisdictions (with the exception of Western Australia) have failed to fund specialist child witness support units as recommended by the ALRC & HREOC.

Out of Court Statements: Complaints and Interviews with Complainants

A blurry dichotomy has arisen among the States between laws affecting the recording of interviews with child complainants which may or may not be admitted as evidence and laws affecting the pre-recording of a child's evidence (in whole or in part). Recorded complaints (made by the child prior to the court proceeding) have the potential to facilitate the child's evidence by allowing the child to give evidence without months of delay. In addition, if admissible, the child may not have to give full evidence in court in the presence of the accused.

Queensland

Under certain circumstances, s 93A of the *Evidence Act 1977* makes the statement of a child under the age of 12 (at the time the statement is made) admissible as evidence of the facts contained in the statement. The circumstances are: (1) the child must have had personal knowledge of the matters stated, (2) the statement must have been made soon after the occurrence of the fact which the evidence is intended to prove or made to an investigator, and (3) the child is still required to be available to give evidence including evidence-in-chief and cross-examination. Even though the statement may be admissible if not made soon after the occurrence of the fact but is made to an investigator in condition (2), s 102

provides that in estimating what weight is to be given to the statement its accuracy and reliability is still to be judged by whether or not it was made contemporaneously.

The statement can be contained in any record of information, whether oral, visual, written or otherwise. (*Evidence Act 1977* (QLD), s 3). However, the courts retain a discretion to reject the evidence, even if the requirements of s 93A are satisfied, if "for any reason it appears to it to be inexpedient in the interests of justice that the statement should be admitted" (*Evidence Act 1977,* s 98). Section 93A applies in civil and criminal proceedings.

New South Wales

An investigating official who questions a child believed to be under 16 years must record any complaint or other representation made by the child that the investigating official considers may be presented as evidence in a court. (*Evidence (Children) Act 1997* (NSW), s 7).

Sections 8 to 12 give a conditional guarantee that once the interview is recorded the child is entitled to give evidence-in-chief wholly or partly in the form of that recording if the accused and his or her lawyer were given a reasonable opportunity (as prescribed by regulation) to listen to and view the recording, and if it is viewed and/or heard by the court. The child must be available for cross-examination and re-examination either with alternative arrangements (that is CCTV, screen or other arrangement, as discussed above), or orally in the courtroom. The court may rule the whole or any part of the recording inadmissible (*Evidence (Children) Act 1997* (NSW) ss 11, 12). A child must not be called to give evidence by any other means unless his/her wishes have been taken into account (s 10). The provisions apply only to audio and/or video recordings (s 3) and only in criminal proceedings (s 9).

Until recently it was possible that a child could turn 16 while giving evidence and the remainder of a pre-recorded interview containing a fresh complaint would no longer be admissible. To overcome this anomaly the *Criminal Legislation Amendment Act 2001* amended s 11 to state that a child who is 16 or more but less than 18 years of age at the time evidence is given is entitled to give the evidence if he/she was under 16 years of age when the charge was laid.

The judge 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 evidence being presented in recorded form (*Evidence (Children) Act 1997* (NSW), s 14). The court retains a discretion to rule that no evidence is to be led in this way at all, but only if satisfied it is not in the interests of justice for the child's evidence to be given by a recording (s 15).

Western Australia

In any Schedule 7 proceeding (*Evidence Act 1906* (WA)), a "relevant statement" may, at the discretion of the judge, be admitted in evidence if a copy of the statement (or details of the statement if it is not recorded in writing or electronically) has been given to the defendant and the defendant is given the opportunity to cross-examine the affected child. A "relevant statement" is a statement that was made by the affected child to any another person before the proceeding commenced, whether the statement is recorded in writing or electronically or not. The content of the child's statement is to be given in evidence by the person to whom the statement is made. If the relevant statement is recorded on video-tape it 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 (*Evidence Act 1906* (WA) s 106H).

As the provision applies to an affected child who is under 16 years at the date the complaint was made, the benefits of the legislation extends to a broader age range than both Queensland and New South Wales. The legislation does not require that the statement be made to an investigator. It can be made to anyone. Nor does it require that the statement be made within a specified time after the occurrence of the alleged offence. The amendment abolished the requirement that, to be admissible in evidence, the complaint had to be a recent or fresh complaint.

Comment

In Queensland and Western Australia the pre-recording of out of court statements at the time the complaint is made is left to the discretion of investigators. In all three States the admissibility of such statements is left to the discretion of the courts but in varying degrees. The Western Australian legislation applies to the broadest age range and is not restricted to statements made to an investigator. The relevant statement is also admissible if not recorded in writing or electronically.

Pre-recording of Evidence

In some jurisdictions, legislation provides for part or whole of the child's evidence to be pre-recorded on video and shown to the court. The pre-recording of the whole of the child's evidence may include the evidence-in-chief and cross-examination of the child.

Queensland

Section 21A(2)(e) of the *Evidence Act 1977* (QLD) provides that the court may order or direct the making of a "videotape of the evidence of the special witness or any portion of it" and that "the videotape 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". The court is prohibited from making the order if it would "unfairly prejudice … the person charged or the prosecution".

Besides the age restriction to children under 12, the section is expressed in very broad terms yet, on the former DPP's own admission, s 21A is rarely used in practice (QLRC, 2000, p 159). It is also reasonable to expect that any prejudice could be avoided when the judge is given such broad powers to direct the conditions under which the recording is to be made, including who is to be present or excluded, where and when the recording will occur, and what portions are to be recorded.

New South Wales

The New South Wales Children's Evidence Taskforce rejected the pre-recording of children's evidence, arguing that the use of CCTV would provide the child with similar benefits (NSW Attorney Generals Department, 1997). Only out of court statements in the form of interviews recorded by investigators are admissible (see Out of Court Statements p 18). The Taskforce wrote that it would be too problematic to reconvene the same prosecutor and defence lawyer at a separate time and place, given their "likely commitments" (1997, p 23). Concern was also expressed that the procedure could lead to the undesirable result of having the child examined by different people at different times. Their Western Australian colleagues have been able to overcome such concerns and have successfully operated since 1992 a system less detrimental to the child and no more prejudicial to the accused as the following section shows.

The New South Wales Taskforce seems to have missed two crucial concerns commonly raised by the children: repeating evidence and seeing the accused. If a child gives evidence by CCTV but without pre-recording, the child may still need to give the evidence twice (at committal and trial). Further, even when CCTV is used, the children are still at risk of seeing the defendant at court.

Western Australia

The vast majority of cases in Western Australia are now fully pre-recorded. Although judges have the discretion to allow a pre-trial recording, there is no discretion for the use of CCTV/screens for taking the evidence. In practice, the child gives evidence from the remote CCTV room while the judge, both counsel and the accused are in the courtroom (Kennedy, 2000).

Under subsection 106I(1)(a) of the *Evidence Act 1906* (WA), the prosecutor may apply to the court for an order directing that the evidence-in-chief of an affected child (a child under the age of 16 years on the date the complaint is made) be videotaped at a special pre-trial hearing, in whole or in part, and presented to the court in that form and that the child be available at the proceeding to be cross-examined and re-examined. Alternatively, under subsection 106I(1)(b) the prosecutor may apply to the court for an order directing that the *whole* of the child's evidence (including cross-examination and re-examination) be videotaped at a special pre-trial hearing, and presented to the Court in that form , and that the

affected child not be required to be present at the trial. In either case, pre-recorded evidence is also admissible in a re-trial (s 106T(1),(5)).

More than one pre-trial hearing may be held if necessary where the application is for full pre-recording under s 106I(1)(b) (see s 106K(5)). When full pre-recording takes place, the child does not need to be present at the trial unless the trial judge orders the affected child to attend for the purposes of giving further evidence in clarification of video-taped evidence (s 106T(3)).

Section 106J deals with the orders and directions a trial judge can make about the conduct of the special hearing and presentation of the evidence where the application is for part only of the evidence to be pre-recorded. Section 106K deals with the different orders and directions a trial judge can make about the conduct of the special hearing and presentation of the evidence where the application is for the whole of the evidence to be pre-recorded.

The Western Australian judge's own Guidelines (Western Australian Judiciary, 1998) clearly state the procedure under s 106I(1)(a) for recording only the evidence-in-chief "is seen as an unlikely procedure that should be used only in exceptional circumstances" such as "if there is 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." (1998, p 5). It is clearly envisaged and accepted in Western Australia that the usual procedure is to have all of the child's evidence pre-recorded.

Comment

The provisions for pre-recording of the child's evidence vary considerably between states. After examining the Western Australian system described here, the ALRC & HREOC (1997) recommended that "legislation should permit the entire evidence of a child, including evidence-in-chief and cross-examination, to be taken prior to trial and videotaped for presentation at trial whenever the interests of justice so require" (p 316). It was also suggested that the Standing Committee of Attorneys-General should encourage all States to enact similar legislation.

Judicial Warnings: Reliability and Corroboration

Although most jurisdictions have attempted to abolish rules of law or practice that required judges to warn jurors about the dangers of convicting on the uncorroborated evidence of complainants in sexual assault trials, judges still retain the discretion to warn about the unreliability of the evidence of children if satisfied it is in the interests of justice to do so. Despite legislation to enforce changes in legal and community attitudes and knowledge, judicial warnings concerning the evidence of children "continue to be standard practice in many jurisdictions" (ALRC & HREOC, 1997, p 326).

Queensland

Section 632 of the *Criminal Code* (QLD) was enacted in 1997 to provide that a person may be convicted on the uncorroborated testimony of one witness. The section abolished any law or rule of practice that required a warning to the jury that it is unsafe to convict on the uncorroborated testimony of one witness. Judges retain the discretion to comment on the evidence if it is considered to be in the interests of justice to do so. However, judges are now supposed to be prohibited from warning or suggesting to the jury that the law regards a particular class of complainants (for example, women and children) as unreliable.

Despite the fact s 632 (*Criminal Code* (QLD)) specifically mentions both rules of law and rules of practice, the annotations in *Carter's Criminal Law of Queensland* (containing the *Criminal Code* and other Acts with annotations, which is used by every criminal lawyer, judge and magistrate) seem to defeat the intent of the legislation.

> Section 632(1) provides that there is no requirement on a prosecution under this section (rape) for there to be corroborating evidence of a complainant. Therefore, whilst corroboration is not required as a matter of law under this section "[t]here is a rule of practice falling short of a rule of law which makes such corroboration highly desirable: see *R v Cook* [1927] … In cases of rape and other sexual offences the trial judge should, as a matter of practice, in all cases even if there is substantial corroboration, warn the jury that it is dangerous to convict on the uncorroborated evidence of the complainant… (Paragraph 349.45, Service 67, Feb 2002).

Perhaps it is too difficult for some lawyers and judges to let go of conventional legal practices. The authors have specifically referred to the new section 632 inserted in 1997 but have perpetuated the belief that corroboration warnings are still required. It is therefore not surprising that such warnings continue to be given in various forms.

This interpretation is given by the High Court and can be traced back to the perpetuation of the erroneous view in *Longman's* case and beyond that ". . . alleged victims of sexual offences no longer form a class of suspect witnesses, but neither do they form a class of especially trustworthy witnesses" (*Longman v The Queen* (1989) 168 CLR 79 by Justices Brennan, Dawson and Toohey).

New South Wales

In New South Wales, judges are permitted to warn juries about evidence that is "of a kind that may be unreliable" (*Evidence Act 1995,* s 165). However, a warning is mandatory where "…the reliability of the evidence may be affected by … the age of the witness" and the defence requests that a warning be given (*Evidence Act 1995,*

s 165(1)(c)). Under subsection (2) warnings are required to contain a statement that the evidence may be unreliable, reasons why that may be so (such as age or lack of corroboration) and the need for caution in deciding whether to accept the evidence and what weight to give to it.

In *Murray v R* (1987) 39 A Crim R 315 at 322 the NSW Court of Criminal Appeal suggested that, in exercising a discretion to comment on the evidence of a complainant in a sexual offence case, judges should warn the jury that

> …in all cases of serious crime it is customary for Judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in.

This comment has become the common form used by New South Wales judges in sexual assault cases (ALRC & HREOC, 1997, p 327). The Commission suggested a similar approach could be taken when judges comment on the evidence of child witnesses. Furthermore, the Commission recommended that where judges decide to exercise a discretion to comment on a child's evidence, the only permissible form of comment should be the phrase used in *Murray's* case and then

> only where (1) a party requests the warning and (2) that party can show that there are exceptional circumstances warranting the warning. Exceptional circumstances should not depend on the mere fact that the witness is a child, but on objective evidence that the particular child's evidence may be unreliable (Recommendation 100).

In the ALRC & HREOC's view, warnings should follow the *Murray* formula because it would "reduce the effect of an individual judge's bias against, or general assumptions about, the abilities of children as witnesses" (p 327).

Western Australia

In any proceeding on indictment, a judge is not to warn or suggest to the jury in any way that it is unsafe to find a person guilty of an offence on the uncorroborated evidence of a child because children are classified by the law as unreliable witnesses (*Evidence Act* 1906 (WA), s 106D).

Despite the specific prohibition in s 106D the Court of Criminal Appeal in *R v Revesz* (Court of Criminal Appeal (WA), 18 October 1996, unreported) held (where a 7 year-old girl gave evidence in a criminal trial about domestic violence) the jury should have been warned about convicting on the uncorroborated evidence of the child given the circumstances of the case (the child had shown some hesitation about whether she really understood the difference between the truth and a lie). Justice Parker said the jury should have been warned about the "…dangers inherent

in the evidence of a young child". He based this on his assumption the evidence was that of "…a 7 year-old child describing events that could only have been observed by her in circumstances of considerable emotional disturbance". This was despite s 106D. The same could be said about any adult in similar circumstances.

Comment

In *Robinson v The Queen* (1999) HCA 42, the High Court said that s 632 (*Criminal Code*, QLD) does not mean that a judge cannot draw attention to the absence of corroborating testimony from witnesses (paragraphs 18-19). The High Court said the first subsection merely restated the common law rule that an accused can be convicted on the testimony of a single witness and did not over-ride the exception that warnings were required in certain circumstances to avoid miscarriages of justice. Now those exceptions remain in the law except with respect to certain classes of witness. In overturning the majority judgment of the Court of Appeal in Queensland, the High Court seems to have paid no regard whatever to the Explanatory Notes tabled in Parliament with the Bill which amended s 632 in 1997. The notes read: "This new provision … will repeal the present requirement that a trial judge must warn a jury of the dangers of convicting on the uncorroborated evidence of one witness" (p 23). It is another thing entirely to say in subsection (3) that a trial judge is not prevented from making "comment on the evidence in the trial that is appropriate to make in the interest of justice."

The High Court said (*Robinson v Queen,* paragraph 25), where there are features such as age of a complainant at the time of the alleged offences, a long period that elapsed before complaint, inconsistency in some aspects of the complainant's evidence and degree of suggestibility on the part of the complainant, then a warning should refer to such circumstances, and should be expressed in terms which make clear the caution to be exercised in the light of those circumstances. It is difficult to see how a comment as to age can amount to comment about evidence without tainting all child complainants of that age as a class of unreliable witnesses.

In summary, judicial warnings concerning the evidence of children continue to be given despite changes in the law. It may be argued that the legislative intent of abolishing the corroboration requirement has been thwarted by judicial assumptions and prejudices regarding the ability of children to give evidence (ALRC & HREOC, 1997).

Committal Proceedings

A committal hearing is heard before a magistrate in order to determine whether there is sufficient evidence for the person charged with an indictable offence to face trial in a higher court. The ALRC & HREOC (1997) heard extensive evidence in public hearings that "committal proceedings were exceedingly traumatic for children" (p 318). The Commission recommended that "child witnesses should not give evidence in person at committal hearings" (p 319) and argued that the rules of

evidence should be amended to permit a child's written, audio or videotaped evidence to be produced instead of "live" evidence.

Queensland

Children are routinely required to give evidence in court at committal proceedings. Although there is no legislation specifically dealing with children in committals, the QLRC (2000) notes three provisions which affect the way a child may give evidence at committal. Under s 110A of the *Justices Act 1886* (QLD) a child's written statement of evidence could be admitted as evidence instead of the child attending at the committal. The procedure is not available if the defendant is not legally represented or if the defence do not agree to it. The child still needs to be available for cross-examination. Frequently, the child is required to give live evidence-in-chief and/or to be cross-examined despite the procedure being available.

Section 93A of the *Evidence Act 1977* (QLD) provides for the admission in any proceeding (including a committal proceeding) of an out of court statement made by a child witness if the child, at the time of making the statement, was under the age of 12 years or was intellectually impaired and if the child had personal knowledge of the matters dealt with in the statement. Even if the child's evidence is pre-recorded under s 93A, the child is still required to be available to give evidence or for cross-examination.

Section 21A(2)(e) of the *Evidence Act 1977* (QLD) enables the court to make an order that the videotaped evidence of a special witness is to be heard in the proceeding instead of direct testimony. As stated above, the former DPP has admitted s 21A is rarely used in practice (QLRC, 2000, pp 159, 243).

New South Wales

Evidence for the prosecution in any committal proceedings must be given by means of written statements which are admissible as evidence (*Justices Act 1902,* s 48AA). Subsection 48(3) defines a written statement to include the transcript of a recording made by an investigating official of an interview with a child as referred to in the *Evidence (Children) Act 1997.* If a person is an alleged victim of an offence involving violence he/she cannot be called for cross-examination on the written statement unless, under s 48E, the magistrate is satisfied there are "special reasons" why the witness should be called. The aim of the legislation is to avoid complainants giving evidence twice, particularly in sexual offence cases.

Under s 48E, a magistrate may, for the purposes of committal proceedings, give a direction requiring the child's attendance. The direction may be given on the application of the defendant or informant or on the motion of the magistrate. Until an amendment in 1996, s 48E made a written statement not admissible as evidence under s 48A if the defendant had given a notice requiring the person who made it to attend. In 1996 it became a matter for the Magistrate to decide.

In the case of a victim giving evidence in proceedings that relate to an offence involving violence (including child sexual abuse), s 48E(2)(a) states a magistrate may give the direction only if he or she forms the opinion that there are "special reasons" why, in the interests of justice, the witness should attend to give oral evidence. Under subsection 48E(8) regulations may make provision about determining "special reasons" under subsection (2)(a). No regulation had been made at the time of writing. In *B v Gould & DPP* (1993) 67 A Crim R 297, Studdert J said

> 'the interests of justice', whilst necessitating careful consideration of the interests of the defendant cannot be limited to the consideration of his interests alone. ... The reasons must be special to the particular case. There must be some features of the particular case by reason of which it is out of the ordinary and by reason of which it is in the interests of justice that the alleged victim should be called to give evidence ... The apparent strength or weakness of a prosecution case is a relevant matter. If the material placed before the Magistrate suggests that there is a real possibility that if the alleged victim is subject to cross-examination the defendant will not be committed, that may in the particular circumstances afford special reasons to require the alleged victims attendance for cross-examination (p 303).

The QLRC (2000, p 236) noted that while the frequency of applications was low, some "60 % of applications to allow cross-examination under s 48E had been granted."

Finally, note that when the *Criminal Procedure Amendment (Justices and Local Courts) Act 2001* (NSW) and the *Justices Legislation Repeal and Amendment Act 2001* are each proclaimed, the *Justices Act 1902* will be repealed and the law in s 48E(2)(a) will be relocated to s 93 of the *Criminal Procedure Act 1986* (NSW).

Western Australia

Since 1992, children have not been required to appear at committals in Western Australia. Before 1992, s 69(2) of the *Justices Act 1906* allowed written statements to be used at preliminary hearings instead of the witness giving oral evidence, in certain circumstances.

In 1991, the Law Reform Commission of Western Australia report on Evidence of Children and Other Vulnerable Witnesses (Project No 87) recommended that steps should be taken to avoid children being unnecessarily examined and cross-examined at committal proceedings and at the trial. Some respondents suggested that cross-examination at committal proceedings could be more stressful to the child than cross-examination at trial, where there is the constraining effect of the jury's presence on defence counsel. The Commission referred to a possible need for cross-examination if a Magistrate was unable to decide whether or not to commit the

accused for trial without the assistance likely to be provided by the child's oral answers to particular questions.

The Law Reform Commission (1991) recommended that in cases 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.

The Commission proposed that the child could still be cross-examined at committal proceedings where good cause for an oral examination is shown by the special circumstances of the case. This was accepted by the judicial members of the Chief Justice's Criminal Law Practice and Procedure Committee.

The *Acts Amendment (Evidence of Children and Others) Act 1992* inserted new subsection 69(2a). It stated that in a Schedule 7 preliminary hearing the affected child is not to be called as a witness unless the magistrate is satisfied that there are special circumstances that justify the complainant being called. The amendment also deleted a requirement that no other party objects to its tender.

The comments of Justice Pidgeon are worth noting in *Angus v Di Lallo* (1993) 11 WAR 93.

> The object, purpose and policy of the *Acts Amendment (Evidence of Children and Others) Act 1992* is very clear from a reading of the Act itself. It is considered that it can be harmful for children, who may have been subject to sexual abuse, to give evidence in court. The Act seeks to overcome this harm by providing that such children may give their evidence by such means as their going into a separate room and for their evidence to be relayed to the court by closed-circuit television. The Act clearly sees it undesirable for such a witness to be required to give their evidence twice, namely at the preliminary hearing and at the trial.

Also, the “special circumstance” test in Western Australia was stricter than the “special reasons” test in New South Wales. In Justice Pidgeon's view

> … having regard to the context of the legislation in this State and to the fact that the court is exercising a discretion to exclude what is otherwise authorised and admissible evidence … the term “special circumstances” … must be given a very restricted meaning and a more restricted meaning to that referred to in those jurisdictions where the right is specifically given to the defendant to request the calling of a child in order that a question of special circumstances may be judged. I would see this being limited to questions that would affect the Magistrate's own decision whether or not to commit the accused for trial … 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 preliminary hearing, in addition to having to be present at the trial, is paramount (*Angus v DiLallo* (1994) 11 WAR 93).

However, as of 3 January 2001, by Act 71 of 2000, the new s 69 of the *Justices Act 1906* (WA) dispenses with the discretion to permit the affected child to be called and cross-examined if the defence could establish special circumstances. Subsection (3) provides that, despite any other Act, where a person is charged with an indictable offence a statement of an affected child may, on a preliminary hearing, be tendered in evidence and is admissible as evidence to the same extent as oral evidence. Where there is no preliminary hearing, the statement can be tendered to a court of summary jurisdiction to be used in evidence for the purposes of the trial or sentencing of the defendant. The statement can be written, audio or videotaped.

After 10 years of operation in this fashion, the Western Australian government is now willing to go one step further and abolish committal hearings. On 27 March 2002 the Attorney-General introduced the *Criminal Law (Procedure) Amendment Bill 2002* into Parliament. The Bill honours a Labor government election commitment and gives effect to the recommendations of the Law Reform Commission of Western Australia report on the Review of the Criminal and Civil Justice System (September 1999). If passed, the Bill will abolish preliminary hearings and replace them with a regime of disclosure by the prosecution and, to a lesser extent, by the defence. In his Second Reading Speech (27 March, 2002) the Attorney-General said:

> The Law Reform Commission identified the concern that preliminary hearings place an additional and undue burden on victims and witnesses. There is a recognised public interest in protecting citizens who become involved in the criminal justice system only by reason of their being victims or witnesses. It is undesirable that they be required to give evidence in court on more than one occasion, unless absolutely necessary. In the case of rape and sexual assault victims in particular, to require these witnesses to testify twice takes a huge toll on people who are already significantly traumatised. There is no compelling reason for allowing this to continue. The delays caused by preliminary hearings also have severe repercussions, as they can impact upon the ability of witnesses to recall facts as clearly as they once might have… An argument commonly raised by defence lawyers who are in favour of retaining preliminary hearings is that they are a useful mechanism for obtaining information about the prosecution case. However, preliminary hearings were never intended as a mechanism for disclosure, and this purpose will be achieved more efficiently by introducing a new statutory regime to require earlier and complete disclosure by the prosecution. The Bill also

> implements this new disclosure regime… In place of the preliminary hearing, the Bill establishes a new procedure in the Court of Petty Sessions described as the committal mention. At the committal mention, the defendant must plead to the charge. The magistrates will require that all written statements and videotapes of children's evidence be tendered and received by the magistrate. The magistrate will then commit the defendant to a superior court for trial or sentencing. (HANSARD, pp 9026 to 9030)

Comment

While the model adopted by Western Australia in 1992 has undergone 10 years of growth and evolution, the law in Queensland and New South Wales is still similar to that which applied in Western Australia prior to 1992. Justice Pigeon of the Supreme Court of Western Australia succinctly outlined the reasons why there is widespread agreement that children should not be called at committals.

> 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 evidence. …Parliament, in the case of young children, has clearly restricted it 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 on the basis that there is an enshrined right to cross-examine. The proper approach is 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 (*Angus v Di Lallo* (1994) 11 WAR 93 at 102).

Control and Restriction of Cross-examination

Unrestricted cross-examination has the capacity to severely traumatise a child witness. Under cross-examination a child may face repetitive and abusive questioning and be accused of lying or “wanting it” (Eastwood et al, 1998).

The Queensland Court of Appeal has acknowledged that, even in the context of a trial, the right to cross-examine is not a fundamental human right but rather it was an incident of the obligation of a court to ensure a fair trial that balanced the interests of the accused with the interests of the public (*R v McLennan* [1999] 2 Qd R 297). Therefore, it might also be argued, the right to cross-examine is even further diminished in a committal proceeding.

Queensland

Before 2000, under s 21 of the *Evidence Act 1977* (QLD) a court could disallow a question which was indecent or scandalous (unless the question related to a fact in issue in the proceeding) or if the question was intended only to insult or annoy or was needlessly offensive. That section applied regardless the age or category of the witness. A new s 21 was substituted when the *Criminal Law Amendment Act 2000* (QLD) became operational on 27 October 2000.

Now a court may disallow a question, or inform a witness a question need not be answered, if the court considers the question is an improper question. An "improper question" means a question that uses inappropriate language or is misleading, confusing, annoying, harassing, intimidating, offensive, oppressive or repetitive. In deciding whether a question is improper, the court must take into account any mental, intellectual or physical impairment the witness has or appears to have, as well as any other matter about the witness the court considers relevant, including age, education, level of understanding, cultural background or relationship to any party to the proceeding. Such matters are given by way of example only and courts are not limited to considering those matters. There is no age limit or restricted category of witness to which the section applies.

New South Wales

Section s 41 of the *Evidence Act 1995* (NSW) is in very similar terms to the Queensland provision and indeed appears to be the source of the wording of the amendment in Queensland. The only real difference appears to be that Queensland dropped the necessity to find the annoying, harassing, intimidating, offensive, oppressive or repetitive questions to be "unduly" so.

Western Australia

Section 26 of the *Evidence Act 1906* has not been reformed as in New South Wales and Queensland. The court may forbid any question it regards as indecent or scandalous, although such question may have some bearing on the case, unless the question relates to facts in issue, or if the question is intended to insult or annoy, or is needlessly offensive in form, notwithstanding that such question may be proper in itself.

Comment

Judges and magistrates have always had the power to control cross-examination through the inherent jurisdiction of the court. A lack of will, interest or education may have contributed to the need to set out in writing the matters that may be unfair to witnesses. If a judicial officer is to ensure the fairness of the proceedings, it must be fair to all parties.

Conclusion

Fifty-five years ago, the need to protect the child from appearing in court was recognised (Committee of Inquiry into Sexual Offences, 1944). Five years ago the Australian Law Reform Commission reminded governments that they have a responsibility to ensure "the evidence of child witnesses to be taken in a way that promotes the physical and psychological recovery, health, self-respect and dignity of the children involved" (ALRC & HREOC, 1997, p 298). Only Western Australia has undertaken substantial and comprehensive legislative and procedural reform. Legal processes in other jurisdictions continue to fail to meet these standards. Clearly what is needed, is a paradigm shift.

The Need for a Paradigm Shift

There is a growing awareness and articulation in the literature, that substantial legislative and procedural reform is not enough (Easteal, 2001; Esam, 2002; Kelly, 2002). There is also increasing frustration that despite decades of reforms children's experiences in court continue to be "lessons in injustice, inhumanity and disrespect" (Kelly, 2002, p 368). Cashmore (2002) argues that

> What is needed as long as children are required to tesify in adversarial court proceedings is not just a technological fix, but a change in the way children are treated in the court process. They need to be asked questions they can understand and to be treated with respect (p 215).

Despite legislative amendments, problems remain in the legal system both nationally and internationally for child complainants. Esam (2002) questions whether the current system in England and Wales, even with legislative amendments, will be able to meet the needs of children. She suggests that "we need to start again with a blank sheet of paper" (p 323). It is also argued that no amount of court preparation or technological improvements can protect children from "the worst excesses of adversarial court systems" (Kelly, 2002, p 372). Rather there is the need to discover "more effective ways of enabling children to have access to justice" (p 375).

The difficulty of such a task is not to be underestimated – because it involves social transformation. Advocating social change is not popular. "Far better to proselytise changing the wording of statutes than advocating that the fundamental social structure must be transformed" (Easteal, 1998, p 211). Combined with this is the resistance of law to change particularly when such change requires deconstruction and reconstruction of key concepts, beliefs and attitudes which underpin the law (Easteal, 2001). In addition, adequate consideration was not given to the ability of the courts to thwart the 'intent' of legislation and the inability to "see past the distortion of conventional knowledge" (Easteal, 2001, p 229).

It is also argued that the focus should be on "law's power to define and disqualify" (Smart, 1989, p 164) rather than on law reform in itself. Care must be taken to avoid "constructing legal policies which only legitimate the legal forum and the form of law" and "to resist the temptation that law offers the promise of a solution" (p 165). Rather there needs to be a challenge to the power of law and a redefinition of the wrongs against women and children "which law too often confines to insignificance" (p 165).

If children are still being abused in the criminal justice system (Eastwood et al, 2000), despite decades of reform – then the reasons why this continues must ultimately be addressed. It is argued that the fundamental problem is the ongoing history of "denying credibility to women and children" (Kelly, 2002).

> The reasons children's evidence is so deeply contested is not due to the fundamental (or even smaller) differences in the capabilities and understandings of children as compared to adults, rather these arguments serve to deflect direct attention to, while also making more palatable, the continued resonances of centuries of disbelief and suspicion of children who accused adults (usually men) of sexual crimes (Kelly, 2002, p 364).

Indeed the history of denying that women and children are sexually assaulted is entrenched in law. As early as the 17th century, English common law considered that allegations of rape or sexual assault should be viewed differently to other criminal allegations (Scutt, 1990). For example, "regarded then as now, as possessing a legal mind of the highest order" (Scutt, 1990, p 316) attested to the belief that the words of children and women were not to be trusted when matters of rape or sexual offences were involved.

> It is true rape is a most detestable crime, and therefore ought severely to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent (Hale, 1713, p 634).

Consequently, Chief Justice Hale held the view that juries in rape trials should be warned about convicting alleged offenders without corroborating evidence (Scutt, 1990). Men are still enacting legislation concerning the sexual assault of women and children, and the words and attitudes expressed by Hale in 1713 remain entrenched nearly three centuries later promoting the view that women are not to be trusted in matters of sexual assault (Scutt, 1990). The corroboration warning, which warns the jury about convicting on uncorroborated evidence, is still given, in one form or another, in Australian jurisdictions.

The problem with such a warning and the unsubstantiated assumptions and gendered myths which underlie such a pervasive precept, is that there is no general

legal requirement that the testimony of a witness must be corroborated. “One witness to a key fact, if believed, can provide sufficient proof of that fact” (Mack, 1998, p 59). Despite the fact that judges today are no longer required to give such harsh warnings, judges are repeatedly exercising their discretion to comment on the evidence and “cast unwarranted doubt on women testifying about sexual assault” (Mack, 1998, p 59). According to Mack (1998) most recent appellate cases which deal with sexual assault warnings involve cases of women and girls under 18 years of age. She argues that the result of such warnings is to “undermine the protection the law should provide against the sexual exploitation of children by adult males” (p 65). In summary, the reason why corroboration warnings continue “is the persistence of social and judicial attitudes which accept and endorse the myths which were used to justify the older practices of denigrating the credibility of those who testify about sexual assault”(Mack, 1998, p 65).

The basis for such a warning lies in false beliefs about women, children and sexual assault. The beneficiaries of the myth that children lie about sexual abuse are the (mostly) men who perpetrate the abuses. As Scutt (1991) maintains, too many men have profited from the difficulties which children face in speaking out against the abuse. If the justice system continues to adhere to the erroneous view that children are untrustworthy where accusations of sexual abuse are concerned, there is little option “but to conclude that fear of the truth underlies it” (p 137).

Two decades ago, when the extent of sexual abuse was re-ignited in public awareness, the importance of “believing” the child was established as a cornerstone of the child’s psychological survival. Prominent researchers in the area (Berliner & Barbieri, 1984; Faller, 1984; Finkelhor, 1984; Jones & McGraw, 1987) emphasised the crucial importance of “acceptance and validation” (Summit, 1983, p 179) to the child. According to Kelly (2002) there was also an implicit assumption that the truth which children were struggling to tell would be self-evident in the legal system. This optimism rapidly diminished when it became clear how legal practices and procedures systematically disadvantaged children, and the extent to which defence lawyers would use underhand tactics and their adult and professional status to intimidate the child. The strongest tactic was to undermine the child’s credibility - and using the worst excesses of the adversarial court system, it became ‘open season’ on child witnesses. These abusive practices continue despite the fact that some of the well accepted practices in the adversarial systems would be unlikely to stand the test of the *UN Convention on the Rights of the Child* regarding preserving children’s rights and dignity when they appear in court (Kelly, 2002).

Reforms in substantive and procedural law have not given children the belief, respect, protection or justice they deserve and to which they are entitled. We need a paradigm shift. Somehow, we have lost sight of the fact that what the child wants most of all is to be listened to – and to be believed.

CHAPTER THREE

METHOD ISSUES AND METHOD

Method Issues

Two methodological issues have framed the discussion on method to be presented in this chapter. The first consideration is "methodological appropriateness" (Greene, 1994, p 537). In other words, it is the research question/s and purpose of the research, which determine the choice of methodology. The research question/s also inform and guide the research paradigm. Greene (1994) identifies this as "a paradigm of choices" (p 537). Such a paradigm rejects methodological orthodoxy and focuses rather on the specific purpose of the particular inquiry. The second consideration emerges from a determination to maintain the trustworthiness of the research data. This consideration has been satisfied by incorporating elements of a constructivist framework (Guba & Lincoln, 1989, 1994; Lincoln & Guba, 1985).

The paradigm within which the current research is shaped draws strongly on constructivist paradigms, and to a lesser extent on aspects of Frierean empowering frameworks (Friere, 1973). It draws together a synthesis of these frameworks with some elements of each framework given more consideration than others. Constructivist paradigms require "that evaluation catalyse social action… the specific contours and facets of that action are not prescribed but rather emerge from the setting. In this way, constructivism differs from more prescriptive agendas" (Greene, 1994, p 540). Praxis-oriented frameworks emphasise the possibility of social transformation through a change enhancing, contextualised and interactive approach to knowledge (Lather, 1991). The view that research is explicitly committed to building a more just society - research as praxis - represents a significant element of the research paradigm.

In summary, constructivist and praxis-oriented methodologies have informed the research method. The choice of a qualitative methodology which employed semi-structured and unstructured interviews emerged from the research question/s, as well as the nature and meaning of the research.

Method

The research method emerged from the literature on child sexual abuse and the criminal justice system (see Review of Literature and Legislation, p 4), from constructivist and praxis-oriented considerations (see Method Issues p 35), and from the research questions (see Introduction p 1). The research method was also based on earlier doctoral research into the experiences of child complainants of sexual abuse in Queensland (Eastwood et al, 1998).

The Research Design

The aim of the research was to investigate *from the perspective of the child* the significant processes and consequences of involvement in the criminal justice system. Mindful of the constructivist framework, the choice of methodology called for one that did justice to the variable responses from children who had been sexually abused to tell about their experiences of the criminal justice system. Therefore, the study embraced a qualitative methodology that allowed for a focus on the whole research context.

Originally intended as a longitudinal study, the legal and ethical concerns could not be overcome. This factor constrained the research design and research method and reflected the constructivist belief that the research design emerges as interactions occur in the natural settings (Greene, 1994; Lincoln & Guba, 1985). Therefore, the study gathered in-depth interview data from children who had been sexually abused about their experiences with the criminal justice process after legal proceedings were completed. This also meant that the data gathered was retrospective in nature.

The study adopted the definition of a child used by the United Nations Convention on the Rights of the Child (1989) which defines "a child as a person under 18 years of age unless the relevant national law specifies an earlier age of majority"(Article 1). The Australian Law Reform Commission also adheres to this definition. The children involved in the current study were between 8 and 17 years of age at the time of the research.

The Research Participants

There were a total of 130 participants in the study. The central focus of the study was on the in-depth data gathered from sixty-three (63) child complainants (61 females and 2 males) aged 8 to 17 years who were complainants of childhood sexual abuse and had sought justice through the criminal justice system (see Findings – Parts One and Two). Given the in-depth nature of the interview process and the need to articulate experiences, children younger than eight years were excluded. The upper age limit (under 18 years) was determined by the definition of a child adopted by this study and is consistent with the United Nations definition of a child. In order to add depth to the research data gathered from the complainants, interviews were also conducted with 39 parents/guardians of the complainants. Data was also gathered from 28 legal personnel (including crown prosecutors (16), defence lawyers (7), and judicial officers (4)) across the jurisdictions of Queensland, New South Wales and Western Australia. Background data was also provided by court support personnel (see Findings - Part Three).

Most of the child complainants were female (96.8%). The percentage of male complainants was 3.2%. Although the literature estimates females are abused at one

and half times to three times the rates for males (Finkelhor, 1994), the proportion of males to females in the current study is low and indicates the need for further study of male complainants in the justice system.

The average age of child complainants was 13.9 years at the time of the initial interview. The length of time between reporting and trial ranged from 8 - 36 months with an average wait of 18.2 months. In 63.5% of cases in the current study, a conviction was obtained, while 36.5% of cases resulted in an acquittal.

The average age of child participants in Queensland was 12.6 years compared to 14.6 years in New South Wales and 14.6 years in Western Australia (overall average 13.9 years). The average length of time between reporting and trial was the longest in Queensland with an average wait of 20.8 months. New South Wales and Western Australia averaged 16.4 months and 17.5 months respectively (overall average 18.2). However, it should be noted that with the facility to fully pre-record evidence in Western Australia, one-third of children gave evidence many months prior to trial. The conviction rates for cases across jurisdictions were 55.5% in Queensland, 55.5% in New South Wales, and 69.4% in Western Australia (overall average 63.5%) (see Table 3.1).

Table 3.1

Key Demographics across Jurisdictions

Jurisdiction	Average Age of Child at Interview	Average Months from Reporting to Trial	Conviction Rates
Queensland	12.6 yrs	20.8 months	55.5%
New South Wales	14.6 yrs	16.4 months	55.5%
Western Australia	14.6 yrs	17.5 months	69.4%
Average	13.9 yrs	18.2 months	63.5%

92% of alleged offenders were known to the child. The relationship of the accused to the child included father, step-father, uncle, brother-in-law, great-grandfather, neighbour, family friend, mother's boyfriend, mother, friend's father,

boss, school employee and cousin. In 8% of cases the alleged offender was a stranger to the child.

Table 3.2

Relationship of the Child to the Alleged Offender

Relationship	Frequency	Percentage
Family Friend	18	28.5
Neighbour	9	14.2
Uncle	8	12.6
Stepfather	7	11.1
Father	5	8.0
Stranger	5	8.0
Mother's Boyfriend	2	3.2
Mother	2	3.2
Friend's father	2	3.2
Boss	1	1.6
Brother-in-law	1	1.6
Great-grandfather	1	1.6
School employee	1	1.6
Cousin	1	1.6

The proportion of alleged offenders known to the child in comparison to alleged offenders who were unknown to the child is similar across jurisdictions. The percentage of alleged offenders known to the child in Queensland, New South Wales and Western Australia were 94.5%, 88.9% and 91.7% respectively. Percentages of alleged offenders who were strangers to the children were 5.5% in Queensland, 11.1% in New South Wales and 8.3% in Western Australia (see Table 3.2).

The literature consistently states that most perpetrators of sexual abuse are known to the child. According to Bagley (1995), around 80% of the time the perpetrators are known to the child. The current study found an even higher percentage of children (92%) knew the alleged offender. 39.7% of alleged offenders were family members and in 52.3% of cases the accused was someone known to the child such as family friend, neighbour or mother's boyfriend (see Table 3.2). The proportion of alleged offenders known to the child is also reasonably consistent across jurisdictions (94.5% in Queensland, 88.9% in New South Wales, and 91.7% in Western Australia). The betrayal of trust that occurs when the child knows the abuser only compounds the effects of abuse (Browne & Finke lhor, 1986). The implications for the current study are that most of the children were required to give evidence against a family member or someone known to them, further adding to the stress for the child.

Access to Participants and Ethical Issues

Originally, the intention was to include the jurisdictions of Queensland, New South Wales and Victoria. Invitations to be involved in the research were sent to the office of the Director of Public Prosecutions in each state. However, the ODPP in Victoria declined any involvement with the research. The Director of Public Prosecutions in Western Australia was subsequently approached. Given the significant reforms in relation to child complainants that have been implemented in Western Australia, this necessary modification was seen as a positive opportunity to compare the experiences of child complainants across the three jurisdictions.

A number of organisations acted as gatekeepers in gaining access to participants. Most of the children interviewed in Queensland, were accessed through Protect All Children Today (PACT) with two children accessed through the Office of the Director of Public Prosecutions (ODPP). All New South Wales participants were located through the NSW Victim Support Service (VSS), and the Child Witness Service (CWS) helped to access children in Western Australia. These organizations provide direct support for child witnesses going through the criminal justice system and were able to access suitable participants prior to any contact from the researchers. This enabled the child to feel free to decline to participate and ensured their details remained confidential.

The subject of child sexual abuse represents a deeply personal and disturbing occurrence in the life of the child and any researc h in this area, is by its very nature fraught with ethical problems (Finkelhor, 1986a). Ethical approval was sought and given through the University Human Research Ethics Committee. Although this study did not seek any details of the abuse itself, clearly there were important ethical considerations. First, written informed consent was gained from the children, parents and legal personnel and all questions in relation to the study were thoroughly discussed. Second, confidentiality was ensured through a number of procedures: interview tapes were securely locked; pseudonyms only appeared on written transcripts; and informed consent included the right to withdraw from the study at

any time. Participants were reassured that all measures would be taken to protect confidentiality and all questions asked concerning the research were answered fully.

Once the child had given permission to speak to the researcher, the witness support organizations supplied the researchers with a list of contact details. First contact by the researchers was conducted by phone. There were three important considerations in the initial call. First, the child was given the opportunity to ask in-depth questions about the research. Secondly, the parents/guardians were given the same opportunity. The children were advised of their rights as research participants and were reassured that the research was about the legal process only. Abuse details would not be discussed. Thirdly, children either chose to conduct the interview at their home, at the Child Witness Service, or the DPP office, or by phone if distance precluded face-to-face contact. 92% of the interviews were conducted face to face with the child. At the conclusion of the initial phone call, interview times were arranged and the researchers contact details were given to the child and parent or guardian. With this access protocol in place, the interests and wishes of the children and their caretakers were given prime consideration at all times.

In recognition that research procedures themselves can traumatise participants (Finkelhor, 1986b), every effort was made to provide a supportive and reciprocal environment. When attention was drawn to a particular need of the complainants, participants were referred to appropriate agencies or support structures that had been established prior to the commencement of the interview process. Wherever possible, some degree of control was given to complainants at various stages of the research process; in the structure and content of the interview, in modifications to transcripts, and in seeking their input in the discussion of analysis and findings. Overall, the aim was to create an interview process that was an affirming experience for all child participants.

The Interview Process

The interview process commenced with an in-depth discussion of informed consent, confidentiality, and other issues as raised by the children. Participants were advised that the interview was to be audiotaped and a full verbatim transcript of the conversation would be available for their approval prior to inclusion in the final sample. The interview then took place for approximately one to one and a half-hours.

Subsequent to the interview the tapes were fully transcribed and a copy was sent to each child for any amendments. If amendments were required they were discussed in-depth by phone with each participant in an unstructured interview. The final transcripts were then returned for inclusion in the final sample data. After a preliminary analysis of the data, each child was sent a summary of the findings prior to the release of the final report. It was considered an important part of the process that the children were given a copy of the findings – *before* the adults. They were invited to read it and to give written feedback on their experience with the research

process, the findings, and other comments in relation to the research. This process served to enhance researcher sensitivity, theoretical sensitivity, and receptiveness to the research setting (Lincoln & Guba, 1985)

The interview questions directed to the children were mainly determined by the key events in the criminal justice process, such as reporting to the police, committal proceedings, and the trial. Other questions about their participation in the criminal justice system and the child's feelings about the system were added, as was the opportunity for each child to state how they would change the system to minimize harm to the child complainant. These questions were added to facilitate complete investigation of the research aims in order to complete a meaningful report at the conclusion of the research.

Children were given the option of telling their own story of the entire process unprompted, or for the researcher to guide the child through the legal process using a number of significant signposts to aid the child in the telling of their story. The majority of the children selected the second option, with some children switching to the first option as they became more comfortable with the interview process.

The interview questions for the parents or guardians were also determined as above. Parents were asked for their observations of how each part of the legal process affected their child, in addition to their opinions on how the system could be changed to minimize harm to their children.

The interviews with legal participants were largely unstructured, with the focus on what the legal participant believed to be the salient features of the legislation and procedures in their jurisdictions. Participants were encouraged to present their own perspective on sexual abuse cases so as to identify key issues for the defence, prosecution and judiciary.

Transcription and Data Analysis

All interviews with children, parents and legal participants were taped and transcribed in full. The transcribed interviews were then subject to a qualitative analysis technique known as interview analysis. Interview analysis enables the researcher to identify and explore similarities and differences between groups. Means and frequencies were also obtained from the demographic data of the whole sample, and then for each state separately.

Interviews with all complainants, parents/guardians, and legal personnel were transcribed verbatim and in conjunction with case notes formed the base data. Although the broad chronological categories of the legal process, such as reporting to police, the committal, the time between committal and trial, and finally the trial process and its outcomes were identified prior to data analysis, the codes, categories and themes which emerged within these broad categories were determined inductively rather than by imposing predetermined classifications on the data

(Glaser, 1978). These working categories and themes were then further analysed in terms of the children's experiences in the criminal justice process. Emerging themes were documented and examined for tacit biases and assumption, and further analysed.

Limitations of the Method

There were a number of limitations of the method employed in the study. First, access to child complainants was reliant on gatekeepers to make contact with possible participants. Therefore the number of children able to participate in the study was limited by the ability and time available to gatekeepers to make initial contact. Although this may be perceived as a limitation, the depth of data gathered ensured a richness of data, which contributed significantly to a deeper understanding of the experiences of the child. Second, given that a number of complainants were approached to be involved in the study but declined because their court experience was too upsetting to discuss, it should also be recognised that those children most severely traumatised were not included in the study due to understandable reluctance to relive their experiences. This fact in itself only draws further attention to the serious nature of the effects of the entire process on children. Third, given the inability to access participants between initial reporting and trial, the resultant lack of longitudinal data must also be considered a limitation. Until gatekeepers within the criminal justice system allow access to participants to enable longitudinal studies to be undertaken, more extensive data will remain inaccessible. Fourth, based on a constructivist approach, the stories of the children were taken at face value as their own phenomenological realities. While triangulation of data from other sources (such as parents and legal personnel) was incorporated wherever possible, essentially the constructivist view aligns with "assessing the viability (utility) as opposed to the validity (truth) of an individual's unique world view" (Neimeyer & Neimeyer, 1993, p.2). Fifth it may be considered that the inclusion of mainly female complainants is a limitation. Further research with male complainants is needed to identify relevant issues.

Conclusion

In conclusion, the process of locating participants and the interview process and procedures have been outlined. Procedures used to analyse data have also been examined. As outlined earlier in this chapter, the method is consistent with the methodological considerations of methodological appropriateness and trustworthiness in data analysis. Constructivist and praxis-oriented methodologies have influenced the framing of the research method. The research findings will be presented in the following chapter.

CHAPTER FOUR

FINDINGS – PART ONE

Child Complainants and Parents

Introduction

This section will detail the data gathered from child complainants (63) and parents (39). The data itself will be presented in a sequence that generally parallels the steps that occur in the process itself and in categories identified by the children as significant. After presentation of data on whether the children would report sexual abuse again, the key categories identified by child complainants in the criminal justice process are examined. The categories include: reporting the abuse; waiting for committal and/or trial, waiting to give evidence, seeing the accused, evidence-in-chief, cross-examination, the verdict and sentence, and a range of other issues which arose from the process. Children were also asked to make suggestions for reform. In the presentation of the research findings the experiences of the children will, where appropriate, be supported by data gathered from parents.

The Big Question

Children in all jurisdictions were asked if they would report again if they were ever subject to sexual assault in the future. The lack of confidence demonstrated by children in the justice system is of considerable concern.

Queensland

Given their experience of the justice system, 39% of the children said they would *not* report abuse again in the future and 17% were *unsure* if they would report again (see Appendix B). Only 44% of the Queensland children indicated they *would* report abuse again in the future. Reasons given included "because people shouldn't do that" (QLD Child 11yrs) and "so the person who did it to them can go to jail" (QLD Child 14yrs).

Most parents provided specific comment on their child's feelings about the legal system. All comments were of a negative nature. "Many times I wish she hadn't gone through with it…it has taken her months to recover from the trial process," (QLD Parent) and "she is very traumatised and still cannot talk about it" (QLD Parent). One parent thought that the court system was abusive toward children and another stated "the legal system failed us greatly" (QLD Parent). Another parent observed:

> She just wondered why she bothered. She is quite disillusioned and she is angry. She said 'they didn't believe me'… Children aren't stupid. They picked up on how ridiculous the system was… it needs big changes (QLD Parent).

New South Wales

56% of New South Wales children would definitely *not* report abuse again in the future and 11% were *unsure* whether they would report again (see Appendix B). "I know it's the right thing to do but emotionally, I don't know if I could handle that – probably no" (NSW Child 16yrs). Only 33% indicated they *would* report again if sexually abused. The anger against the system is reflected in their comments.

> The whole system is a total fuck up. Instead of going to court they should just write 'no justice here, please leave'. We are supposed to be free after this but we are not free, we are even more caged up. It's a joke. Don't put yourself through the trauma (NSW Child 16yrs).

> It makes me feel like it is no good going to court or anything. It is just a waste of time. I think it is not even worth doing anything with the courts. They are pathetic really. They don't look after you. They couldn't care less. They are not interested… It is the hardest thing and it ruins your life. You never forget it (NSW Child 16yrs).

One child returned a letter with her interview transcript making the following heartfelt comment on her feelings about the court process.

> I would just like to add one thing to my interview and that is, it makes it very hard when police, legal system and judges send messages throughout the world telling us to report crimes like sex offences, and then when we do we get no good outcomes and our lives just get heaps more pressure put on us. All for nothing! It's a waste of time and it hurts a lot. If they keep telling us to report it then they should do something about it when we do (NSW Child 16yrs).

New South Wales parent's comments on the court system included "if it (the system) happened to *their* child they'd be outraged" (NSW Parent) and expression of anger at the system.

> With all the power the courts say they have – they don't have anything. They don't know what these children have been through. They just don't listen. Every day it is just routine to

> them…they don't care that we are human beings with lives…and it is never forgotten…never (NSW Parent).

Western Australia

17% of child complainants in Western Australia indicated they would *not* report abuse again with 19% *unsure* (see Appendix B). One child who wasn't sure explained the dilemma. "It's just really hard, because flesh heals – inside doesn't – and if it does, it takes a damned lot longer to heal" (WA Child 16yrs). Of the children who would not report again comments included "it's too hard…I wouldn't want to go through it again" (WA Child 16yrs) and "because I don't think it was fair and it was scary… I wouldn't want to be that scared again" (WA Child 11yrs). 64% of children said they would report again. These children expressed the view that "it treated me pretty good" (WA Child 12yrs) and "it was okay and it helped telling someone about it" (WA Child 14yrs).

Reporting

This section investigates by each jurisdiction, the child's experience of reporting the abuse to the police including how they came to be involved, the difficulty of the decision to report, and the process of providing a statement to police. Parent's views of their child's experiences with reporting the abuse are also examined.

Queensland

The police came to be involved in a number of ways. Most frequently (27%) disclosures were made to mothers, while the other children disclosed to school friends, sisters, teachers, and a friend's mother. One child disclosed to a teacher who reported the conversation to authorities. Another child told her mother who did not act on the information. She then disclosed to a friend's mother who escorted the child to the police. In one case the older sibling reported the abuse to the head of a program (HOP) she attended. The HOP reported the abuse to the child's father. The younger sibling then felt safe enough to disclose to her father about the abuse also. A younger sibling, in another case, reported the abuse to her parents on behalf of herself and her older sister. One mother reported to police after she noticed abnormal bleeding and their doctor then confirmed abuse had occurred.

A small number of parents became aware of their child's abuse when police investigations resulted in parents being notified of the abuse. The children in these cases were upset that their parents were contacted about the abuse, "My parents didn't know…I didn't want them to know about it. I didn't want anyone to know about this sort of thing" (QLD Child 15yrs).

While most children said that the decision to report was a difficult one, many in consultation with parents and friends agreed to report the matter to police. "I felt ashamed, I felt scared… but happy that I had told someone" (QLD Child 12yrs). "I wanted him to go to jail for what he did" (QLD Child 14yrs). One child said she "felt ok about reporting until my family started harassing me" (QLD Child 13yrs).

However, more than half of the children (55%) in Queensland were reluctant to report and expressed views to that effect. "I didn't have much choice in it" (QLD Child 14yrs). "I just wanted to keep it a secret… just pretend it didn't happen. I didn't want to hurt Mum or my stepsister" (QLD Child 15yrs). "I didn't want to tell anyone and I didn't want anyone to know about it" (QLD Child 16yrs). In one case the child explained that "it was difficult to get Dad in trouble" (QLD Child 9yrs). Another child said "My Mum sort of made me. I was a little bit pissed off at the idea because if I had been given a choice I don't think I would have done anything" (QLD Child 14yrs). She went on to say the reason why she didn't want to tell police was "in case they didn't believe me" (QLD Child 14yrs).

In two cases children reported to adults who were legally bound to report the abuse to authorities. One child said, "I'd come to her with a concern…not knowing that it had to be reported…I didn't want anyone to know about it" (QLD Child 16yrs).

More than half of the Queensland parents also provided specific comment about how their child felt about reporting the abuse. "She didn't want to do it at first and then she did – she was wavering quite a lot" (QLD Parent). One parent left the decision to the child, "once she thought about it…she went through with it" (QLD Parent). Another parent reported that her child was relieved about reporting the abuse.

Most children reported police as being helpful, sensitive and friendly. Only two children indicating negative comments such as police were "nasty" (QLD Child 15yrs) or "not helpful and very pushy" (QLD Child 16yrs). The gender of the investigating officer arose as a frequent theme. Most children expressed a preference for a female investigating officer. "It put me off a bit because it was a male officer" (QLD Child 15yrs).

Children clearly found it difficult relating details of the abuse when providing a statement to police. "They made me tell bit by bit which I didn't want to do" (QLD Child 13yrs). "I just didn't want to talk about it" (QLD Child 14yrs). However two children specifically stated that the experience was beneficial. "Talking to the police was helpful in getting it out" (QLDCC3). "I felt happy because it helped me" (QLD Child 11yrs). One parent reported a negative effect on their child after giving their statement, "She was miserable…hyped up and nervous" (QLD Parent).

Nearly half of the Queensland children commented specifically on having another person present during the interview. One child was accompanied by a

representative of the Family Services Department. The investigating officer gave one child "no choice" – she was not allowed to have anyone present during the interview. Five children conducted the interview with their mother present, which sometimes presented as a two-edged sword. While the children were appreciative of the support their mothers gave them, they felt very uncomfortable discussing the level of detail required by the police in front of their mothers. "I didn't want to hurt Mum" (QLD Child 15yrs).

New South Wales

Children in New South Wales disclosed the abuse to a variety of people including mothers, friends, friend's mothers, and in one case, to hospital staff after a suicide attempt. For one child the decision was made for her when the police contacted her. One child indicated that it was not difficult to report "because I didn't want him to get away with something like that" (NSW Child 16yrs). Some New South Wales parents commented on their child's experience of reporting the abuse and indicated negative experiences. "She hated me for reporting it" (NSW Parent) and "we tried to report three times before there was staff and facilities available" (NSW Parent).

Many children commented positively on the helpfulness of police. "They were really good" (NSW Child 16yrs) and "they let you have some time because they knew how hard it was" (NSW Child 13yrs). Other children reported negative experiences with the investigating officers. "He asked me if I was lying" (NSW Child 15yrs) and "he put down what *he* said. I wanted him to put down what *I* said" (NSW Child 16yrs). A number of parents also commented on the interaction between their child and the police. All comments were of a positive nature such as "he kept us informed all the time" (NSW Parent).

Bearing in mind that most child complainants were female, the gender of the investigating officer again featured strongly with 78% of children commenting specifically. Three children were interviewed by a female officer; in one case the child was given a gender choice. Male officers interviewed another three children, with all children expressing a preference for a female officer. "It's easier to talk to a woman about that stuff" (NSW Child 14yrs). In another case, the child was interviewed by a male and a female.

Some children commented on giving their statement to police including the length of time taken. One child had to give her statement over a period of three days, "it was stretched out because I couldn't handle it…I was sick…I couldn't eat…I was so worried" (NSW Child 16yrs). Another child took seven hours to give her statement. One child mirrored the negative Queensland comments regarding the level of detail required. "They wanted to go into like really, really, bad details" (NSW Child 13yrs). Another child was "scared but I wanted to get it over and done with" (NSW Child 15yrs).

Western Australia

Disclosures of abuse by Western Australian children were to parents, grandparents, friends or family members who then reported the abuse to police. In one case the parents and the child's psychiatrist persuaded her to report the abuse. In two cases the child reported the abuse directly to the police. Police initiated contact in one case and in another case the child did not know who reported the abuse.

A number of children commented on the difficulty of making the decision to report. Some were in agreement with their parents to report while others reported somewhat reluctantly, saying, "I didn't really want to but they convinced me, so I did" (WA Child 12yrs) "I sort of did it for my parent's benefit," (WA Child 17yrs) and "I didn't like to report it for a little while because I think I was too scared" (WA Child 16yrs). Two children were not given a choice and were not happy with this. As indicated in the other states, where police initiated contact it was a negative experience for the child. "I was confused and I didn't know what was happening" (WA Child 17yrs).

Half the children commented on the helpfulness of police with the majority of these indicating that the police were helpful and tried to make the child feel comfortable. Parents also indicated a positive response in relation to police. "The police were… compassionate and answered all questions" (WA Parent).

Gender choice was again a strong theme for Western Australian children with 83% of the children providing specific comment. Of these, two-thirds were interviewed by one or two female officers, with only one child experiencing a negative with an inexperienced female office, "she didn't know what questions to ask" (WA Child 17yrs). The remainder of these children stated that they preferred a female officer because "I feel easier to connect with a female" (WA Child 16yrs) and "because it was really personal I'd rather it be a woman" (WA Child 14yrs). Four children who were happy with their female officer would also have liked a female indigenous officer. Eight of the children who commented were interviewed by either one or two male officers. Of note, one female child was given a gender choice and chose a male officer, while another child was told a female officer would not be available for a few days and agreed to be interviewed by a male officer. The latter did not feel comfortable with the male officer. One child stated that the male officer was "very aggressive" (WA Child 17yrs) while taking her statement over a period of six days. Two children were interviewed by a male/female team.

The process of providing a statement to police was also highlighted by Western Australian children. Consistent with comments from children in Queensland and New South Wales regarding the level of detail required, "the process was gruelling… the detail… it was really shocking going through it" (WA Child 16yrs). Most of the children found the actual abuse difficult to talk about, "it was scary just thinking about it all over again… and having to say it" (WA Child 11yrs). One

parent said that the police did not obtain a full statement from her child because the child took six months to tell the parent everything.

In summary, the initial experience with police was generally a positive one. Understandably, the interview process was described as a gruelling and stressful experience. A consistent opinion across jurisdictions was the view by the children that they wanted to choose the gender of the investigating officer.

Waiting For Committal and Trial

The time between reporting and trial was particularly stressful for all children in all jurisdictions. The length of time between reporting and trial ranged from 8 to 36 months across all jurisdictions with an average wait of 18.2 months. In Queensland the average wait was 20.8 months, in New South Wales 16.4 months and in Western Australia 17.5 months.

It should be noted that children in Queensland and New South Wales waited for an average of 7.2 months and 9.4 months respectively for committal proceedings followed by the trial. However, Western Australian children were not required to appear at committal. In addition, with the facility of pre-recording all evidence, almost one-third of child complainants did not have to wait to give evidence at trial.

Queensland

The average time between reporting and committal for Queensland complainants was 7.2 months with a range of 2-12 months. The complainants considered that the wait was too long with one child commenting, "it seemed like it took forever and we weren't informed. I had no idea what was going on" (QLD Child 15yrs).

Queensland parents commented on the effect that waiting between reporting and attending the committal had on their child. In two cases the alleged offender still lived next door during this period. One child suffered nightmares and sleep disturbances. All parents commented negatively about the effect waiting had on their child(ren), "she was very abusive and angry. We tried to get counselling but no one would do it," (QLD Parent) and, "we tried to keep it so he didn't keep his life focussed on just that" (QLD Parent). One parent commented that by the time committal had come around her child had forgotten most of the detail of the event.

In Queensland the average wait between reporting and trial was 20.8 months. Most Queensland children commented on the difficulty of the wait for trial. The wait was frequently compounded by repeated adjournments and the need for re-trials. One child was subject to three adjournments in a two-year wait for trial. Two children were subject to two adjournments prior to first trial followed by a twelve-month wait for a re-trial because of a hung jury. Another two children were also subject to a re-

trial after a hung jury. A child who waited 17 months for trial said "the wait was difficult because when we finally got there and they were questioning me – I didn't know most of the answers" (QLD Child 11yrs). Another child commented that "sometimes it was really annoying, because I would think too much and I'd get all jumbled up" (QLD Child 14yrs). One child described the effect of waiting.

> It was terrible because I was just so fretting, in the middle of the night I would wake up and go – 'Dad are we going to court tomorrow?' And he'd go 'no, we don't know when' and I would have bad dreams every single night for like weeks and weeks and weeks (QLD Child 13yrs).

One parent said that the period between committal and trial was particularly stressful because of the rough treatment her child was subject to at committal. "You sort of know what's coming but you are not sure how it is going to be" (QLD Parent). Another parent reported how her child became "very withdrawn and dragged down" (QLD Parent) during a 15 month wait for trial. Queensland parents also argued that the length of time between reporting and trial was detrimental to the child's case. "It's no wonder he got off because she couldn't remember every detail of what happened. I mean how can you expect a nine year-old girl to remember what happened two years ago?" (QLD Parent). The view of many parents was summarised by one father. "I mean the bottom line is that the person who should not be suffering is suffering" (QLD Parent).

New South Wales

The average waiting time for committal from reporting to trial for children in New South Wales was 9.4 months with a range of 3-12 months. One child commented that her committal was adjourned three times. She had to fly to Sydney each time and was sent home each time. One child said, "it was always on my mind" (NSW Child 14yrs). Her parent commented that the waiting time was "very stressful" (NSW Parent) for the child.

In New South Wales the average length of time between reporting and trial was 16.4 months. Children's comments focussed on the trauma of waiting, the inability to get on with their lives, the anger at repeated adjournments, and in some cases the inability to share the harrowing abuse evidence with mothers. One child said it was hard "knowing he was out there somewhere … allowed to walk around" (NSW Child 16yrs). Another child explained the effect of enduring three adjournments and one hung jury before reaching trial. "It would be like another six months or something and then they would say that it's off again… we were just waiting and waiting for it" (NSW Child 16yrs).

New South Wales children also highlighted the ability of a committal hearing to unsettle and traumatise the child prior to giving evidence at trial. One 13 year-old child recounted the effects of a tough committal hearing.

> Because of the hearing I was really emotional until the trial. When everyday came closer to the trial I was getting more tense and all that. Then I started to have nightmares which were telling me to kill myself… Everyone was saying that it (the trial) is bigger than the hearing and they'll be yelling at me more, and that kind of scared me because I don't like getting yelled at (NSW Child 13yrs).

The child then waited two years for the trial and went on to describe how hard it was not being able to discuss what had happened to her with her mother.

> I wasn't allowed to speak to Mum until after the trial was over. So I wasn't allowed to bring out my feelings to Mum… and then when there was a hung jury, I still couldn't say anything to Mum (NSW Child 13yrs).

The parent of 14 year-old complainant said that "the longer it dragged on the harder and harder it got for her" (NSW Parent). Another parent described how during the 12-month wait for trial her daughter was too frightened to leave the house. During the commission of the offences, the alleged offender had taken her to Bangalow State Forest and threatened to kill her if she told anyone. Consequently, "I feared for her life and she feared for her life too" (NSW Parent).

Western Australia

In Western Australia the average length of time was 17.5 months between reporting and trial. Most of the children (83%) commented on the wait for trial. One child said the wait was "like a time bomb waiting to go off inside me" (WA Child 14yrs). Other children reiterated the detrimental effects of a long wait. "That was two years of my life just waiting and worrying" (WA Child 16yrs).

Another child who waited 2 years and 3 months to go to trial said "It was really bad, I had nightmares like anything – just the waiting. It gets to a stage where you feel nobody's on your side" (WA Child 16yrs). She went on to explain

> The waiting is so hard because you don't feel secure – I think because the courts have made you feel like it is never going to be over and done with. They are just taking so long, and they just don't understand the pain that you go through. It's really hard (WA Child 16yrs).

Other children also commented on the effects of the wait for trial. "I just wanted to put it behind us – I wanted to forget about it" (WA Child 17yrs). "I just wanted to get it over and done with" (WA Child 14yrs). "That's all I could think about – I was really moody and angry all the time" (WA Child 16yrs).

Western Australian parents substantiated the negative effects of waiting for trial. The mother of a twelve-year-old child said "she had quite a lot of nightmares waiting for trial. She was just starting to come good and then we got a trial date and it was panic again…" (WA Parent). Another commented that "It was like her life was on hold" (WA Parent).

In summary, the wait for trial in all jurisdictions was one of the most problematic features of the process for the children. The trauma of waiting was compounded for those complainants in Queensland and New South Wales who were also required to give evidence at committal. The committal experiences clearly distressed the children and made the wait for trial even more upsetting.

Waiting To Give Evidence

The delay in presenting their evidence to the court at both committal and trial was discussed by all complainants. Waiting to give evidence in the precincts of the court was a nerve-wracking and difficult time for most children. In combination with pressures already on the child, inadequate facilities and hours of waiting exacerbated the level of stress suffered by the child. This section examines the data from children and parents on the difficulties of delays in presenting their evidence to the court at both committal proceedings and at trial.

Queensland

Witness rooms were often windowless and typically furnished with nothing more than a table and chair. Queensland children waited in witness rooms between one hour and 4 days to give evidence at committal or trial with most children spending an average wait of just under one day. The waiting rooms left much to be desired according to the children, "cold… boring… horrible… it was really small, really stuffy and really bare" (QLD Child 15yrs). "Not even a plant to look at…it was brown" (QLD Child 12yrs). "There was nothing to do" (QLD Child 10yrs) and "it was pretty boring for three or four hours" (QLD Child 9yrs). Only one waiting room in a particular courtroom outside the metropolitan area had waiting areas with tea and coffee facilities, a toilet, and a TV.

To add to the bad conditions one child complained that "we weren't allowed outside the room" (QLD Child 11yrs). Children also reported having to walk past the accused to access toilets. One child said she was "shuffled around from one room to another room to avoid seeing the offender" (QLD Child 12yrs). Another child could not even access a witness room and had to wait in the corridors and be "moved every time the offender came out of the courtroom" (QLD Child 10yrs).

Parents commented specifically on the effect that waiting to give evidence had on their child. Most commented negatively on the amount of time their children spent in the witness room, "there was a lot of waiting for it" (QLD Parent). One parent commented negatively on the waiting room, "the room was pretty

dingy…there wasn't much room and there were quite a few of us in there" (QLD Parent). Parents reiterated the stress on the child of just waiting to go into court and give evidence.

New South Wales

New South Wales children commented on the poor waiting conditions in the courts. In the most extreme case, a child who was required to attend court at committal for five days straight from 9am until 4pm, "in a little room with nothing…he was allowed to walk around and we weren't" (NSW Child 13yrs).

The children also experienced lengthy waits of between 2 hours and 5 days and described becoming increasingly nervous as the hours passed. "We waited in exactly the same room with nothing. I remember because it was for so long. It was about three days before I got in" (NSW Child 16yrs). Another child waited for three days in a witness room before being told the trial was aborted. "It's really hard the waiting and when everyone keeps coming and going saying you're not going in. Cause that's putting more pressure on you" (NSW Child 13yrs). Her mother described how after three stressful days, her daughter said "I'm not going to believe anything the police tell us again. Because they kept coming in and telling us it is starting and three days later – sorry no – its not starting" (NSW Parent). Another child whose trial was adjourned three times had to wait each day in the witness room until 4pm each day (NSW Child 16yrs).

Western Australia

The wait for children in Western Australia was a much more pleasant experience. Children were protected in the secure environment of the Child Witness Service (CWS) within the court building complete with support personnel, activities, videos and games to occupy the waiting time. Except for one child who had to wait a day due to the previous case going overtime, children in Western Australia reported only brief waits (1 or 2 hours) before being called to give evidence in the CCTV rooms within the CWS facility.

In summary, there was an overwhelming difference in the way in which children in Western Australia experienced the wait to give evidence compared to those in the eastern jurisdictions. Clearly the lack of child-friendly facilities in the eastern jurisdictions added further to the stress of the whole proceedings.

Giving Evidence: Seeing the Accused

Almost all child complainants (in Queensland and New South Wales) expressed fear at seeing the accused during court proceedings in two contexts. They were frequently confronted with the accused outside the courtroom before, during and after giving evidence. In addition, a number of factors determined whether the

child was forced to come face to face with the accused in court at committal and trial. Those factors included the availability and use of CCTV and the use and placement of screens. Children in Western Australia were protected from seeing the accused at all stages of the process.

Queensland

In Queensland, children repeatedly commented on the trauma of having to be near the accused and fear of anticipation of seeing the alleged offender. The court has the discretion to permit the use of screens and CCTV both at committal and trial to assist children in not having to come face to face with alleged offenders.

All Queensland children, except one, were required to give evidence and face cross-examination at committal. None were permitted to use CCTV. All of these were required to give evidence live in the courtroom. Of these, 30% were also refused the use of screens during presentation of their evidence.

Use of the screens did not prevent the child being disturbed or distracted by the accused. In one case the accused "rattled his handcuffs and stuck his head up" (QLD Child 13yrs). Two children said that they could see the alleged offender's feet shuffling under the screen, which made them feel uncomfortable. In another case the screen was placed in such a way that the child could see the alleged offender's reflection in the glass. Most children appreciated the screen. "The screen was good. I didn't have to look at him" (QLD Child 14yrs). Another child was provided with a screen but could still see the face of the accused.

> I could still see him, his face. Because the screen wasn't big enough, because I am like quite little, so the screen didn't do anything really. The screen was just covering the desk. … I didn't feel nice seeing him – just remembering (QLD Child 14 yrs).

Just prior to trial, 29% of Queensland offenders entered a plea of guilty. Of those cases where the trial proceeded, all children (100%) were required to face the accused in court during evidence-in-chief and cross-examination. None of the child complainants were permitted the use of CCTV and 50% were refused the use of screens. "That was the worst part… I had to see him.. I just tried to focus my eyes on the prosecutor" (QLD Child 15yrs). An eleven year-old child who was not permitted a screen, explained the view of most complainants that the thought of seeing him "scared" her and she would have liked it "if they had covered him with a screen so she couldn't see him"(QLD Child 11yrs).

New South Wales

At committal proceedings 33% of children in New South Wales were required to give evidence. Of these cases, two-thirds were not permitted to give

evidence via CCTV. In one case, the child was not permitted the use of CCTV, screens or even a support person. A complainant who gave evidence via CCTV recounted how technical problems meant she had to stand for three hours while giving evidence.

> Because it was only last year, I was a tad small, and there was a seat to sit down, but they couldn't move the camera or the microphone so I had to stand up for like three hours – just standing there' (NSW Child 13yrs).

The children indicated the negative effect of having to see the accused in court. "I felt so uncomfortable. I didn't want to be in there. It was the worst thing having him stare at you" (NSW Child 16yrs). One parent commented that they "had to walk past the room he was in" which unsettled the child (NSW Parent).

A number of parents commented on the use or otherwise of screens and the fact that the court would often not make a decision to allow the screens until just before the event. One parent stated they "fought tooth and nail" (NSW Parent) for the screen. Two parents commented that their children were afraid of seeing the accused in court. Another parent confirmed that the accused "shuffled" (NSW Parent) his feet under the screen when the child was giving evidence at committal.

The use of screens and CCTV varied considerably at trial in New South Wales. Of the children whose trial proceeded, 57% were permitted the use of CCTV and 43% were refused. Those children who were refused the use of CCTV were also refused the use of screens. One child who was not permitted to have the accused screened said "we shouldn't have to see him. He was giving me dirty looks and stuff like that" (NSW Child 16yrs). Another child said "I was so scared to death – he looked at me and gave me a dirty look" (NSW Child 15yrs). The parent of a child who was sexually abused by the alleged offender for 4 years asserted that the use of measures such as CCTV was crucial.

> I watched my daughter mortified at the prospect that she may have to face the offender in court, it nearly destroyed her – the fear of actually having to see this man again, who had actually threatened her with death if she told anyone. I do not see what difference it makes to the court whether evidence is given by video, but it makes a huge difference to the victims. It gives them extra courage to carry on and also saves them the humiliation of being in a packed courtroom (NSW Parent).

Western Australia

The fear of seeing the alleged offender however, was generally not an issue in Western Australia where children are not required to give evidence in court. Stringent steps were taken to ensure that while children were in the precincts of the

court they were kept within the facilities of the Child Witness Service (CWS). Not one child in Western Australia was required to face the accused in court at trial as the use of CCTV is standard procedure. The only child who faced the accused in court made the choice herself to confront him.

Western Australian complainants were spared the additional stress experienced by complainants in the eastern states. All Western Australian children reiterated the importance of not having to see the alleged offender and expressed appreciation of the protection offered. "I didn't want to see him at all" (WA Child 11yrs). "I never got to see him.. so that was better" (WA Child 14yrs). "It would have been scary to see him"(WA Child 13yrs). The use of procedures such as CCTV and pre-recording were applauded by the children because "I didn't have to look at him" (WA Child 14yrs). The parent of a 14 year-old said her child was constantly protected from coming face to face with the accused. "She was actually on another floor in the courts, so there was no way she could accidentally bump into him. It was very well organised" (WA Parent).

In summary, being confronted by the alleged offender both inside and outside the courtroom disturbed complainants. In Queensland, CCTV was not used at all and the use of screens was inconsistent for children of all ages. In New South Wales, some children were refused the use of CCTV and the use of screens. Western Australian children were protected at all stages of the court process from coming face to face with the accused.

Giving Evidence: Evidence-in-chief

Difficulties associated with giving evidence-in-chief at committal and trial were affected by issues such as whether the child was required to give evidence live in court, whether or not screens or CCTV were used, and the length of time which had elapsed since the abuse was first reported. The children elaborated on these aspects.

Queensland

A number of Queensland complainants provided specific comment about evidence-in-chief at the committal. Many of the children experienced few problems with the questioning or with the prosecution. However, for some children "the whole experience wasn't good" (QLD Child 15yrs). One child said she was really nervous and "kept stuffing up," (QLD Child 11yrs) and another child couldn't remember any of the details from her statement because she had lost her copy of the audiotape and was unable to refresh her memory prior to giving evidence. One child explained how she approached giving evidence.

> It was like an exam where you have a paper that you have to do and then you have to remember what you said on the paper and then they ask you what was on the paper (QLD Child 14yrs).

All Queensland children whose trials proceeded were required to give evidence in court in the presence of the accused. Half of the complainants were not permitted screens and even though applications had been made to use CCTV – these were also denied. Despite, these difficulties complainants generally seemed to appreciate the manner in which the direct examination was conducted by the prosecutors. Comments from children focussed on the friendliness of the prosecutor and behaviour towards the child. "He was good, he was nice to me" (QLD Child 14yrs). The parent of a 10 year-old child who had to give evidence in court said "she was quite overwhelmed by the whole thing" (QLD Parent).

At trial, not one Queensland child was provided with the use of CCTV. The following comments reiterate the views of most children and parents in relation to the need for CCTV.

> The CCTV thing. I think it should be made compulsory, because it is kind of freaky being in there. We tried to get it but our lawyer said there was no chance of him getting it through… Basically he said that you are not going to get it because the defence lawyer would object to it (QLD Child 14yrs).

Her mother said a television screen on a portable shelf was placed in front of the accused so that it would block her line of sight.

> And I kind of feel like we were given second best. We asked for either CCTV or a screen. And CCTV is obviously not happening in Queensland. When we were told about the screen being wheeled out we were told we should be grateful for that (QLD Parent).

New South Wales

Children in New South Wales reported no significant problems with the evidence-in-chief at committal. At trial, 43% of children were refused the use of CCTV and none were permitted the use of screens. For some children, giving direct evidence was not without it's difficulties including some technical problems with CCTV facilities.

Another child who had already given evidence at an earlier mistrial presented herself in court to go through the ordeal again. "I was a total mess. A mess because there I was telling another lot of jurors…" (NSW Child 16yrs). In similar comments to Queensland complainants, children also reported being sensitive to what were perceived as hostile or insensitive comments by the prosecution.

> I was up on the witness stand and I was telling my story and it got to the personal bits and I started crying. I actually had to leave the courtroom… and my prosecutor came out and told me how stupid I was for starting to cry, and that was pretty upsetting (NSW Child 16yrs).

Western Australia

30% of children in Western Australia pre-recorded their evidence-in-chief and cross-examination months prior to trial, negating the need to give evidence in court. The remaining 70% were all permitted to give evidence CCTV, thereby alleviating the stress of physically being the courtroom and the embarrassment of discussing their experience in the presence of a court full of strangers. One of these children however, chose deliberately to give evidence in court in order to confront her abuser. Although for most Western Australian children "just having to talk about it again was difficult" (WA Child 16yrs), giving evidence-in-chief was not considered a big problem. Clearly the process was uncomplicated by the child not being in the courtroom with the alleged offender. Nearly half of Western Australian children specifically commented that giving evidence-in-chief was "no problem". Some children indicated particularly positive feedback with comments such as "That was fine, just giving my point of view about things" (WA Child 17yrs) and "it was good because I'd already done everything before and I felt comfortable" (WA Child 14yrs). The preference for giving evidence by CCTV was expressed by nearly all the children. "With the CCTV everything was very clear and you could hear and see everything" (WA Child 14yrs).

The use of CCTV facilities and thorough witness preparation clearly contributed to helping the children to at least feel comfortable enough to give a reliable account of the abuse. One child described how she prepared herself for giving evidence.

> I know what happened and I am the only one with those feelings. I can't go through and think – wow, I get such horrible feelings or this is so uncomfortable or something. You've just got to get rid of those thoughts and just tell it like it's a story and that's what I did. Just sat there and told it like a story (WA Child 16yrs).

When children were not permitted to give evidence via CCTV, children in Queensland and New South Wales indicated that being in the courtroom in the presence of the jury made them uncomfortable, and that it was embarrassing and scary talking about the abuse in front of the jury. "If they were looking at me, they quickly looked away… it was like they hated me" (QLD Child 14yrs). "I was embarrassed because they kept looking at me" (QLD Child 13yrs). In summary, children who were able to give evidence-in-chief with the aid of pre-recording or

CCTV found the experience less stressful than those children who were forced to appear in the courtroom with the accused.

Giving Evidence: Cross-Examination

The overwhelming area of concern for all children was the experience of cross-examination and the attitudes and behaviour of defence counsel. Part Two of the findings (see p 74) presents an in-depth case study of a committal cross-examination. The difficulties faced by all child complainants are depicted in the following comments.

Queensland

The comments of Queensland children focussed heavily on the their experience with defence counsel during cross-examination. The traumatic experience of cross-examination was compounded by the fact that of all the children who were required to give full evidence at committal (all except one), none were permitted the use of CCTV. All children commented negatively on their interaction with the defence who they said made them feel bad about themselves and intimated that the children were either stupid or lying. The use of confusing questioning was frequently cited. "He asked lots of difficult questions and tried to mess me up" (QLD Child 14yrs). Without exception, the children found the defence lawyers to be intimidating. "He got me all stressed and confused. He was yelling at me. He was jumping up and down, banging his thing down at me" (QLD Child 14yrs). Another child focussed on the repetitive questions and being called a liar.

> Every second word was you're lying. I was getting really annoyed with him. I said, I'm telling the truth. …And he was like, I put it to you blah blah blah, and then he'd say something else in that and then he'd make it like, five questions in one and he'd reword it again so it'd be like asking the same question again and again and again (QLD Child 14yrs).

More than half the parents commented on the effect the cross-examination at committal had on their child(ren). All parents commented negatively about the defence lawyers their children encountered, "he was horrible…very overpowering to the child" (QLD Parent) "…he was really rough on her" (QLD Parent). One parent said that their child was very upset when she came out of the courtroom, "she was a mess" (QLD Parent). One parent who supported two children through the courts said that the cross-examination was the "hardest bit" (QLD Parent) of the whole process.

Perhaps understandably, the experiences of children with defence counsel were particularly stressful and traumatic. Children frequently reported the intimidating experience at committal unnerved them for the trial. "I wasn't looking forward to seeing that barrister again… He was like a gentleman compared to last

time – he had to be nice in front of the jury this time" (QLD Child 14yrs). Children found it disturbing to be accused of lying, and making everything up. A child who was cross examined for four and a half hours said "He was so mean to me… he made me cry… he just asked all these questions and he said 'you're lying, you're lying'" (QLD Child 11yrs). A parent identified one of the tactics employed by defence.

> I think that part of this guy's plan was to bore them senseless. To throw up so much mud that some would stick. They would be so clouded about what was real and what wasn't that they wouldn't know what to decide (QLD Parent).

New South Wales

Cross-examination also drew considerable response from New South Wales children. Although some children required to give evidence at committal were permitted the use of CCTV, the comments indicate children experienced similar treatment to those in Queensland. "He was trying to get me to say all this stuff wasn't true" (NSW Child 15yrs), and "he made me angry and upset…he implied that I asked for everything" (NSW Child 16yrs). One parent commented that when the barrister called her child a liar, "it nearly tore my child apart" (NSW Parent).

In New South Wales all children were cross-examined at trial although only 57% were permitted the use of CCTV. Those children who were required to appear in court in the presence of the accused reported considerable distress. One child who was not permitted a screen or a support person described her experience.

> This time I thought the court was ridiculous. The first time it was like more professionally done. Mr X (the accused) was actually talking to his guy while I was talking – and he was passing notes. Everyone in court was just watching me get all this. And making me feel worse. And I would cry and they wouldn't do anything or help me. I didn't have a support person, we had nobody. So I was in a court full of old people that just wanted to be grumpy at me. I didn't really want to be in there so I tried to answer the questions as quickly as I could so I could just get out of there (NSW Child 16yrs).

The children reported that being accused of lying was very upsetting. One child described a gruelling cross-examination spread over two days.

> His solicitor came on and did it for three hours. He really pushed the point and I just broke down. At 4 o'clock they stopped and I had to come back the next day. It was uncomfortable because all night I was just thinking about court. He was really mean… yea he kept saying "you're lying, you're lying, I know this is lies". I

> felt pretty upset because I knew it was the truth (NSW Child 13yrs).

Another New South Wales complainant, who had three adjournments before finally reaching trial, was cross-examined for one and a half days. "He kept going over the whole thing again and again and kept saying I was lying" (NSW Child 16yrs). Other comments indicated the children knew the role of the defence counsel, but this did not ease their distress. "She was doing her job, but she made me feel really bad" (NSW Child 11yrs). Her mother reported that after the cross-examination "she bawled for hours… she didn't trust anyone after that" (NSW Parent). Another child said "he was the nastiest horrible man I have ever met in my whole life" (NSW Child 16yrs).

Western Australia

Children in Western Australia were spared the distress of facing cross-examination in the courtroom. The degree of separation offered by the comprehensive use of CCTV and/or pre-recording clearly reduced the trauma of cross-examination for children in Western Australia. "Its easier because it's like if someone is yelling at you through the TV there, its not as bad as someone yelling at you from like five feet away" (WA Child 16yrs). The same child offered some insightful speculation for the behaviour of defence counsel. "Seriously, they would have to have some sort of huge financial kick back because I don't know how they can live with themselves doing that sort of thing" (WA Child 16yrs).

While children still reported being upset by accusations of lying and repetitive questioning, the secure environment and thorough preparation by the CWS, the use of CCTV, and the shorter length of cross-examination facilitated the eliciting of reliable evidence from the child.

> He was very rude… what he was saying to me. Like I didn't feel like I was fifteen or whatever, I felt like I was so little, like I was a little girl. But I was on top of him and I was going to prove that this did happen (WA Child 16yrs).

One child commented that "he basically called me a liar all the time… I was expecting it. At first I got angry about it, but I just kept my cool" (WA Child 17yrs). Another child specifically explained the benefit of CCTV. "It would be highly inconvenient for them – if they are trying to intimidate a witness to have CCTV" (WA Child 16yrs). A fourteen year-old girl reported that

> Defence counsel spoke very loud and it was like he was always having a go at me. But I just tried to stay calm and told him it wasn't true… I was glad I wasn't in the courtroom but on the CCTV for this (WA Child 14yrs).

The difficulty of the process is still evident however. “I left the room a couple of times crying. It seemed like a long time. I just hated it” (WA Child 11yrs). “He was nasty, he wouldn’t believe me” (WA Child 12yrs).

> I think he was trying to confuse me – and that’s awful because in my mind I’m just trying to have my story out there and just to get it out. And then I’ve got some guy twisting my words and saying no, no, no (WA Child 16yrs).

In summary, all complainants reported the cross-examination to be the most distressing part of the court process. The behaviour of defence counsel and being accused of lying were particularly traumatic for the children. All children in Western Australia faced cross-examination once only and all children were able to use CCTV or to fully pre-record their evidence. A more detailed presentation of a cross-examination is provided in Chrissie’s Case Study (see p 74).

Verdict and Sentence

Across all jurisdictions, 63.5% of cases involving child participants resulted in convictions, while 36.5% of cases resulted in an acquittal. The conviction rate appears quite high, and this may be, at least in part, due to the fact those children who were successful feel more able to discuss the process. Those most traumatised may not have volunteered to be interviewed.

Queensland

In Queensland 55.5% of the complainant’s cases resulted in conviction. 27% of offenders entered a guilty plea prior to trial thereby negating the need for the child to give evidence at trial. Those involved in cases that did not secure a conviction (44%) all expressed strong anger at the outcome. “I felt so angry – I just wanted to punch him… he should have gone to jail” (QLD Child 11yrs). One parent said that after her child found out about the verdict “she was angry – and the anger still hasn’t subsided” (QLD Parent). For many, the fear of not being believed was exacerbated when the alleged offender was acquitted. “It was my word against his… didn’t they believe me?” (QLD Child 10yrs).

One child’s story (QLD Child 16yrs) in particular raised the issue of comparative sentencing. The confused child related how the offender received a 5-month sentence for committing unlawful carnal knowledge (after pleading down from rape). On the same day, the same offender appeared in court on charges of stealing and damaging park property and received a 9-month sentence for those charges. The child said “this isn’t fair” (QLD Child 16yrs). The child’s mother was angry that the prosecutor pleaded the charges down despite their objections and says it was wrong that “he got longer for stealing park property than he did for unlawful carnal knowledge and causing a pregnancy on top of that” (QLD Parent).

Children widely expressed concern at the amount of time that would actually be served by offenders. For example, one child (QLD Child 15yrs) expressed disgust at the fact that although the offender was sentenced to 2 years, he will be eligible for parole after 10 months.

New South Wales

In New South Wales (after pleas) 55.5% of cases resulted in convictions. 33% of offenders entered pleas. All children (44.5%) expressed anger at acquittals and this is reflected in the tone of children's comments. "I was just so angry I just wanted to go after him and kill him myself.. I couldn't believe it, it was just as if they were calling me a liar" (NSW Child 16yrs).

Plea/charge bargaining was also a problem for some children in New South Wales. One mother expressed anger at a charge bargain which saw the offender plead down from multiple counts including indecent assault, attempted sexual intercourse and sexual intercourse to one charge of intercourse with a child under the age of 12 years.

> I would like to get across that my daughter and I found it extremely difficult that this offender was allowed to plea bargain down to a minimum of one charge. Until recently we were not told what the actual charges were brought down to and to my horror – he was allowed to plead guilty to one charge of sexual intercourse with a child of twelve (NSW Parent).

As with their Queensland counterparts, children in New South Wales expressed disgust at the sentences – which ranged from 200 hours community service, good behaviour bonds through to 4-year sentences for a range of charges. "It sucks – he should have got longer" (NSW Child 15yrs).

Western Australia

The cases of 69% of children in Western Australia resulted in convictions. Again, the issue of belief comes through strongly in children's comments. One male complainant who secured a conviction said "I thought for so long that no-one would believe me…(the offender) told me that no-one would believe me" (WA Child 16yrs).

One 11 year-old says she was worried for months that the accused would not be convicted and says the verdict was important to her.

> Then the judge would know that he did it and he would get charged for it and have a record and everything. So he wouldn't

> be able to try it again… and then everyone would believe me then (WA Child 11yrs).

The child was devastated when the alleged offender was acquitted and expressed distress that "they didn't believe me" (WA Child 11yrs).

Strong anger was also expressed by Western Australian children who did not see the alleged offender convicted. "It happened to *me, I* was there - and *he* gets nothing" (WA Child 13yrs). A parent also expressed frustration and anger at an acquittal.

> I did the right things you know, I kept within the law. I thought okay I'll let the judicial system do it for me. I would have been better off going over there and punching him in the mouth. It would have been more satisfying (WA Parent).

In those cases where convictions were obtained, more than half expressed the view that the sentences were inadequate. When the offender was sentenced to 140 hours community service one child commented, "after the things he did to me it really sucks" (WA Child 16yrs). Another child argued that "they shouldn't be let out early because they probably don't learn their lesson" (WA Child 12yrs).

In summary, across all jurisdictions the comments of the children centred on the importance of being believed, anger at acquittals and inadequate sentences. Plea-bargaining accompanied by a lack of consultation was perceived as a problem and contributed to the anger felt by complainants and parents.

Other Matters

In addition to the key areas of concern outlined above, children also raised issues concerning judges and magistrates, court support, prosecutors, legal language and after-court follow-up.

Judges and Magistrates

Some children in Queensland and New South Wales commented specifically on the Magistrate presiding over the committal hearing and frequently referred to that person as the judge. Children indicated they understood that the magistrate's role was to listen to the court proceedings and there were no negative comments about lack of interaction with the magistrate. In one case the child commented, "he was good. He got up the barrister for badgering me" (QLD Child 14yrs). One child who had a male magistrate commented that there was only one female apart from herself in the courtroom, which made her feel uncomfortable. Three children considered it worth commenting that they had a female magistrate.

Comments by children about the judges were also limited but worth noting. In Queensland, comments frequently focussed on whether the child thought the judge was nice or grumpy. "He was a bit old and cranky" (QLD Child 13yrs) or "He was nice" (QLD Child 12yrs). Children also noted whether the judge was male or female, and whether they spoke to the child and appeared to listen carefully. "He didn't do much – just listened" (QLD Child 16yrs). "He was grouchy looking and he had this real sour face on him" (QLD Child 14yrs).

Similarly in New South Wales children reported minimal contact with the judge and one child indicated appreciation at a friendly gesture from the judge. "The judge said at the start to just go easy on her because she's only young" (NSW Child 13yrs).

Children in Western Australia also indicated gratitude when the judge expressed some positive comment. One child was particularly impressed by a judge who thanked the child for coming and said she "hoped everything goes okay for the future" (WA Child 17yrs). Children also recalled helpful comments that made the child feel more comfortable. "The judge tried to make me feel comfortable before it all started. And she asked me if I wanted a break" (WA Child 14yrs). "The judge asked me if I wanted to have a rest" (WA Child 14yrs).

Court Support

All Queensland complainants had court support from PACT (Protect All Children Today) who provided children with information about the court process, emotional support and activities while waiting to give evidence. Queensland children generally agreed that court support "helped me get through it" (QLD Child 15yrs) and "made it easier" (QLD Child 14yrs).

Children in New South Wales expressed similar appreciation of court support personnel from the WAS (Witness Assistance Service). "She was the only one that kept trying – she was there, and she was the only person that was there from day one to the end" (NSW Child 16yrs). However a small number of children were not permitted a support person in court at trial.

> They wouldn't let my support person come in with me… I didn't want to be in there unless she was there because I had no one – I didn't know anyone and she made me feel safe (NSW Child 16yrs).

Although the positive interaction with court support personnel was appreciated, it was not possible to always ameliorate the overall effect of the court process. "It helped a little – but I was still scared" (NSW Child 15yrs).

The comprehensive Child Witness Service (CWS) in Western Australia drew widespread comment and support from child complainants. "You feel safe in here –

that's the best thing – in here it just feels like nobody can get to you and you know it" (WA Child 16yrs).

Overall, there were no negative comments in relation to support offered to children. All children and parents in each state indicated that they valued the support offered by court support personnel and often considered "it (CWS) was the only good thing about going to court" (WA Child 16yrs) and "without her (court support worker) I don't think we would have been able to make it" (QLD Parent).

Prosecutors

When asked about their experiences with crown prosecutors, there was a wide variation in the types of responses from children. Clearly in each state, there are those who are able to more easily develop a rapport with children, and others who are not. The responses of the children are indicative of this.

Queensland

25% of children indicated they met the prosecutor prior to the committal hearing, "he introduced himself and told me what was going to happen" (QLD Child 14yrs). A significant proportion (75%) did not meet the prosecutor either prior to, or on the day of the committal.

At trial in Queensland, children reported varied experiences with prosecutors. Children generally met with the prosecutor on only one occasion prior to trial (88%), with a small number of children indicating they were not introduced to the prosecutor until the morning of the trial (12%). Children who met with prosecutors felt more comfortable and were able to ask questions about the process. Parents also indicated a variety of opinions with some commenting "he was very thorough" (QLD Child 14yrs) and other comments such as "the prosecutor had to ask me what was going on … obviously he hadn't had time to thoroughly study the file" (QLD Parent).

New South Wales

66% of children met with the prosecutor prior to the committal proceedings. The children indicated that they appreciated the information about the process and the opportunity to meet the person who would be questioning them. In one case the prosecutor met with the child on five occasions, "I thought it was excellent…he just explained so many things that I didn't understand" (NSW Child 15yrs). Only one parent commented, saying that the prosecutor "did not do a thing" to protect her child from the aggressive defence counsel (NSW Parent).

Comments about the crown prosecutor at trial varied considerably from "he was very rude" (NSW Child 16yrs) to "she was really lovely" (NSW Child 16yrs). Children indicated they met with the prosecutor on only one occasion prior to trial.

Western Australia

Western Australian complainants met more frequently with prosecutors – on up to three occasions prior to trial. Nearly half of the children reported they met with the crown prosecutor on more than two occasions prior to trial. The opportunity to develop rapport with prosecutors was clearly a more positive experience for Western Australian children. It seemed really important to the children that they felt able to relate the prosecutor. "I need to be able to get to know a person to be able to trust them… I didn't feel comfortable talking to a complete stranger about what happened to me" (WA Child 16yrs). "I thought he was excellent – he made me feel good" (WA Child 17yrs). "She did such a good job, you could tell she really cared about her job" (WA Child 12yrs). Most children indicated that being able to spend more time with the prosecutor helped them to be more comfortable about the process of giving evidence. Children frequently referred to the prosecutor as "my lawyer".

In contrast, those parents who specifically commented on the crown prosecutor said they wanted the prosecutor to go in there and fight for their child and expressed frustration at what they perceived were the attitudes of some prosecutors. "He was defeated before he even started – he just didn't try" (WA Parent). "He said this was just like a parking ticket to him" (WA Parent).

Legal Language

Children in all jurisdictions mentioned difficulty in understanding the legal language used by judges, magistrates, prosecution and defence counsel during court proceedings.

> Some of his questions I didn't understand. I think they need to be able to do a better sentence structure for you to be able to answer it you know. I mean it even happened with my lawyer as well. She would ask me a question which I didn't understand' (WA Child 16yrs).

One child suggested that the use of incomprehensible language was a deliberate ploy on behalf of defence counsel. "He used words that I didn't understand and he *knew* I wouldn't understand" (NSW Child 16yrs).

However, a higher percentage of Queensland children (65%) indicated "it was hard to understand" compared to (11%) in New South Wales and (11% in WA). "Most of the questions that they said to me I could not understand" (QLD Child 15yrs). "They used really big words to make me sound stupid" (QLD Child 12yrs).

Although children were frequently told to ask for questions to be repeated if they didn't understand – this did not seem to address the real language barriers faced by them. An eleven year-old child said that "even asking him to repeat it – he just said it weird again" (QLD Child 11yrs).

> They said very big words. Most of them I didn't understand. They said if you don't understand a word just ask them to repeat it – yea – but they just repeated it and I still couldn't understand it - which didn't make anything better (QLD Child 13yrs).

After-court Follow Up

The lack of follow up after court proceedings appeared a problem for most children in Queensland, New South Wales and to a lesser extent in Western Australia. Eventually, most children were notified by letter of the outcome of the case, however one child says "nobody ever told me anything" (NSW Child 16yrs). "I think that there should be even a letter to come out and say look if you need anymore help, then try here, here or here" (QLD Parent). A view expressed succinctly by one child is indicative of the feelings expressed by many children - that the court process often left children with many unresolved issues and questions. "Nobody is giving me any answers and I've got so many questions" (WA Child 15yrs).

Other Effects on the Children

Children and parents reported on other effects of the legal process including the impact on education, family and relationships. Two-thirds of children in Queensland and New South Wales and one-third of children in Western Australia reported detrimental effects on their education. Both children and parents reported that school results went down markedly as the child found it difficult to concentrate during the wait for trial. "I was nervous and my marks went down" (QLD Child 14yrs). "I was always thinking about going to court instead of my schoolwork" (NSW Child 15yrs). "It was pretty hard to concentrate at school and I missed a lot" (NSW Child 16yrs). Two of these children were completing Year 10 Certificates. Both children failed to attain the certificate, with one leaving school and the other repeating the year. Another child indicated that she "was embarrassed when the police came to her school to speak with her" (NSW Child 13yrs). Four children reported that they left school because of the stress of keeping up with schoolwork and the difficult in concentration.

> It affected my schoolwork because I was usually high graded, high placed and I started to get low grades because I was scared and stuff. It was affecting my work. I was thinking about court and how it was going to end up (WA Child 14yrs).

Two children reported that they had to leave school because other children and teachers found out about the abuse and they "just couldn't handle the stigma of all that" (WA Child 17yrs). Another child lost a number of school friends and said "their parents did not want them to associate with me…I'm so lonely" (WA Child

15yrs). As summarised by one child, “you can’t function and have a normal life with this stuff going through your head” (WA Child 12yrs).

Children from all jurisdictions also discussed the effect of the legal process on their family units. Many children indicated quite severe negative effects, with two children unable to live with their families because the families supported the perpetrators. One thirteen year-old child told how she had been cut off from her parent and siblings since her stepfather was convicted. Her family believed the abuser and she said that she felt she was “being punished for something she didn’t do” (QLD Child 13yrs)

Three children said that their grandmother did not believe them (the alleged offenders were their sons). Five children said that their families were “stressed out” throughout the whole process, with one child noticing an increased incidence of conflict between family members. One child reported running away from home four times because of the stress.

One child commented specifically about the impact of the legal process on her family. She stated that she no longer had a relationship with her grandmother nor did she receive a card at Christmas from her. In addition, the child had to travel to Sydney five times in all in relation to the court proceedings, accompanied by her mother. On these occasions her siblings would be put into foster care as there was no other support available.

A number of parents responded specifically about the impact of the legal system on the family unit, with all comments being of a negative nature. The negative effects included family division and increased conflict between family members. In two cases the child was removed from the family with one guardian stating, “her mum always said she was an accident…that she shouldn’t have happened” (QLD Parent). Two New South Wales parents commented saying that their children did not trust people anymore as a result of their participation in the legal system. “It affected her with friends…she didn’t know who to trust or anything” (NSW Parent).

Some children expressed appreciation of the good support from their family members. Other children in Western Australia indicated quite severe division within their families and increased conflict between family members. Parents also commented specifically on the impact of the legal system on their family, “it’s been hard on all of us…it’s caused a lot of problems” (WA Parent). Another parent stated that the abuser had really ‘abused ‘the whole family as he was a trusted family friend.

The Right Decision

Children were asked if they believed it had been the right decision to seek justice through the court system. In Queensland, 55% of the child complainants felt

they had made the right decision to go through the legal process. The remaining 45% did not believe they had made the right decision for a variety of reasons, ranging from the outcome (acquittal) to "the legal system sucks because of how long they make you wait" (QLD Child 16yrs). The majority of children who felt they had made the right decision to report said that "even though it was horrible" (QLD Child 12yrs), they did so in order to prevent the abuser from abusing again. Another child commented that "it was very upsetting and I'm glad it's over" (QLD Child 11yrs).

55% of the New South Wales children felt they had made the wrong decision to report the abuse. 45% were happy with their decision to report. Of those children who felt they made the right decision to report the majority did it to stop the alleged offender from abusing again. "You can stop it before it happens to any other girl" (NSW Child 11yrs). "I reckon its sick how people enjoy doing it and I just want to try and get rid of them all and teach them a lesson" (NSW Child 13yrs).

Many parents indicated they felt betrayed and abandoned by the justice system. One parent said that the child's trust in everything had been destroyed by the legal system, "they basically put her down as the criminal not him" (NSW Parent). Another parent said, "we've had eighteen months of overdoses, slicing and cutting, nightmares, bulimia" (NSW Parent).

72% of the children in Western Australia felt they had made the right decision to report the abuse, "it's the right thing to do…someone has to stop creeps like him" (WA Child 16yrs). 17% felt they had not made the right decision to report the abuse, "there is too much stress with all the waiting…it's more stress than what actually happens during the abuse…I think the system stinks" (WA Child 14yrs). 11% were unsure. A parent from Western Australia commented positively about the process itself. "The system worked for us" (WA Parent). Other parents expressed negative comments, ranging from, "going through the system…what's the point" (WA Parent) to "I know she is damaged and she will never be the same" (WA Parent). One parent believed the justice process contributed to two suicide attempts during the fifteen-month wait for trial.

Children's Suggestions for Reform

Queensland

When Queensland children were asked what they would like to see changed, the most frequently mentioned issue was the length of time of the whole process. Queensland complainants waited an average of 20.8 months between reporting and trial.

> It dragged on for too long. Things like that people just want to forget about. Like it was two years later and I was still being reminded of it. And like to get over something you need to forget about it and move on and you couldn't because it was never

> finished… it was like unfinished business sort of thing that never got resolved (QLD Child 15yrs).

This view is supported by parents who maintain "the waiting is traumatic" (QLD Parent) for the child and maintained the process needed to be shortened so the child can start to heal.

Also frequently identified by the children was that "the people in the courtroom should be nicer … they were kind of mean" (QLD Child 13yrs). Understandably, the behaviour and attitudes of defence counsel played a significant part in this experience. "They could use nicer barristers…" (QLD Child 14yrs). "How the other lawyer speaks to kids – he should be nicer to kids" (QLD Child 11yrs). The harshness of the adult-centred court environment is not understood by children and the message which was conveyed to children was that they were "being punished for something" (QLD Child 13yrs).

Queensland children also indicated that they wanted reform to include them not having to see the accused, better waiting facilities in court including a "special room just for kids" (QLD Child 12yrs), and more information about the whole process. "Kids really should be told what we are getting into" (QLD Child 12yrs). Other miscellaneous suggestions for reform included more court support, more women in court, and being able to read the impact statement to the offender even if he pleads guilty "so he knew what I was going through" (QLD Child 14yrs).

Parents also pleaded for more focus on the needs of the child. Reforms cited included the need for better court facilities, "a dedicated child abuse court" (QLD Parent) and mandatory training for legal professionals.

> There should be a section specially set aside for the children, and the people that deal with children should be highly trained – even the barristers should have to do some sort of further education if they want to deal with children's cases (QLD Parent).

New South Wales

In New South Wales the length of time from reporting to trial was also the most frequently mentioned area in need of reform (average wait of 16.4 months). Children referred to the ongoing disruption to education and on the trauma of waiting. "The long wait for two years including adjournments is very traumatic" (NSW Child 16yrs).

Being treated in a hostile manner by defence counsel was also considered an important area in need of change. "The defence lawyer shouldn't be allowed to ask the same question more than twice" (NSW Child 16yrs).

Children also identified a feeling that they were being punished and that this needed to change.

> At least they could get us out of the (waiting) room for lunch. He was allowed to go out and get his lunch but we had to stay in. He was allowed to walk around outside and we weren't… that's what I mean, they make it look like we had done it to him (NSW Child 16yrs).

Not having to be in court with the accused was also supported by the majority of parents.

> So why aren't the victims of sexual assaults who are sixteen afforded the same rights with the video camera in court…even though the offences took place when they were under 16 years… bearing in mind that these children are still petrified of these offenders, and not forgetting the threats of violence and that nobody would believe them is what kept them quiet in the first place (NSW Parent).

The need for more court support was also indicated by a number of children, with children conveying the sense of isolation they feel when they have to give evidence in court.

> I think it would be good if your support person was actually sitting next to you, because if they are a long way away on the other side of the courtroom that is a long way… it would be good if they could give you a cuddle or something, because you are next to the judge and he is a big fella, and you are just sitting there all by yourself and everyone is looking at you (NSW Child 16yrs).

Other issues raised by children in New South Wales included better waiting room facilities, being kept better informed, and the need to ensure the process was more private. Inadequate sentencing, which appeared to fail to take the offences more seriously was also a frustration and a concern. "If they keep telling us to report it then they should do something about it when we do" (NSW Child 16yrs).

Western Australia

In Western Australia, children wanted to change the wait for trial with almost half saying it was too long (average 17.5 months). Even those children who were able to pre-record their evidence to some extent were unable to put it completely behind them until they knew the verdict. "How come it takes so long? It goes on for ages and you are always thinking of it" (WA Child 16yrs). "Three years of my life wasted" (WA Child 16yrs). "It's too long and too painful – it should be over in a

year" (WA Child 12yrs). Parents also supported this view. "Shorten the whole damn thing because it is hell for the kids for starters" (WA Parent).

Unlike the other jurisdictions, Western Australian children are protected from seeing the accused and appearing in court during the entire process. Although not to the same degree as children in Queensland and New South Wales, the behaviour of defence counsel still bothered children in Western Australia. "I think the defence counsel could have been a bit more easier, cause if he'd been four years old when it happened he wouldn't have liked it" (WA Child 14yrs). "I'd like the defence lawyer to be nicer and not so scary, he was tall and grumpy" (WA Child 14yrs). "They should be more caring" (WA Child 17yrs). It is worth noting that one child said it was "like they were protecting him not me" (WA Child 17yrs).

The quality of support offered by the Child Witness Service was widely acknowledged. On learning that the CWS was unique to Western Australia, three children indicated a wish to expand this service to every court in every state. Other issues raised by Western Australian children included tougher sentencing, the jury being told of prior convictions, more privacy, more meetings with the prosecutor, and more contact with females in the court process.

In summary, across the jurisdictions, the two most cited reform issues by all children was the length of time taken from reporting to trial and the treatment by defence during cross-examination.

Conclusion

This section has depicted the perspectives and experiences of child complainants about the criminal justice process. Triangulation of the child's experience was provided by data from parents. A case study of one child's cross-examination experience at committal is presented in part two of the findings.

FINDINGS – PART TWO

A Case Study of a Cross-Examination: A Queensland Committal

Introduction

This section describes the experiences of Chrissie during cross-examination. The rationale for presenting a case study of Chrissie's committal story is based on a number of considerations. The depth of the data and her committal experiences are representative of the attitudes and behaviours to which other children have typically been subject in their pursuit of justice. The data for this section was gathered from a number of sources including the child herself, her mother, the police prosecutor, the court support person, the court transcript and defence counsel. Chrissie's story synthesises key issues for child complainants (see also Discussion p 122) and also highlights the multi-dimensional nature of the difficulties faced by the sexually abused child in an adversarial criminal justice system designed for adults.

Chrissie's Perspective

At the time of committal Chrissie (not her real name) was 14 years of age. She had waited twelve months from the time of reporting to her first appearance at court for committal proceedings. The defendant was her father. She was not permitted to use CCTV but was allowed to have the defendant screened and a support person present in the courtroom. When asked if someone explained to her what the court process was going to be like she commented that "nobody told me how mean the other guy (defence counsel) was going to be. I heard that he was bad, but I didn't realise how bad". She went on to say that if she had known what was going to happen she would "have been very scared".

During her interview Chrissie reported that when she was giving evidence-in-chief the defence counsel kept interrupting all the time (corroborated by the police prosecutor and the transcript). She also said that he repeatedly said "ridiculous" out loud while she was talking about her experiences of abuse. She reported that during cross-examination he yelled at her constantly and believed that "he was trying to make me feel bad about myself. He was trying to make me feel stupid." Chrissie did indicate some appreciation for the comments of the magistrate and said "He was good – he got up the barrister for badgering me".

After the committal Chrissie said she "came home shaking" and that she "didn't want to see anyone." When asked what she would like to see changed, she said "they shouldn't put a mean guy in court with kids."

The Parent's Perspective

Chrissie's mother was not happy with her treatment during cross-examination. She said it "was very hard for her… bloody barrister. He went on yelling at her and jumping up and down for hours." After the committal her mother said she was a "blubbering mess." She also reported that "it took months to settle her down. And then she was only just starting to come to terms with it all and then the trial." She indicated that after her traumatic experience at committal the wait for trial was particularly stressful because you "know what's coming."

The Perspective of the Police Prosecutor

The police sergeant who prosecuted the committal said Chrissie "was nervous and a bit embarrassed but came out with good evidence". He commented that there was no problem with her evidence-in-chief "but the problem that she then had to face was, she was – she had to go through it again under cross-examination." He said that "for a young girl – that type of hostility, she had probably never confronted it. Not with grown men being hostile towards young girls in such a manner".

He also articulated the nature of the gruelling questioning and how Chrissie was "in tears the whole time she was under cross-examination."

> She probably had to say things she's never said before. In the way she had to describe what happened. She had to draw what she had seen and for a thirteen year-old… to put it on paper is virtually impossible. She was forced to do that.

The prosecutor also commented on the efforts of the magistrate to control the inappropriate and harassing questioning of defence.

> Yes, its quite unusual for a magistrate to say that he's going to have an adjournment and if that type of cross-examination continues he'll excuse the witness and commit it to trial. That would indicate that, to everybody else who is there – it's inappropriate.

The prosecutor went on and described the defence counsel as "very intimidating" with his gestures and "he was continually yelling at the girl." In an interesting comment worth noting he also said "they don't behave like that in the District Court in front of juries." The prosecutor added "I thought there was no need for this."

The courage displayed by Chrissie is reflected in the comments of the prosecutor.

> Eventually it was like she decided that he could yell all he wants. Seems like she decided that he's been yelling at me for however long – it can't get any worse. She dug her heels in and made a stand.

In summing up his views on the way Chrissie was treated, he acknowledged her courage and strength. "To see how a thirteen year-old (sic) is treated at committal and then to see her still sitting there - give her full credit." He indicated the gruelling process a child endures to make it to trial. "If the jury could understand how these people have been treated throughout the process so far, and yet they're still in it."

The Perspective of Defence Counsel

It should be noted that defence counsel was not interviewed about Chrissie's case in particular, but rather on defence perspectives on child sexual abuse cases. When viewed in conjunction with the above comments from Chrissie, the comments of defence provide a more coherent perspective of the child's treatment.

Defence counsel expressed very strong views on the child's role in the process. "You've got to get around the idea that the criminal justice is about the child. It shouldn't be about the child, and hopefully will never be about the child." He went on to argue that "the child is just a witness."

He also indicated that he did not want to facilitate the child to give good evidence "because if I am defending a bloke I want to make life difficult for their witnesses." He went on to argue "I'm not there to find the truth… no-one's there to find the truth."

When asked about the need for reform in the way children are treated in the justice system the defence counsel maintained "it is not about making it nicer for the child." However, in relation to implementing the ability for children to give evidence via CCTV he indicated approval of such a reform.

> The worst thing, if you're acting for a bloke, the worst thing to see in front of a jury is to have an 8 year-old girl crying while she's talking about Daddy sticking his fingers up her bum…I'm in favour of it because I think it will help me get a bloke off.

The irrelevance of the child in the justice system is reinforced in his re-stating once again that no-one cares about the child in the process.

> You've got a fundamental difficulty if you can't distinguish between trying to protect children, from the judicial system of sending people to jail. The Crown don't care about the child. The police don't care about the child. And I don't care about the child. The kid – see the trial is not about the child.

When asked if he would want his own child in the justice system if s/he was sexually abused, his response was definitive.

> No way in the world. It's horrible. The whole thing is horrible… What the kid has to go through is horrible… It might be simply that the informed rational proper thing to do is try and get to go to a psychologist and psychiatrist and get over it, but don't bloody aggravate it by putting it through the courts. It's all these idiots in the Crown, these coppers, getting cross-examined by some boofhead like myself. It's not worth it.

Perhaps a presentation of the court transcript in combination with the above statements will clarify why the child is so traumatised by the process of cross-examination.

The following excerpts from the committal transcript add the final element to understanding the cross-examination experience. When combined with the preceding comments from the child, the parent, the police prosecutor and the defence counsel, it is clear just to what extent the process is "not about the child."

The Court Transcript

Prior to cross-examination, the child gave her evidence-in-chief. During direct evidence defence counsel interjected 12 times on a variety of matters. Please note that the excerpts from the court transcript below are reported precisely as recorded in the transcript document. Breaks in the transcript are appropriately indicated.

The Cross-Examination Begins

Mr X: Why didn't you tell anyone for such a long time?

Child: Beg your pardon?

Mr X: Why didn't you tell anyone for such a long time?

Child: Because I was scared.

Mr X: Scared of what?

Child: My Dad.

Mr X: What was he going to do to you?

Child: I'm not sure.

Mr X: Well you can't be scared of nothing can you?

Child: No.

Mr X: You have to be scared of something don't you.

Child: Yes

Pros: Objection your worship. Fear is certainly subjective…

Mr X: I beg your pardon?

Pros: She can develop a fear – without any person…

Mr X: Oh look I object to my friend putting words in to the witness's mouth.

BENCH: Well, the situation is this, that you asked the witness. She said she was scared that's why she didn't say anything to anyone. She said she was scared of her father.

Mr X: Yes.

BENCH: Right?

Mr X: Now I'm asking her why she was scared of the father

Bench: And what was your answer to that? Did you say anything there?

Mr X: I might approach it this way. Did he ever hit you?

Child: No

Mr X: Did he ever threaten you? Do you know what a threat is?

Child: Yes.

Mr X: Did he ever threaten you?

Child: I don't think so.

Mr X: What do you mean you don't think so.

Child: I can't remember.

Mr X: So the answer is that he has never threatened you. Is that right?

Child: Yes.

Mr X: He's never been violent towards you?

Child: No

Mr X: Well then what were you scared of?

Child: What he did to me.

Mr X: Scared of that?

Child: Yes. Because I didn't…. (child interrupted)

Mr X: How long was it from when you first told your mother that you'd seen your father? Last seen him? Even talked to him? How long? A year and a half? Does that sound right?

Child: Yes.

Mr X: But you got the courage up did you?

Child: Yes.

Mr X: And your mother was sitting in bed?

Child: Laying in bed.

Mr X: And you just gathered this courage up to go and tell her. Is that right?

Child: Yes.

Mr X: In a cool, calm way you just went in there and told your mother? That's what I thought you just told this fellow here – that she was sitting in bed and you gathered up the courage to go in there and tell her. Is that right?

BENCH: I don't think she said – did she say in a cool calm way?

Pros: No she didn't say that.

BENCH: No. Okay. Well – well the question is that you didn't go in there in a cool calm way. You – you went in and told your mother. That – that's what's being asked of you.

Mr X: You got up the courage to go and tell her. Is that right?

Child: Yea.

Mr X: So out of the blue, as it were, you decided to go in there and tell her about what had happened? I just want you to confirm this for me. You got the courage up..

Pros: Objection Your Worship

Mr X: To what?

BENCH: Well, first of all, 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 toward her. Ask the questions calmly and properly and let her answer those questions.

Mr X: Thank you.

Pros: Your Worship I maintain my objection.

BENCH: Yes.

Pros: In that Mr X put to the witness that she's come up with it out of the blue and the witness has clearly said that she's come up with the courage..

BENCH: Yes

Mr X: Oh look this is rubbish. I object to this. Perhaps the witness can wait outside.

BENCH: No. No. You question the witness. 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 went in a cool, calm way which she hadn't. She hadn't given that evidence at all. That was just put in her mouth.

Mr X: Well it was a question with respect Your Worship.

BENCH: Yes. But those words weren't given in evidence. You just put that – you said to her that she went in in a cool calm way and she didn't say that at all. So just continue with your cross-examination of her.

Mr X: I will.

BENCH: And just keep everything down just to a nice calm level.

Mr X: Thank you.

BENCH: Ask the witness her questions. Just – if you feel you're being harassed or badgered in any way you just let me know. You just take your time. Okay?

Mr X: Do you remember about 10 minutes ago when this fellow was asking you some questions? Do you remember that?

Child: Yes.

Mr X: Do you remember telling him that you told your mother on a night when – or an occasion when she was sitting or lying in bed? Do you remember telling him that 10 minutes ago.

Child: Yes.

Mr X: Do you remember telling him that you did that because you'd got the courage to go and do that? That was the words you used "courage" wasn't it?

Child: Yes.

Mr X: That there was not conversation between you and your mother immediately before you went into her bedroom to tell her?

Child: Could you please repeat the question?

Mr X: Your mother's in the bedroom watching TV. Is that right?

Child: Yes.

Mr X: You walk into her bedroom and tell her do you?

Child: Yea

Mr X: Right. So there was no conversation before you walked into her bedroom to tell her.

Child: No.

Mr X: So there was no outside influence that prompted you to go in and tell her?

Child: No.

Mr X: You did it out of the blue.

Child: I'd been thinking about it for a while.

Mr X: Yes. Apart from you thinking about it, you didn't talk to your mother before you walked in that night and just told her while she was lying on the bed watching the TV?

Child: No.

Mr X: That's right isn't it.

Child: Yes.

(Break in the transcript)

Mr X: you were not having an argument with your mother.

Child: No.

Mr X: You didn't blurt out; I've been touch or words to that effect during the course of an argument with your mother.

Child: No.

Mr X: All right. If there's one thing we can be certain of it's that that did not happen? Is that right?

Child: Yes.

Mr X: What did his penis look like?

Child: I beg your pardon?

Mr X: What did it look like? Do you want me to explain that question to you?

Child: ….No.

Pros: Your Worship she has just had three goes at trying to get it out. I've watched her Your Worship.

BENCH: Yes.

Pros: Maybe he could let her speak.

BENCH: Or be more specific with the question.

Mr X: What did it look like? Can you use words to describe what is was you saw?

Child: Not really.

Mr X: Why not? How long was it? How wide was it? What colour was it? How big was it?

BENCH: One question at a time.

Mr X: I'm just trying to give her some hints.

BENCH: No. You're getting a bit over giving hints. You're getting towards harassing her. One question at a time. If you can't answer the question – if you don't know the answer witness – just so say so. I'll take a short adjournment and just let you settle down a bit and then we'll come back and we'll run this at a more calm and leisurely way.

Mr X: Your Worship perhaps the…

BENCH: … than the harassment that's going on now. Or otherwise I'll excuse the witness for the rest of the…

(Break in the transcript. Adjournment followed by some questioning)

Mr X: I was asking you before the break what his penis looked like. Can you please tell me now.

Child: No.

Mr X: You can't describe it at all? I beg your pardon?

Child: I don't know how to.

Mr X: Well, how long was it?

Child: I don't know.

Mr X: Is it because you didn't see it that you don't know how long it was?

Child: I did see it.

Mr X: Well, how long was it?

Child: I don't know.

Mr X: Well how long was it?

Child: ….how do you expect me…

Mr X: No. I expect you to tell me. Tell me this. Do they teach you at school how long a centimetre is?

Child: Yes.

Mr X: How long is a centimetre? Hold up your fingers please and show me how long a centimetre is? Right. Using your understanding of centimetres, how long was it?

Child: I don't know.

Mr X: Well you say you saw it. I am now asking you to tell me what it was that you saw?

Child: I know what I saw but I don't know how long it is or how wide it is.

Mr X: How much of it did you see?

Child: Not very much of it.

Mr X: All right. How much? How long?

Child: About three centimetres of it.

Mr X: Now why didn't you say that before?

Child: Because I thought you meant how long the whole thing was.

Mr X: So you're saying you saw three centimetres of it. Is that right?

Child: About that.

Mr X: And how wide was it?

Child: I don't know.

Mr X: Well you say you saw it. We know that you have an understanding of centimetres. You say you saw three centimetres of it. How wide was it?

Child: I don't know.

Mr X: What did it look like at the end?

Child: A normal penis.

Mr X: I beg your pardon.

Child: A normal penis.

Mr X: Without going into it too far, have you seen a penis on another occasion?

Child: When we had sex ed last year.

Mr X: Oh. Do you know the difference between a circumcised penis and an uncircumcised penis? Did they teach you that?

Child: What? An erection and a normal?

Mr X: No. I'm afraid we're just going to have to stick with this. You'll have to describe – I'm afraid miss – what you saw. Did you see the end of it.

Child: Yes.

Mr X: Well can you please use words to describe what it was that you saw? I think so far we have got you saw three centimetres of its length. Is that right?

Child: Yes.

Mr X: How wide was it?

Child: I don't know.

Mr X: Why not?

Child: Because I didn't see it straight on. I saw it from, not like front on. It was…

Mr X: What did the end of it look like please? Was it square, rounded? Square or rounded? I'm not trying to put words in your mouth. I'm asking you to use your own words. Can you draw it?

Child: No.

Mr X: Why not?

Child: No. Because I can't draw.

Mr X: Now they teach you to draw things at school surely. I'll give you a piece of paper and a pen and ask you to draw what it was that you saw – you say you saw.

BENCH: She just said she can't draw. Can you draw it or not? Just..

Mr X: Well I'd like her best effort at least Your Worship.

BENCH: Well she said – she described it. You keep asking her to describe it. She said it was like a normal penis as she was taught in sex education at school. So – what – what further do you want? What are you – what do you want her to draw? What do you want her to say? Like, she…

Mr X: Well I want her to draw what she saw.

BENCH: Can you – can you draw what you saw?

Mr X: I'd like her to make her best effort to draw what she saw. It's a matter for, in my respectful submission at the end of the day, for the jury – for the jury as to whether or not they accept this of course. If you could do it to scale. Do you know what to scale means?

Child: Yes. Can I just draw it?

Mr X: Are you finished?

Child: Yes.

Mr X: Can you just hold it up so I can see that?

Child: I drew a little..

Mr X: Perhaps if I can. You've got a sort of a bulb on the end of it. Is that right?

Child: It's not a bulb.

Mr X: Well I'm not trying to put words in your mouth but you seem to have two lines coming down parallel – can you look at me for a moment please? You seem to have two lines coming down parallel and then a round thing on the end. Do you want to have a look?

Child: It's not a round thing – it's the end of a penis.

Mr X: Well, I'll just ask you to have a look at what you've drawn. Do you agree that there seems to be some sort of round thing or bulb on the end of the two parallel lines?

Child: Yes.

Mr X: Is that what you saw?

Child: No – I can't draw it exactly.

Mr X: Is that what you were shown in your sex lessons at school?

Child: No.

Mr X: Have you drawn there what you were shown in the sex lessons at school as opposed to what you saw that day?

Child: No.

Mr X: What you say you saw that day?

Child: No.

Mr X: Well, have you drawn what you saw or not please?

Child: I drawed it to the best of my ability?

Mr X: And the best of your…

Child: I can't..

Mr X: …the best of your ability?

Child: I can't…

Mr X: …ability includes that bulb – round thing on the end. Is that right?

Child: It's not a bulb thing.

Mr X: Well just look at it and tell me what it is if it isn't a bulb thing? Perhaps if Your Worship could have a quick look at it?

Child: I can't draw a penis.

Mr X: I'm not asking – I'm asking you to draw what you saw that day? What you said you saw that day?

Child: I can't draw it.

Mr X: Because you didn't see it.

Child: I did so.

Mr X: I'll get back to this bulb thing that you've drawn on that. Am I to understand that's a drawing of what you say you saw that day? Is it?

Child: Not exactly because I can't draw it exactly.

Mr X: But your best efforts to draw it include that bulb at the end of the two parallel lines. Is that right? Is that right? That's your best effort to draw what you say you saw that day. Do you accept that? Do you accept that? Are you thinking now or do you want me to repeat the question? Do you want me to repeat the question?

Child: No

Mr X: Are you going to answer the question?

Child: It's not exactly what I saw because I can't draw properly.

Mr X: Well can you use words to describe it?

Child: No – because I can't draw it properly.

Mr X: You didn't see anything that day did you?

Child: Yes I did.

Mr X: That's why you can't draw it. Cause you don't know what it looks like. Is that right?

Child: No.

Pros: Objection Your Worship. She's explained why she can't draw it.

BENCH: She's explained quite often why she can't draw it. She said she can't draw a penis. She said she did see it on that date what she's drawn there is the best of her ability. So that's the evidence she's given now. I'd suggest possibly move on Mr X.

(Break in the transcript. During later questioning the issue is raised again)

Mr X: Did he use he use his left arm or did he use his right arm? Did he take you by the left hand or the left arm, or hand, or the right arm or the right hand? Forget about the fact that you can't draw a penis, the thing you say you saw. Tell me what he did? *(Cross-examination continues)*

Conclusion

The issues raised in relation to the preceding case study are complex and disturbing. Chrissie (aged 14 years) was required to give evidence-in-chief and be cross-examined in a Queensland court at committal proceedings. She was not permitted to give evidence via CCTV. Her father was the accused, and she had been made to wait twelve months to give evidence for the first time. While giving evidence-in-chief, defence counsel repeatedly interjected and mumbled "ridiculous" while she was trying to describe intimate details of the abuse.

According to the police prosecutor, throughout the entire cross-examination process the defence lawyer was hostile, intimidating, and continually yelling at her and thumping his fist on the table. Chrissie was crying the whole time during cross-examination. Questioning began with defence trying to put words in the child's mouth about why she was scared to tell her mother, and how she "got up the courage" to tell her. The magistrate, even at this stage tried to stop defence badgering the child. Defence counsel then asked the child more than *thirty* times to describe the penis of the accused. The child tried to explain she didn't know exactly how to describe it and finally was able to get out that she hadn't seen all of it, only about three centimetres of it. In an concerning display of who was controlling the court, the defence then forced the child to draw the penis "to scale", despite the child's pleas that she couldn't draw and her statement that she had only been able to see part of the penis. When the drawing was complete, defence tried at least seven times to get the child to say that the penis she had drawn had "a bulb on the end". To her credit, the child refused to say those words pleading that she had "drawed it to the best of my ability" and that she had difficulty drawing it because "I can't draw". Later in

aggressive cross-examination, defence also tried to humiliate the child by making fun of the child's attempt to draw the penis.

On at least thirteen occasions during the cross-examination the magistrate told the defence to calm down, ask questions one at a time, to stop yelling, and stop harassing the child. On each occasion, the defence counsel acknowledged the comment from the bench and then continued to brutally cross-examine the child. At one point, the magistrate threatened to stop the questioning, excuse the witness and to commit the matter straight to trial if the harassment did not stop. Despite this warning from the bench the harassment did not stop, yet the child was forced to endure more abuse.

There are a number of important points raised by the manner in which this child was allowed to be cross-examined. First, it is clear that defence refused to be controlled by the magistrate. Second, it is clear that regardless of the legislation, misleading, confusing, annoying, harassing, intimidating, offensive and repetitive questioning was allowed to continue. Despite threats to excuse the child and commit to trial, this was not done. Third, it is extremely unfair and even ridiculous to demand a child, or even an adult, to describe a penis in detail, and to draw a penis "to scale". It is strongly argued that most, if not all adults would find it an impossible task to *accurately describe the length, width and colour* of their own penis, their partner's penis, or even their brother's or father's penis. It is even more absurd to expect a child to draw in detail the penis of someone who perpetrated abuse on the child. The Discussion section (see p 122) will present an analysis and discussion of cross-examination and the implications of Chrissie's experience for both the child and the justice system.

FINDINGS - PART THREE

Legal Participants

Introduction

This section presents data gathered from in-depth interviews with a range of legal participants across the jurisdictions of Queensland, New South Wales and Western Australia. The data was gathered from interviews with 28 legal personnel including crown prosecutors, defence counsel and members of the judiciary. All legal participants were experienced in cases involving child sexual abuse and most were senior legal practitioners in their fields. The findings will be presented in categories that emerged from the interviews.

The Big Question

Prosecutors, defence lawyers and members of the judiciary were all asked to respond to the following question. "If your child was the victim of a serious sexual assault, would you want them in the criminal justice system?" Responses were categorised as "yes", "no" and "not sure". Mindful of the experiences of the child complainants reported in the previous sections, the responses reported in the following section provide a revealing picture of the justice system from the perspective of those who are the key players in the system itself.

Only 18% of legal professionals in Queensland responded that they would want their child in the system. In New South Wales, 33% indicated "yes", while in Western Australia the percentage was considerably higher at 46%. Overall, only 33% of legal participants would want their own child in the criminal justice system.

In Queensland, 55% indicated they would definitely not want their child in the system, with another 27% "not sure". In New South Wales, 34% said they would not want their child in the system and 33% were "not sure". In contrast to the eastern jurisdictions, the response of legal participants in Western Australia indicated that 15% said "no", while 39% were "not sure".

While 75% of the judiciary indicated a positive response to the question, only 38% of prosecutors responded "yes". Not one defence lawyer said they would want their own child in the criminal justice system. The reasons given by legal participants (prosecutors, defence and judiciary) for these responses are detailed below.

"No – I wouldn't want my own child in the system"

55% of legal participants in Queensland and 34% in New South Wales said they would not want their child in the justice system. This indicates that more legal

personnel in the eastern jurisdictions than in Western Australia are opposed to the involvement of their own child as a complainant in the criminal justice system. Only 15% of legal participants in Western Australia indicated they would definitely not want their child to be part of the process. A number of reasons were given by legal participants for not wanting their child in the justice system. A Queensland prosecutor explained why "it was not worth it".

> No way in the world… Because it's just not worth it… I mean the preservation of your own child should be utmost in your mind, and I don't think this helps to any degree at all. I wouldn't have a child anywhere near the criminal justice system if you wanted a child to forget about it and get on with his or her life. It doesn't serve the victim any purpose at all. I suppose some people say it helps to get it off their chest. I wonder about that.

Another prosecutor in Queensland gave reasons for his response that focussed on the trauma suffered by the child.

> You know sometimes I think that the whole process can be much more traumatic than the incident itself and that at the end of the day the child feels so much more violated and so much more traumatised by the whole incident rather than just the actual indecent act...

The view is reiterated by defence lawyers from Western Australian and Queensland respectively.

> No, I think this adversarial system is very difficult. I think the adversarial system is very damaging to children – even truthful or untruthful children, it's just damaging… I will say that the criminal justice system is a very blunt instrument and I don't know that it deals with child sexual abuse terribly well. If the perpetrator is found guilty then you go to jail. If not found guilty, them the perpetrator goes away saying 'I'm vindicated' (which we know isn't what a not guilty verdict is), and the child goes away thinking 'they think I'm a liar'… In fact the perpetrator can just walk away and the child walks away with nothing.

> No way in the world! It's horrible, the whole thing is horrible. There is no benefit to the child going through all of that to send some piece of rubbish to jail. What the kid has to go through is horrible… it might be that the informed, rational proper thing to do is try and get to a psychologist or psychiatrist and get over it. But don't bloody aggravate it by putting it through the courts. It's all these idiots in the Crown, these coppers, and getting cross-examined by some boofhead like myself – it's not worth it.

The notion that there are so many variables which have to come together is cited by a prosecutor from New South Wales.

> No, I wouldn't know who they would get and how it would go. I'm just too worried about how it would affect them adversely… Nothing is very good about the system and I quite often think this is the wrong place to be for kids who just can't understand what's happening, and can't understand what's being said to them, and can't understand questions that are being put to them, and certainly don't understand a 'not guilty' verdict.

The prosecutor went on to comment. "It's a terrible thing to have to say, but don't put yourself through it."

A judicial officer agreed with the other legal participants that the criminal justice process is damaging to the child.

> No, I don't think they (the system) want to think about the child. I think they are blind to the interests of the child and where the child is at. Their rights have been invisible – they have been denied very basic rights. … The trial process is flawed for anybody, but for children it is not only flawed - it is cruel.

"I'm not sure if I would want my own child in the system"

Legal participants across all jurisdictions responded within this category: with 27% in Queensland, 33% in New South Wales and 39% in Western Australia reporting they are "not sure" if they would want their own child in the system. The conflict evident in making such a decision is reflected in the comments of a prosecutor (QLD).

> I find it very hard to answer that actually. I suppose all I can say is that I wouldn't necessarily, automatically want to do it. Depending on the… if the child was actually physically injured I probably would… I mean you won't get away from the fact that almost inevitably it will impose a much heavier burden on the child unless the fellow pleads guilty right from the outset.

Another prosecutor (QLD) was also unsure of the best course of action.

> Oh, that's a difficult question. I don't think there is an easy answer to that. It would depend on the extent of the abuse I would think. I really couldn't answer that. There are cases I would say no, and there are cases where I would say yes.

The ability of his own child to "endure" the system was raised by another defence lawyer (QLD) who also commented on his own possible reaction to the idea of his child being abused.

> All I can say is this, I would as a father, try and assess her ability to, when I say endure the system, endure the system is probably a bad way of phrasing it. As a father, and in conjunction with my wife, I would try to assess the situation in terms of how serious the sexual assault was… If it was serious I would talk to my daughter and I think I would tell her or try and explain to her that it might be therapeutically beneficial for her to go into the system. … But if the child was a particularly timid sort of individual, I might be less inclined to push down that track, and that's for a serious physical interference.

He went on to indicate "I would hope that I just wouldn't lose my cool and go bananas. I don't think I would. I would hope I wouldn't."

The dilemma of the question was also commented on by a defence lawyer in Western Australia.

> I hesitated because I'm not sure. I'm not sure. I think at the end of the day it would have to be a decision that they would make. But I don't think you can completely throw it on the child to make that decision… It depends on the extent of the offending… If it was a systematic pattern of offending against the child, well depending on how fragile my daughter was – I mean, you would always act in the best interests of her. If that was going to damage her further, you'd have to seriously question whether that was the right way to go.

The same defence lawyer also commented on the possible reaction of a parent in that situation. "I probably would have killed him by then so it wouldn't make any difference. So, but it just shows we are all capable of irrational bloody thoughts."

A prosecutor from Western Australia indicated the difficulties involved in making such a decision.

> It depends on what the child psychiatrist had to say whether or not that child would be better served by going through the process of court. I would think very long and hard. We've come a long way, but not a long way, at the same time. It would depend very much on the child and what happened and how serious it was… If it was so serious that it would really harm the child then no, if it wasn't so serious, then yes.

As indicated by other legal participants, she went on to comment about feeling the need to deal with the perpetrator. "If I had a teenage daughter, and it was just sexual touching, I would like to think that a quick poke in the eye and a kick would suffice, rather than telling police."

Another prosecutor (WA) commented "it would depend very much on the degree and the circumstances… But I think you would really have to weigh that up, but you can see that it's a terrible thing for a child to have to go through, those proceedings. It really is."

"Yes, I would want my own child in the system"

The percentage of legal participants who said they would want their own child in the system was only 18% in Queensland, 33% in New South Wales, and 46% in Western Australia. The comments of one prosecutor (QLD) indicated confidence in the system. "I actually do believe in the system and I would think that the need to bring the person to justice would be worth the risk of any trauma." The same prosecutor outlined the benefits of the process. "It gives closure and it gives them, I should think, an enormous self confidence to have gotten through it."

A judicial officer (WA) who was comfortable with the child in the system also commented that the provisions in their jurisdiction mean that "the child is not in the courtroom" and that this significantly reduces the trauma to the child.

However, many of those who responded in this category still qualified their response. Another New South Wales legal participant presented a list of conditions she would want in place for her own child.

> I'd want a well-educated judge, who is very aware of the issues. I'd want all the facilities available for the child… I'd would really like an understanding defence lawyer that does have his job to do and be very respectful and gentle to my child so that they don't have a fear and terror of being in trouble from having done the right thing and spoken out… I would want a victim support officer to support my child… and I would want a prosecutor who cares about my child in terms of minimising the trauma for them in court.

Another prosecutor (WA) acknowledged that although "it is pretty gruelling for the complainant", she would still want her child in the system. "I think I would put them into the justice system. I mean I would think about it quite hard, but I would. I mean it would depend on the individual too because I think you need somebody who is fairly resilient… I think I probably would." A colleague of hers (WA) said that she would "absolutely" want her child in the system. "My own personal view is that for their own dignity, and later in life, the child is better facing up to it at the time."

In summary, the percentage of legal participants who stated they would want their own child in the justice system is low, particularly in Queensland and New South Wales (18% and 33% respectively). This must be of significant concern given that these very professionals are involved with the justice system on a day to day basis, and no doubt understand it better than other members of the community. Clearly, there is widespread agreement from all categories of participants that the whole process can be extremely damaging to the child and is perhaps not worth the trauma.

Key Legislative and Procedural Issues

Most of the data gathered from legal participants focussed on recent reforms in the justice system in relation to child complainants. The main issues identified were the use of technology such as CCTV; the treatment of child complainants during cross-examination; judges and magistrates; and the abolition of committal proceedings. A specific question on "acceptable behaviour" by defence is raised, and data in relation to "child sexual abuse, lies and 'kiddy-fiddling'" are presented. The chapter concludes with comments from legal participants on the need for reforms for child complainants.

The Use of Closed Circuit Television

Views on legislation for the use of CCTV varied considerably between prosecutors and defence, as well as among jurisdictions. This is perhaps understandable given that in Queensland CCTV is rarely used, in New South Wales it is sometimes used, while in Western Australia it is standard procedure in cases involving child complainants. Some Queensland and New South Wales prosecutors indicated a reluctance to use CCTV.

> I think it was difficult to maintain concentration in children and to actually appreciate the gravity of what this was. …I don't like making the victim sort of live out a trauma for the benefit of getting a result, but you actually get a better depth with the interaction between the accused and the victim in the box (QLD Prosecutor).

> I don't really like it. I just don't think there's enough personal rapport built up between the jury and the victim (NSW Prosecutor).

> I think that probably there's some times when a prosecutor might not be as encouraging with CCTV and there's instances where it's not encouraged. …The child sort of agrees to go into court because it's almost what is expected of them (NSW Prosecutor).

The discretionary and inconsistent application of provisions for CCTV and screens was also repeatedly raised.

> I don't really understand why a child aged twelve or under may have those protections. It seems very strange. I mean it strikes me firstly that all persons who are legally still children should be entitled automatically to that protection. I find it very arbitrary that 12-year-old cut off point. I don't think a child should be in the court in the first place. I think the child's interests should be paramount, shouldn't it? (QLD Prosecutor)
>
> For example, if everybody was done by CCTV, you remove the intimidation, the physical intimidation. …I think we as prosecutors, would lose something in the theatre of it all if the child isn't physically present in court, but you know, that's the trade off (QLD Prosecutor).

However, Queensland defence counsel, were not in agreement as to whether CCTV should be used.

> You take a twelve-year-old who is a real little miss… you know what I mean. Why shouldn't they face their accusers (sic) because you see, it's my belief that the ability to sit in another room can lend itself to a risk of the story just rolling along. …Whereas in the presence of a judge, it has the capacity to have people think, well this is pretty serious business. That's what I've got against the TV in the other room. It's just like, Mum took me shopping yesterday. You know what I mean? (QLD Defence)
>
> I prefer a child to be on video. The most damaging thing is for a little girl to get in front of a jury and see flesh and blood and see her cry, da, da, da, da. The poor old Crown you see, most Crown prosecutors want that, want the child in the courtroom. The jury seeing her cry. …I'm in favour of it because I think it will help me get a bloke off. By all means bring in these television cameras – you're helping the defence (QLD Defence).

Prosecutors and Judicial officers in both Queensland and New South Wales reported difficulties with poor equipment and lack of funding. According to some legal participants, the problem with CCTV is that it is a funding and political issue (QLD Judiciary).

> The court system in Queensland is just atrocious in terms of the facilities provided. There's really only one court over there (magistrates court), which allows for the reception of evidence of child who is place in another room (QLD Prosecutor).

> I favour it. I've always favoured it but the problem is… there was just never any equipment (QLD Prosecutor).

However, in those jurisdictions where CCTV was frequently used (NSW and WA) there was an acknowledgement from the range of legal participants that the use of CCTV actually minimised the prejudice to the accused and benefited the child.

> I've found that children are very attentive, very mindful, still quite anxious and also quite emotional by the nature of the evidence they have had to give which indicates to me that they have taken the whole thing quite seriously (NSW Prosecutor).

> My experience has been that children are actually better able to concentrate when they're in a room on their own. They are more focussed on what they are doing (WA Prosecutor).

> What prevents a child being able to give evidence for hours on end is mental exhaustion and the more trauma they're experiencing, the shorter time they can answer questions for, so they can actually concentrate for longer, in my experience, when they're out of the room with CCTV or being pre-recorded (WA Prosecutor).

The effect on successful prosecutions was a frequent consideration.

> See - prosecutors are frightened they are going to lose prosecutions, but that's not what happens and also what they have discovered is that they can prosecute when kids are younger and a kid can give a better account of themselves (WA Prosecutor).

Defence lawyers from Western Australia believed that use of CCTV did not affect convictions and that "you break even".

> I don't see any disadvantages to the defence. I don't think CCTV has meant there has been more convictions – or more acquittals. I don't think CCTV makes any difference at all to be honest (WA Defence).

One defence lawyer offered some advice to his colleagues in Queensland.

> My perception is that it works well… But I don't think this has affected the rights of the accused. I'd be anxious to say this to my Queensland colleagues, don't get too worried about this cause you actually won't find that things will change. I mean you do have to get used to talking to someone on a TV monitor, stand in a different spot, you can't move around, but once you get used to that it's not so bad (WA defence).

Another defence lawyer summed up the view of most legal participants in Western Australia.

> I just think that the perception here is that one of the advantages of the CCTV is that people have understood, especially over a period of time, the reasons for it. That we don't want to damage children, many of whom have been damaged already by the events (WA Defence).

Cross-Examination

Legal participants provided considerable comment about the cross-examination of child complainants. The behaviour and attitudes of defence counsel, prosecutors and the judiciary was widely discussed. One judicial officer summed up the cross-examination process commenting that "it can get a bit rough, and it's all about playing games and getting the bench intimidated" (QLD Judiciary).

Some comments focussed on the reluctance of prosecutors to object promptly when cross-examination goes too far. "They haven't objected as promptly as they should or could. Part of the reason is that often these matters are prosecuted by quite junior prosecutors" (QLD Prosecutor). A member of the judiciary, also commented on how aggressive defence try to intimidate the court. "Young lawyers tend to do the committals and again, they're intimidated by senior counsel, who intimidate both the child and the prosecutor and the bench. No question" (QLD Judiciary).

It was generally agreed that children face a torrid time during cross-examination – particularly at committal. A number of prosecutors commented on their experiences with child complainants. One prosecutor referred to a particular case.

> In the end we had her in there for three days. …He (defence) turned her into this broken little girl again and he actually won the trial because she - it was just relentless cross-examination over these three days. It sent this fellow broke (QLD Prosecutor).

> They tend to be more so towards the magistrate rather than in front of the jury. But it's not hard to be aggressive towards a young child. I mean if you're an adult then its dead easy to intimidate them and overbear them if you really want. And it's fairly easy to confuse them or suggest propositions in a way which tend to make the child agree with them because they don't have the skills to properly understand the questions and properly quantify their answers (QLD Prosecutor).

> There are a core of defence lawyers who prosecute these cases who subscribe to the theory that you go as hard as you possibly can at

> the committal hearing, and belt them up, and then before the jury be very nice. By that stage the kid sits there and they think, oh no, that other fellow is going to cross-examine me. And of course you have read the transcript and you know that they have been called everything, liars, blah blah, all this sort of thing. The kids are terrified about having to give evidence before a jury because they think they're going to get beaten up again. And often they'll say 'I don't want to give evidence', and you have to say to them, 'well look, they've beaten you up because there was nobody else around there to be seen'. It's a bit like a school-yard bully (QLD Prosecutor).

Despite the evidence from other legal participants, one defence lawyer insisted that he's never met a defence barrister who tries to intimidate child complainants.

> To be honest, I've never met anyone who does. I would have thought that savage cross-examination of children hasn't existed for so long. I am sure cross-examinations get heated but it's often a response to a child who won't answer questions and that sort of stuff"(QLD Defence).

Another defence counsel maintained the view that children in Queensland are already given every protection during cross-examination.

> It's been my belief that long before any of this new fangled legislation came along, the judges and 95% of the counsel gave them absolutely every consideration to the fact that they were a child (QLD Defence).

Comments from defence barristers sometimes indicated a particular view of children. One defence lawyer said you have to be reasonable when cross-examining a child unless the child is "precocious".

> You can get a nine-year-old as precocious as all. You could get reasonably strong in your cross-examination even of a nine year-old if they've come in, in a precocious fashion (QLD Defence).

> If the child comes over in a very brazen manner then I think that child should face her accuser (sic)… and you can apply this across the board. You get adults who are absolutely timid souls, including at a sexual level. (QLD Defence).

Some participants insisted that children could not be confused by rough cross-examination if the abuse really did happen.

> If something happened to a child, then it's my belief that if you're talking of a child say from eight years of age onwards, or seven years of age onwards. If something has happened to the child, I don't believe they are going to get confused (QLD Defence).

A judicial officer commented that "often children were intimidated and harassed… I was always amazed at how people, mostly men, counsel could be so hard on children in court" (QLD Judiciary). Another member of the judiciary commented that there are increasing numbers of children who cannot continue under cross-examination because they are so distraught.

A legal participant from New South Wales provided comment on what might be the child's perspective on the cross-examination process.

> I think it's very difficult for the child, the constant asking of questions, many different times, in many different ways. It's very very difficult for the child. In cross-examination it actually leaves them feeling that they are not being believed, and often they become very tearful and distressed about that. Because I think children also have a perception that they're going to be in trouble during that process. That they've been somehow naughty. I would really like to see defence lawyers be a bit more mindful about how they test the evidence. Some are very hard. … So when it is put to them that they have lied and that they have somehow maybe even brought something like sexual assault on themselves, or even if that stuff is insinuated - the terror for the child and the hurt. Children come out so tearful, so depressed, it really is heartbreaking and to see those children so distressed (NSW Prosecutor).

The comments from legal practitioners in Western Australia also focussed on the child's experience. "So if a child is being traumatized and tortured, that is your responsibility and you simply just can't drag them into court and let them be tortured without thinking about your obligations to them" (WA Prosecutor). A defence counsel commented about the ethics of aggressive cross-examination. "I don't think its ethical to bully a child. I mean that's what your client wants, but I don't think it's ethical to do that" (WA Defence).

Judges

A number of legal practitioners in Queensland commented on the wide variation on what is permitted and not permitted when cross-examining child witnesses. In fact, many defence lawyers and prosecutors gave a list of pro-defence and pro-prosecution judges. Some even suggested that if the judge was not to their liking, attempts would be made to have the trial rescheduled.

> They do know. They do know that Judge X is well known as somebody who is very pro-defence, yet someone like Judge Y and Judge Z, they will let certain evidence in. So defence always try and get cases heard before Judge X… we would say (to the child) if you can't make it, that's fine. We'll put it off to another time. You can't go judge shopping of course (QLD Prosecutor).

> You'll get all sorts of extraordinary variations from this judge to that judge. But I could name individual judges, and say yea, we'll take Judge X, he won't come on too heavy (QLD Defence).

Other comments also focussed on which judges were more likely to intervene during cross-examination. "I mean some judges are very interventionist, other judges are very non-interventionist" (QLD Defence). Another defence counsel explained his interpretation of a pro-defence judge.

> There are some, and a fair percentage fortunately, who are alert to and aware of the fact that children can make stories up. Now fortunately quite a number of judges are alert to this but other judges seem to lose their perspective (QLD Defence).

A number of prosecutors in Queensland commented that some judges and magistrates frequently refuse the use of screens and support persons even when the child is under twelve years of age.

Comments from members of the judiciary on fellow judges and magistrates were also cognisant of judicial styles. "They are so petrified of entering the arena. But the legislation says in fact you should, but it's a mindset. Even when there are legislative changes, lawyers can take a couple of years to even know it's around" (QLD Judiciary). Other judicial officers commented on judicial reluctance to intervene in the aggressive cross-examination.

> No, I think they don't want to think about the child. I think they are blind to the interests of the child, and where the child is at. They are preoccupied with a fair trial – but they just mean fair to the accused. Almost never is anybody else's fairness taken into account because they say you don't have to (QLD Judiciary).

> I think it is blindness to what is going on in front of them. But it can be done, but it's tiring and it requires an attitude of vigilance (QLD Judiciary).

New South Wales legal practitioners also commented on the attitudes of the bench to sexual abuse of children.

> There's an element of the judiciary, as there probably is elsewhere, who might not really think this is a bad crime and

> wonder what everyone is complaining about. It's good in every jurisdiction to see more women on the bench. That has been such a humanising thing. Some of the men are very pleasant, but there are a lot of unpleasant men who are very sexist, they hate women in their courts and ergo they hate children – they hate women and children complaining of sexual assaults against men (NSW Prosecutor).

Another prosecutor maintained that "judges know nothing about children" (NSW Prosecutor). The prosecutor went on to explain that one of the biggest problems in the state was with judicial discretion and lack of judicial awareness of the legislation.

The lack of knowledge of some judges about sexual abuse was also a concern.

> So all of the Supreme court judges on the bench now are without experience of sex trials. So many of them might be from a group of people in society who don't believe its happening. You've got a fair bit of experience about sexual assault these days in juries, but there you've still got these stupid old fools who are of the generation who are yet to be convinced that such things happen (NSW Prosecutor).

In contrast, comments from Western Australia were overwhelmingly positive in relation to judges and the cross-examination of child complainants.

> You must have care for the child from a whole range of people including the judges. Particularly the judges. The judges are wonderful. They are very good at looking for signals of distress and offering breaks when a child is getting distressed (WA Prosecutor).

"You find that judges here are pretty good at stopping cross-examination that gets too tough or too rough" (WA Prosecutor). "Some are better than others, but most of them are generally pretty good" (WA Prosecutor). One judicial officer from Western Australia argued that there is no substitute for keeping the child out of the courtroom. "It's very hard if you are all from the bar and you've got a bar culture, but obviously it's not enough to give the judge power. You need to get the child out of court" (WA Judiciary).

In summary, comments from legal participants focussed on the process of cross-examination as well as the erroneous beliefs that underlie the process. The words of one judicial officer attempted to get to the heart of the problem.

> They (child complainants) deserve to be treated better. I think underneath it all there is an assumption in Queensland that they are not telling the truth. – and I say that having done hundreds of these trials. I basically think there is a fundamental unwillingness

> to believe women and children and I think that is reflected in the way we treat them – and I think the way we treat them is nothing short of appalling (QLD Judiciary).

Acceptable Behaviour?

In earlier doctoral research (Eastwood et al 1998), a Queensland child was interviewed who had undergone a gruelling cross-examination over a period of three days. During that time, whenever the child was upset and needed a break she was allowed to leave the courtroom. However, much to her distress, the defence lawyer followed her everywhere, standing outside the toilet and even putting his foot in the door of the witness room to intimidate her. This tactic went on for three days.

It is worth noting that the issue once again emerged in the current study. A prosecutor who was interviewed, told how the same defence lawyer used the same tactic to intimidate a different child during three days of cross-examination at trial. According to the prosecutor, the child had already "been through the wringer in the committal, it had gone on for days and days."

> Anyway, in between breaks she would come outside and the clerk would take her outside and try and console her. Her mother sometimes showed up and Mr Z would follow them outside. Just follow them outside wherever they went, whether it was into one of those witness rooms or if they sat on the chairs outside the courtroom. It was completely intrusive and inappropriate behaviour (QLD Prosecutor).

The prosecutor commented that "they extended what should have been a small containable trial… into something that was hundreds of thousands of dollars worth." The prosecutor also commented that a number of legal practitioners were also aware of this lawyer's behaviour and that it raises key issues about justice in the courts.

Committal Proceedings

Although children are not required to appear at committal proceedings in Western Australia, most legal practitioners from Queensland and New South Wales expressed very vocal views about any moves to enact similar provisions in the eastern jurisdictions. A number also expressed the view that committals are more a money earning exercise.

> Well lawyers are adverse to any change you know. We've started the new century and everybody's still back in the eighteenth century, you know (NSW Prosecutor).

> Abolishing committals – a lot of barristers would be very adverse to that because its money in their pockets. …Some barristers make a living out of children up in the committals because they are long and tedious. They know the child is going to be really tired after and answer every question under the sun and by the end of the day will be conflicting (QLD Prosecutor).

There was widespread agreement among prosecutors and the judiciary that committals are frequently used to unnerve the child and "beat the child up" prior to trial. "That's why it is open slather at committal because there's not a jury there. They reduce the child to tears, and you know it just brings up things – here is a bully defending a bully sort of thing" (QLD Judiciary).

Defence lawyers in Queensland were far from convinced that children should not be required to give evidence at committal with some commenting it could be the start of trend and a "backward step."

> I'm talking about the politicians who pass this legislation doing away with committals in the circumstances of child sexual assault. I'll tell you what it is and you know what it is. It is that it's too horrendous for the victim having to face up to it more than once. Well, you know, the next step will be that it's too horrendous for the victim to face up to it even once. Now truly, that's the next logical step (QLD Defence).

> I think it is a really dangerous step – because it is your only chance to really get the sort of detail you need. In a significant number of cases they have been won at trial because the committal has identified matters which can be disproven, although its fashionable to say that they are the product of bullying (QLD Defence).

Although most committals in New South Wales are full handups, children may still be required to appear and to face cross-examination. "We are finding that quite a few do have to face cross-examination at committal – often it's the defence's application. My concern is really about the retraumatisation of the child" (NSW Prosecutor).

Despite the reluctance expressed by some legal participants in Queensland and New South Wales, feedback from the jurisdiction of Western Australia (where committals are in the process of being abolished) was very encouraging.

> For a long time now we've had it so that children of sexual abuse crimes don't have to give evidence at preliminary hearings, and that was pretty much taken on the chin by defence counsel. I mean committals are utterly pointless, so I think most defence

> lawyers struggle to find a good motivation for committals (WA Prosecutor).

A judge from Western Australia made the following observation about the way in which committal proceedings are used in some states.

> We did not have, and we do not have an unbridled bar. The restraints upon the bar, would I'm quite certain have been stronger than they were in other states where you have this charade of cross-examining people for three days. No, it would not have happened here (WA Judiciary).

Another judge identified the hostility to this reform in the eastern states and described events at a conference in Queensland.

> Then two of the loudest lawyers there started talking. And really they just have to be stood up to. In fact one of them said something about building a defence, and of course he immediately realised that this was quite an inappropriate thing to say. … the other one mentioned certain things defence do during committal.

The judge argued that there is no reason why those 'things' cannot be done at trial and commented that in Queensland "there seems to a culture of not standing up to the bar" (WA Judiciary).

Defence in Western Australia also seem to have adjusted to not calling a child at committals. "Oh well I can live with it… All these things work, if the prosecution and defence are quite honest with each other in terms of disclosing stuff" (WA Defence). Another defence lawyer commented on the lack of financial incentive for committals in Western Australia.

> Because Legal Aid here has never paid for accused to have committal hearings. So as a result of that lawyers had to do them for free, and not surprisingly therefore, over the years most lawyers have thought of very good reasons not to have them (WA Defence).

Similar views were expressed by prosecutors. "Interesting over in Queensland there seems to be a very strong resistance to abolishing committals, because that's where they make most of their money I think" (WA Prosecutor).

Despite claims from the eastern states that it cannot work, Western Australia seems to have processes in place that ensure the integrity of the system. "We have proper processes to ensure there is complete discovery by the prosecution and we enforce them and make sure that we positively produce material for the defence" (WA Prosecutor).

In summary, there is considerable disagreement between eastern and western jurisdictions on the need for child complainants to be required to give evidence and face cross-examination at committal. The argument that there must be a committal to test the evidence lies at the crux of the issue.

> The committal decision is based on one factor – whether there's a prima facie case. And so as a matter of law, the primae facie case will exist on the statement, because presumably the witness will give evidence-in-chief in accordance with their statement. So while defence barristers can then question that witness about other matters, all they are getting is a second bite. I mean all they are doing is testing out a technique of cross-examination which may or may not be abandoned at trial, and I don't regard that as legitimate testing. Once you've got a primae facie case the magistrate is bound to commit (WA Prosecutor).

Other Issues for Child Complainants

Legal participants also commented to a lesser extent on other issues relevant to child complainants. These included problems with listings and consequential delays to trial, the need for more education about child development, inadequate court facilities for children (QLD and NSW), the need for expert evidence, the inconsistency of arbitrary age limits (eg "special witness" in QLD), improved child support services (QLD), gross underfunding of measures to protect child witnesses (NSW and QLD), separate representation for children, better after court follow-up, pre-recording evidence, and out of court statements. The comment of one judicial officer is worth noting in relation to children giving evidence-in-chief live in Queensland courts.

> I feel sick there while I put these kids through this… It could be a written statement, video statement, audio statement, anything. I often feel sick until they've got through it, and then sometimes they miss the main one and I have to rule that charge be dropped. And I come back here and I want to throw up. It might have taken a kid two years to get to that point and because in that 30 seconds they couldn't remember it, that whole charge goes. It is just so uncivilised. It is all so archaic (QLD Judiciary).

Child Sexual Abuse, Lies and Kiddy Fiddling

During the course of the interviews with legal participants, a number of topics were raised that may best be classified as statements that reinforce the myth that children make up lies about sexual abuse. Despite extensive literature and research to the contrary, such a viewpoint was frequently stated as "fact". During the

course of the research, the term “kiddy-fiddling” was also used by legal participants when referring to cases of child sexual abuse.

Some legal participants suggested that a lot of children lie about sexual abuse and that judges are mindful of this. “There are a fair percentage (of judges) fortunately, who are alert to and aware of the fact that children can make stories up” (QLD Defence). Another defence lawyer asserted that “children do have a knowledge of these things and are capable of inventing it (QLD Defence). Other comments also reflected the belief that it is commonplace for children to make up sexual abuse.

> It used to be the rule of practice that juries were warned that they had to be very careful and cautious in assessing the evidence of a child. …A lot of judges still give that direction. In my opinion, quite rightly, because children do tend and can tend to fantasise these sorts of things. A lot of children are certainly, knowing. So I think that part of the law in its present state is really good (QLD Defence).

> Defence will often put forward in their final address that children will always make up lies about this and if they don’t tell straight away they are making it up (WA Prosecutor).

> The most difficult aspect is that there’s an assumption that if a child says it, it must be true and of course, it’s just a completely invalid assumption in that children tell lies, and in fact my general view of life is that children are more likely to tell lies than adults. …But they call them the victim, right from the outset, the child is referred to as a victim (QLD Defence).

Some legal participants identified this erroneous belief about child sexual abuse as a fundamental problem.

> I think underneath it all there is an assumption in Queensland that they are not telling the truth, and I say that having done hundreds of these trials. I basically think there is a fundamental unwillingness to believe women and children, and I think that is reflected in the way we treat them (QLD Judiciary).

> Yes, why, and is it the male thing? Is it that people are more prepared to believe males than females. Male victims have always got a better chance of success in New South Wales jury matters (NSW Prosecutor).

> I think on the whole it is still that if you’ve got a male complainant it is still them that are on trial, but for some reason,

> juries are much more sympathetic to male complainants (WA Prosecutor).
>
> The general impression I have though is that it's often very difficult to get a conviction unless there is some sort of corroborating evidence. Juries are reluctant to convict someone of any sex offence unless there is some sort of corroborating evidence. …Just simply on the word of the child, I do find it's very very hard to get a conviction (WA Prosecutor).

The view that children lie about sexual abuse was more indirectly espoused by some defence lawyers who asserted that court support groups coach the children in relation to their evidence.

> They are getting in their ear (the child) and schooling them up, so that by the time they get in front of the jury they are an engineered, structured witness (QLD Defence).
>
> I think that coaching goes on… I think it's the so-called support groups where the real difficulties arise. I'd be really surprised if prosecutors did it. …well I haven't come across any case where anyone's really been caught blatantly coaching. But I've had a feeling (QLD Defence).

It is worth noting and of concern that the term "kiddy-fiddling" was sometimes used by the both defence and prosecution. Although perhaps not an issue of disbelief, it is certainly a matter of minimisation of the abuse suffered by children. "Kiddy-fiddling – it's just a generic term when we talk about these types of cases. I don't think it's meant in a derogatory way – it's just a term that is used" (QLD Prosecutor).

The Need for Reform

It is perhaps not surprising, that legal participants in Queensland, the jurisdiction that is lagging behind in the area of reform for child witnesses, were among the most vocal opponents to reform. There was widespread comment from defence lawyers in particular that the system we have now is the best system we could have.

> What we have, isn't that the result of hundreds of years of perfecting it, or attempting to? Isn't what we have got now the very best system that we could have? (QLD Defence).
>
> I think the systems we have in place have been tried over centuries. What was wrong with them? You can't say that there were enormous injustices perpetrated within Australia and

> England and America for hundreds of years. I don't think you can say that and what that means is the system worked pretty well and pretty intelligently (QLD Defence).
>
> I think the system we have is about as good as it can get if you're going to protect the rights of the accused to a fair trial. I don't think we can travel much further down the so-called reform path (QLD Defence).

A judge also expressed concern at the systemic aversion to reform saying colleagues regularly expressed the view that the system is working well and said that this misguided belief "is so embedded in legal practitioners from articled clerks to high court judges. It is just so embedded" (QLD Judicial).

Some comments about reform for child complainants focussed on 'window-dressing' by politicians with some legal participants saying recent changes to legislation in reality "don't mean anything" (QLD Prosecutor). "They are trying to pretend that they are constantly doing something instead of actually doing something" (QLD Defence). A judicial officer argued that legislative changes have been minor and ineffective.

> Well you know I haven't seen substantial changes in the years I've been here. Not even in the last 18 months when I was meant to see them. I say to my colleagues name me one piece of legislation that has made a dramatic difference to a district court trial? (QLD Judiciary).

Some defence lawyers argued strongly against further reforms with comments such as "I don't think there are too many ways in which changes can properly be made without disadvantaging the person charged (QLD Defence).

> I mean even the word reform. It's assumed that any change is a reform, and as I say the term victim is used far too early in the process. I think there is too much intervention goes on as it is with child witnesses (QLD Defence).

However, the precise manner in which the accused would be disadvantaged was not explained by this lawyer or by others. A point further explained by a judicial officer.

> So we are still fighting really at a basic level that any and all measures are seen as prejudicing the accused. It's an attitudinal thing. It's a mindset. They seem to see any steps to assist the child as being prejudicial to the accused. … Rarely have they been asked to articulate why it is prejudicial. They have just been glibly allowed to assert, it's prejudicial (QLD Judiciary).

One defence lawyer even attacked the qualifications of those who draft legislative reform. "The people who draft the legislation in practical reality, they have never in their life been in court standing on their feet prosecuting. The people that frame those are not the people that go into court and do it (QLD Defence). The evidence, however, does not support such a view.

Members of the judiciary also commented on reforms for children and the reluctance of the legal fraternity to protect children. One judicial officer maintained that the prevailing attitude is "lets not rock the boat" (QLD Judiciary).

> They don't want to know. If you are not told then you can genuinely say, I did not know. They don't want to be told because if they are told, then they have got a problem. … We are a state that puts kids well down (QLD Judiciary).

> You cannot challenge one little piece because if you change that little chunk, it will all collapse. That is what lawyers think. They must not be challenged or we cannot have our system of law as we know it, and they use phrases like that. Very pious language. … Any suggestion for change, even something moderate, is seen as absolutely threatening. ..Instead they attack, it's a very interesting response. It's a shut us down response (QLD Judiciary).

Western Australian legal participants presented a very different and more positive perspective on reform for child complainants. "You can only sell it on the basis that it works for everybody – and it does" (WA Judiciary).

> Well I think that's a credit to the defence counsel, actually because the judges were always behind it because I think they felt very much, or judges feel very much in control of their courts and anything that happens in the courts, they feel responsible for, and when they see a child being tortured in effect, they're human and it makes them feel bad. So anything that's going to make it easier for the child is something that they want. Prosecutors are obviously the same, but I thought it was greatly to the credit of our defence profession here in Western Australia that for the most part, there was very strong support for anything that would reduce the trauma to the children, providing that it was not done at the expense of the accused's rights to a fair trial. So I think that's where it comes from. I think it actually came about because we had a decent collection of defence counsel who were actually sincerely interested in reducing the trauma to children (WA Prosecutor).

> …really they have got to be asked eventually if all they are really doing is protecting their turf. … He might speak the loudest but

> he doesn't speak for the decent section. You can't convince people about that (reform). All you can really do is to bring in the legislation. I mean if they wait until everybody agrees, they can forget about it. You can't get lawyers to agree where they should all have lunch on a Friday (WA Judiciary).

Conclusion

In summary, while the comments of some legal participants may be considered of concern in relation to current knowledge about sexual abuse and child complainants, there was widespread agreement that the system is "not about the child." There is also considerable disagreement across jurisdictions, between the prosecution and defence, and sometimes among prosecutors and defence lawyers themselves.

As indicated by some legal participants, perhaps what is needed is recognition that "the child needs a very strong message about the system respecting them and caring about what happens to them" (WA Prosecutor).

> I think they don't see enough kindness. … I see hundreds of kids treated in this appalling way day in and day out. There's something about the frequency of it and the ordinariness of it that means people don't care. I haven't struck very many people since I started on the bench, who care about how kids are treated in our courts, and I don't say that lightly (QLD Judiciary).

> The kids ought to be treated well. And not only do we not make big efforts, in fact we are condoning by our silence a system which is dehumanising. And it's shattering the kids (QLD Judiciary).

The following section will present a discussion of the findings on the data from the child complainants and parents, from the cross-examination case study, and from the legal participants. The discussion will examine the findings in relation to the literature, the research and the legislation.

CHAPTER FIVE

DISCUSSION

Introduction

This chapter will examine the findings and incorporate discussion on a number of levels. It should be noted however, that the focus in the discussion is on the experiences and perspective of the child. On the individual level, the discussion will include analysis of the significant processes in the criminal justice process for child complainants. On the systemic level, the analysis will embrace discussion surrounding the findings from children, parents and legal participants and their implications for the criminal justice system as it relates to child sexual abuse. Finally, on a theoretical level, this chapter will endeavour to examine the reasons why decades of reform have achieved limited gains for Australian children and why the criminal justice system remains the legally sanctioned context for the abuse of children.

One of the most crucial findings that emerge from the current study is that children are damaged by the criminal justice system. Adults who are central to the system (including legal practitioners who are responsible for inflicting the most damage) *acknowledge* that children are damaged. Yet in many jurisdictions those very adults who are responsible, refuse to support substantial legislative and procedural reform. Instead legislators continue to tinker with discretionary and ineffective legislation.

The Big Question

The response from children is disturbing. When asked if they would ever report sexual abuse again, only 44% in Queensland, 33% in New South Wales and 64% in Western Australia indicated they *would.* The higher response from children in Western Australia may be an indicator of the more child-friendly provisions that exist in that state. It should also be noted that the trial outcome is not necessarily a predictor of response to this question, as two-thirds of children who experienced convictions said they would *not* report sexual abuse again. It is evident from the findings that children initially disclose abuse through a desire to stop the abuse, to prevent it from happening to other children, or simply from a desire for justice. However, the way in which they are treated in the courts leaves many children damaged and disillusioned. The reasons for the damage are clearly depicted in this study in the experiences of the children. It is little wonder, most children believe it is not worth it.

It might be easy for lawyers to dismiss the children's response by arguing that children could not possibly understand the intricacies of the law, the duty of advocacy, or the history of traditional jurisprudence. After all, children do not have

the knowledge and experience of the law possessed by criminal lawyers and judges. It might be easy to disregard the concerns of children, if it were not for the fact that many of those very adults who are central players in the system, also do not trust the criminal justice process in matters about the sexual abuse of children.

While the response of the children to this question is disturbing, the response by legal participants may be described as revealing. Legal participants were asked if they would want their own child in the criminal justice system if the child was a victim of a serious sexual assault. Only 18 % in Queensland, 33% in New South Wales and 46% in Western Australia said they *would* want their own child in the system. Once again, the higher response from legal participants in Western Australia appears to be due to the implementation of substantial reforms for child complainants in the last decade. Reasons given were similar to those given by children. Legal participants frequently indicated a belief that it is not worth the trauma suffered by the child and that the process is "cruel and horrible".

In a remarkable finding, not one defence lawyer responded that they *would* want their child in the system. 43% of defence lawyers said they would *not* want their child in the system, and 57% said they were *not sure*. It would seem that those who are responsible for inflicting the most damage on vulnerable children, would not want to do the same damage to their own child. Surely this raises serious considerations about the ethical role of criminal advocacy. It also raises questions about moral reasoning when behaviours that are considered acceptable in courtroom practices involving children, are somehow deemed unacceptable when the lawyer's own child is the potential complainant.

The inadequate level of legislative and procedural reform in Queensland and New South Wales is reflected in responses from children in those states. The percentage of children from both states (39% and 56% respectively) who would *not* report is substantially higher than in Western Australia (17%).

Reporting Sexual Abuse

In order to disclose abuse to family and friends all children had to overcome threats of further physical, emotional and psychological trauma as well as the fear that they would not be believed. Given that 92% of children in the current study were abused by either a family member or by someone known to the child, the risks associated with disclosure may have been considerable. Despite increasing societal recognition of the problem, obstacles to belief of the disclosure persist. Ingrained cultural myths remain about the child who either tells lies to gain attention, or is unable to differentiate fact from fantasy.

Children across all jurisdictions disclosed to a variety of people. Most disclosures were made to mothers, while others were made to sisters, fathers, grandparents, other family members, friends, teachers and mothers of friends. The level of courage required for the child to tell about the abuse is reflected in the

comments of most children that indicated they "did not want anyone to know". However, the involvement of police subsequent to disclosure of abuse was a more difficult decision for children. While some children expressed a desire to make the perpetrator pay for what they had done, more than half of the children were reluctant to report to police and were only persuaded to do so in consultation with parents. For some children, control over whether to report or not was taken entirely out of their hands. Children frequently expressed the view that they didn't want anyone else to know about the abuse as they just wanted to "keep it a secret". Reasons given by children included feeling ashamed, feeling scared, feeling confused, fear of what might happen to themselves or other family members, having to tell about what had happened, and "in case they didn't believe me."

These findings reiterate that the fears and risks associated with disclosure cannot be underestimated. The psychological implications for reporting to, and involvement in, the court process are significant. As the child moves through the criminal justice system, too often the fears become reality.

The Police Response

Comments across all jurisdictions in relation to the police were generally positive, with most children indicating the police were helpful, compassionate, sensitive and friendly. Being kept informed by police was also considered an important issue for children and parents. This is an encouraging finding and one that is indicative of the significance placed by the children upon any positive experience in the overall negative and distressing justice process. Given the abuse of power suffered at the hands of their adult abusers, the supportive attitudes of police, who also represent powerful adults in society, is an important contributor to the healing process. The manner in which many children bonded with the investigating police reinforces the trust placed in them. Police must realise the vulnerability of these children and ensure police training and procedures help them to act with an awareness of the child's emotional and developmental needs.

A small number of negative comments about police occurred in all jurisdictions and indicated a few children felt the police were pushy, nasty, and aggressive. Any expression of disbelief was disturbing to the child. Police who react with skepticism and disbelief create additional barriers to reporting by reinforcing the fear that they will not be believed. If police expect abuse to be reported, they cannot afford to be part of the scenario painted by abusers that if the child tells they will be punished and they will not be believed.

Other problems reported included a parent in New South Wales who indicated they had to report three times before staff and facilities were available to enable the child to give a statement. Another New South Wales child insisted that while the statement was being taken the police officer put down what he wanted to say, not what she said. These comments raise both procedural and evidentiary issues in relation to police.

As indicated in earlier research (Eastwood & Patton, 1993, Eastwood et al 1998), the length of the interview process and the gruelling nature of the questioning involved added to the stress faced by children. Given that many children were reluctant to talk about the abuse from the outset, it is understandable that the process of providing precise detail was a harrowing experience. The trauma of having to re-live in detail the abusive experiences was the most difficult aspect of reporting. Children expressed appreciation about being given a choice of who could be present during the interview and being given breaks. Child complainants also valued other indications of support and understanding.

Another strong theme raised by children about reporting was in relation to the gender of the investigating officer. While it may be argued that the gender of the investigating officers is irrelevant, and indeed it may be beneficial for the child to deal with a male officer, the preferred choice of child complainants for female officers is clear. Mindful that most complainants were females, children in all states indicated a preference for a female officer. The two male complainants, did not indicate a gender preference. Of the few children who were given a choice, only one female child requested a male officer. While some complainants dealt with both male and female officers, children expressed embarrassment and humiliation at having to discuss intimate details of sexual assault with males. Reasons given focussed on children feeling more comfortable discussing intimate sexual issues with another female. Despite operational difficulties, it is clear that the child should be given a choice in relation to the gender of the investigating officer.

Prior to involvement in the criminal justice process, children held an initial simple belief that if they just told the truth about what happened to them, justice will be done (Eastwood et al, 1998). This belief goes to the heart of traditional jurisprudence with emphasis on the assumed ability of law to examine the facts on any matter, and through legal reasoning and process, discern the truth of that matter. Such a view also goes to the heart of legal thinking that through law's supposed objectivity there is equal treatment for all before the law, irrespective of race, class, gender, creed or age. Unfortunately, this is not the reality. In reality, the justice system continues to have enormous difficulty in providing justice to the child who has been sexually abused. Given the number of children who would not report sexual abuse again and the feelings about the process, the initial view of the justice system being able to deliver justice is rarely a view that is maintained by children at the end.

Waiting for Committal and Trial

The current study reports that complainants waited between 8 and 36 months between reporting and trial. The average wait was 18.2 months. The delay between reporting and trial in Queensland was 20.8 months in Queensland and 16.4 months in New South Wales. Although the delay was 17.5 months in Western Australia, one-third of complainants fully pre-recorded evidence months prior to trial. It is of concern that this average represents a longer delay than reported in an earlier study.

Eastwood et al (1998) reported delays of three months to committal, and twelve months between committal and trial.

Despite claims that best efforts are being made to prioritise children's matters in the courts, as recommended by the ALRC & HREOC (1997), the situation shows little or no improvement. The waiting time endured by most children in the current research prevents the children from being able to move on with their lives, and leaves many feeling that it is never going to be over. At a crucial stage of their emotional, social, and cognitive development the disruption caused by an eighteen-month wait may have significant consequences for their psychological well-being. One and a half years spent "waiting and worrying" represents a significant proportion of child's life at a crucial stage of their development.

The current study also identifies the detrimental effects of adjournments and re-trials. In particular, children and parents in Queensland and New South Wales reported the detrimental effects of adjournments. In the worst cases, two children (one in each state) were subject to three adjournments in the wait for trial. After the experience of giving evidence and cross-examination at committal the possibility of similar treatment at trial is frightening for most children and involves considerable psychological anticipation. Combined with the fact there was little or no explanation offered to the child for such delays, the child is further disempowered with the likely consequence that psychological recovery from the court proceedings, whatever the outcome at trial, will be delayed.

The psychological effects exhibited by participants during the wait for trial such as nightmares, suicide attempts, self-mutilation, self-hatred, fear of further victimisation by the offender, depression, inability to concentrate on schoolwork, fear of returning to court after committal experiences and fear of not testifying well at trial, were compounded by the long wait for trial. Children frequently reiterated that it was impossible to get on with their lives and that "it was always on my mind." It is not surprising therefore, that there were detrimental effects on education for most children. For many children it seemed like it took forever. Parents in all states commented widely on the suffering of their children during this time and agreed that the longer it went on, the harder it became for the child. Children repeatedly indicated that the delays prevented them from putting the abuse behind them as they needed to remember every detail in order to give evidence effectively. One child expressed the pain of waiting.

> The waiting is so hard because you don't feel secure – I think because the courts have made you feel like it is never going to be over and done with. They are just taking so long, and they just don't understand the pain that you go through. It's really hard.

Children in both Queensland and New South Wales highlighted the ability of rough cross-examination at committal to unsettle them prior to trial. Those who experienced particularly brutal committals, clearly were more fearful about going to trial. This is vividly portrayed in the comments of one New South Wales child.

> Because of the hearing I was really emotional until the trial. When everyday came closer I was getting more tense and all that. Then I started having nightmares which were telling me to kill myself… Everyone was saying that it (the trial) is bigger than the hearing and they'll be yelling at me more, and that kind of scared me because I don't like getting yelled at.

Other issues raised by children included harassment from perpetrators during this period, and inability to discuss the abuse with those closest to them due to fear of contamination of the child's evidence.

For the child, the period between reporting and trial is marked by inner turmoil and conflict. A series of conflicting thoughts and emotions impinge on their ability to bring some balance and peace to their lives. On the one hand there is the desire to get the trial over and done with, and yet (for children in eastern jurisdictions) there is tremendous fear and trepidation at the prospect of facing a repeat of the attitudes and abuses of committal. There is also a deep need to see the accused convicted and to thereby receive validation. However this need is at odds with their worst fear that the accused will be exonerated and they will be named a liar. In addition, there is the wish to put the abuse behind them so they can move on with their lives and yet again, until trial, the children must constantly recall details in order to "remember" as much about sexual abuse experience as possible for their appearance in court. The longer the period between reporting and trial, the longer the child must live with such immense inner conflict.

While delays are considered a problem for adult victims, the literature makes it clear that the effects upon children are more serious (Cashmore, 1995; Flin et al, 1988). Given the stress of waiting approximately one and a half years for trial, the detrimental emotional effects of awaiting trial after committal experiences, the effect on education and resultant possible long term consequences, and the need to remember and recall details of abuse during the waiting period, the present study substantiates the view that the psychological cost of delay to the child may be considerable. Despite iterations from the three jurisdictions that children are given priority in the court listings, the practical evidence of such attempted remedies is not evident. (Except perhaps in Western Australia where children are increasingly fully pre-recording their evidence). The lengthy wait for trial fails to acknowledge the context and realities of child sexual abuse.

Waiting to Give Evidence

After many months of awaiting their day in court, children in Queensland and New South Wales are then subject to hours and sometimes days of waiting in cramped windowless witness rooms furnished with nothing but a table and chairs. Children in the eastern states describe conditions as cold, boring, horrible, small, stuffy, brown and bare. In Queensland children reported waiting to give evidence for

between 1 hour and 4 days, with an average wait of just under one day. Children were also subjected to seeing the accused, not being allowed to move outside the room, and being shuffled from room to room to avoid seeing the perpetrator. In New South Wales, children waited in similar conditions for between 2 hours and 5 days. In the worst case a child told how she waited for five days in "a little room with nothing" while the accused was allowed to walk around outside and she was not.

In contrast, children in Western Australia wait to give evidence in a special section of the courts known as the Child Witness Service. Within the secure doors of the service, children are provided with support and child-friendly facilities such as toys, videos and drinks. Children in Western Australia waited one or two hours before being called to give evidence in the CCTV rooms within the Child Witness Service (CWS) where their evidence is pre-recorded.

In summary, inadequate conditions combined with the stress of waiting to give evidence emotionally wore down the children and made them more nervous and more distressed by the time they actually gave evidence. Despite an ALRC & HREOC (1997) recommendation that children be provided with designated rooms, (recommendation 113), only Western Australia has effectively addressed this need. Ultimately, such arrangements can only facilitate the child's evidence. Waiting for hours or days in such stressful conditions is not conducive to the presentation of reliable evidence by the child.

Giving Evidence – Seeing the Accused

The process of giving evidence was a key issue discussed by children, parents, lawyers and judiciary. It should be noted however, that legal participants did not reflect the perspectives of the child in many aspects. For example, for children, the issue about the use of CCTV and screens was more about fear of seeing the accused than the purely evidentiary focus of the legal participants. It is also evident that what makes sense from the perspective of the child – does not always make sense from the perspective of the law. Indeed the conceptions of many legal participants reflect a general ignorance not only about the dynamics of sexual abuse, but also about child development. Therefore, the deliberate emphasis in the sections about giving evidence (as throughout), is on the viewpoint of the child – not the adult.

The experience of seeing the accused during the court process arose in two contexts: outside the courtroom and inside the courtroom. All children who came face to face with the alleged offender in the precincts of the court or in court commented on the disturbing nature of the encounter. It seems that Queensland and New South Wales refuse to adequately address the issue despite continuing evidence that seeing the accused is one of the worst features of the process (Eastwood et al, 1998; Regnaut, 1994). Children who are more worried about the presence of the perpetrator are less willing to tell what happened to them and less accurate and

complete in their accounts (Goodman et al, 1998). In relation to this issue, there is considerable variation in the legislation and procedures from state to state.

The problem of seeing the accused was not an issue for children in Western Australia as they were protected from coming face to face with the accused at all stages of the court process. Children clearly expressed relief and gratitude that they did not have to fear seeing the accused. However, children in Queensland and New South Wales were guaranteed no such protection against seeing the perpetrator either inside or outside the courtroom.

The Use of Screens

Within the context of the courtroom, children may be protected from facing the accused through two means: the use of screens and the use of CCTV facilities. (The use of CCTV will be discussed in the following section). According to the findings, the use of screens in the eastern jurisdictions was sporadic and inconsistent.

In Queensland, the use of screens is discretionary for "special witnesses" including for children under 12 years of age. The lack of protection offered by this toothless legislation is reflected in two ways: in the number of children who were refused the use of screens and in the ineffectiveness of the measure itself. At committal, only 30% of children were permitted the use of a screen. The situation was even worse at trial, with 50% of children refused the use of screens including children as young as 10 and 11 years of age. Given that not one child was permitted to use CCTV, all Queensland children were required to give evidence in court in the presence of the accused. Despite the use of screens, makeshift screen arrangements also resulted in children not only hearing, but also seeing the accused. Understandably, children expressed fear at being in court, and there is little doubt the quality of evidence would have been affected.

In New South Wales all children who are under 16 years have a right to alternative arrangements such as screens (if CCTV is not available, is not chosen by the child, or is refused by the court). As a consequence of the recent amendment by the *Evidence (Children) Act 1997,* in limited circumstances, children under 18 years also have a right to other arrangements such as screens. Two-thirds of child complainants required to give evidence at committal were refused the use of screens (and CCTV). As in Queensland, comments were made about hearing the accused behind the screens. Because decisions about the child being able to use a screen were made just prior to giving evidence, the uncertainty added further to the stress suffered by the child. Of those children whose trial proceeded, 43% were denied the use of screens (and CCTV).

The provisions in Queensland are woefully inadequate, but consistent with the inadequate protection offered by other provisions for child complainants. New South Wales has recently moved to address inconsistencies in the legislation, but still gives the court the discretion to refuse the use of screens. Only Western Australia

seems to fully comprehend and address the fear of the child about seeing the perpetrator and the consequences for obtaining effective and reliable evidence from the child.

Comments from some defence lawyers reiterated the view that children who are brazen "little misses should face their accusers (sic)" (note the implication that the child is actually the one on trial). This displays either an appalling lack of knowledge about the dynamics of sexual abuse, or a belief that most children lie about abuse. The failure of some jurisdictions to ensure that the child - under *any* circumstances - does *not* see or hear the accused, indicates the system's inability to understand sexual abuse.

The experience of child sexual abuse becomes related to the experience of the criminal justice system when the child is forced to confront the perpetrator both in and out of the courtroom. First, for the child who has suffered sexual abuse, threats of death or of further physical, sexual and emotional abuse constitute a powerful obstacle to the child revealing the abuse. The power exercised by the abuser in order to maintain the child's silence is impossible to ignore, as is the sense of powerlessness that the abuse imbues in the child. Second, the child's sense of powerlessness as a result of sexual abuse is then compounded by the manner in which the justice system disempowers the child. By failing to protect the child from confrontation with the very person responsible for their abuse, the justice system perpetuates the power relationships and subsequent trauma to the child which are characteristic of facing the abuser.

The Use of CCTV

There is considerable variation in the use of CCTV for child complainants across the three jurisdictions. Based on the research findings, the use of CCTV is virtually non-existent in Queensland, is inconsistent in New South Wales, and is standard practice in Western Australia.

According to the Queensland legislation, the use of CCTV is one of the special arrangements that may be made for "special witnesses". Despite DPP directions that applications for its use be made and plans by the Attorney General to increase CCTV facilities (Press Release, August 2001), evidence of CCTV facilities in other states shows resources have fallen far behind other jurisdictions. When inadequate resources are combined with the reluctance of prosecutors to use CCTV, the discretionary nature of the legislation, and the tendency of judicial officers to consider the measure unfairly prejudicial to the accused, the legislation and facilities are rendered virtually ineffective.

Based on the findings, not one child in Queensland was permitted to give evidence via CCTV either at committal or trial. Many were also refused the use of screens (see previous section). The level of trauma suffered by Queensland children who were required to give evidence in court both at committal and trial without

CCTV is particularly evident. The treatment of Queensland children contrasts with the experiences of children in Western Australia who *all* gave evidence via CCTV (except one child who chose not to), on one occasion only.

In New South Wales, child witnesses in a "personal assault offence" proceeding have the right to give evidence using CCTV unless the court considers it is not in the "interests of justice" to do so, urgency makes their use inappropriate, or the child chooses not to. The "interests of justice" is not defined. 33% of the children were refused the use of CCTV at committal and 43% were refused its use at trial. The same children were refused the use of screens (see previous section). A number of technical problems were reported including one child who had to stand for three hours while giving evidence because the camera couldn't be adjusted. The importance of CCTV being standard procedure for all children, and therefore removing the uncertainty which surrounds the use of CCTV is no better portrayed than in the comments of a New South Wales mother whose daughter had been threatened with death if she told anyone about the abuse. She said her daughter's fear of "having to see this man again …nearly destroyed her."

In Western Australia, the use of CCTV facilities for an "affected child" under the age of 16 years at the time of complaint, is mandatory where they are available, unless the child chooses to give evidence in court. (Children may also fully pre-record their evidence using CCTV prior to trial, see p 20). In contrast to the New South Wales legislation, the choice is in the hands of the child, not the courts. In practice, the CCTV facilities in Western Australia are of a very high standard and are widely used. Only one child in the current study gave evidence in court – and it was her own choice to do so. The comments of the children reinforced the level of protection offered to the children by the use of CCTV. The findings in Western Australia contrasted with the uncertainty and trauma suffered by children in eastern jurisdictions who had to face the possibility or the reality that they would need to give evidence in court in the presence of the accused.

Not surprisingly, the attitudes of legal participants across the jurisdictions varied enormously. The attitudes of some prosecutors and defence counsel in Queensland and New South Wales are no more enlightened than those who believed the earth was flat and if you sailed across the ocean you would fall off the edge of the world. Unsubstantiated claims that the use of CCTV erodes the rights of the accused, that the child wouldn't take giving evidence seriously, that conviction rates would fall, that you need the child in court living out the trauma to get a result, are widespread and erroneous. There is also evidence that where CCTV provisions are discretionary, prosecutors who adhere to these views may discourage the child from using CCTV in the belief that they are more likely to gain a conviction if they give evidence live in court.

While the views of defence counsel differed, some Queensland defence lawyers argued for CCTV to be fully implemented in the belief that keeping the crying child out of court would help the defence. The comments of one defence lawyer crudely sums up this viewpoint.

> The worst thing, if you're acting for a bloke, the worst thing to see in front of a jury is to have an 8 year-old girl crying while she's talking about Daddy sticking his fingers up her bum… I'm in favour of it because I think it will help me get my bloke off.

In stark contrast, prosecutors, defence lawyers and judges in Western Australia all commented on the effectiveness of the legislation and the use of CCTV. Prosecutors commented on how it facilitated the evidence of the child because the child exhibits better concentration, is more mindful, more attentive and less exhausted by the trauma of appearing in court. Defence counsel in Western Australia maintained it has not changed conviction rates, has not affected the rights of the accused and even appeared to understand it was designed to prevent further damage to the child. Evidence that the use of CCTV does not affect conviction rates is also substantiated by recent research in Western Australia (Cashmore, 2002).

The approach of some jurisdictions to the use of use of CCTV is, to say the least, baffling given that it would be fairer to the child and less prejudicial to the accused if it were used in every case. The law in Queensland is most damaging to the child, as it retains full discretion for the use of CCTV. Uniformity of a fair and balanced practice and a simple direction to jurors as in other states are not provided for. Even if a court wants to make an order in Queensland, it is likely that it will be unable to do so because of the gross lack of equipment and facilities due to funding needs being persistently ignored, neglected or overlooked. New South Wales provides plenty of equipment, but permits the courts to choose not to use CCTV, instead of the child, if satisfied that it is not in the interests of justice. Jurors who are involved in a number of trials in one sitting are likely to observe the different practices of judges and must speculate why it is used in one case and not another. If it were uniform practice it would simply be accepted without prejudice. Until this is remedied, eastern jurisdictions may be accused of approaching the use of CCTV in a fickle manner constrained by insufficient resources and erroneous fears. Only Western Australia allows the child to make an authentic choice.

Giving Evidence: Evidence-in-chief

While court processes and procedures are part of life and work for lawyers and judges, very few realise how threatening the process is to the child. The stress suffered by the child in giving evidence-in-chief is affected by issues such as the length of time since the offence was reported, the hours or days spent waiting around the court to actually testify, whether the evidence must be given in court, and whether the child is required to give evidence both at committal and trial. The following section discusses the process of giving evidence across the jurisdictions.

No children in Western Australia were required to give evidence-in-chief at committal proceedings. One third of children in New South Wales and all children except one in Queensland were required to give evidence-in-chief at committal. All children in Queensland and New South Wales whose cases proceeded to trial were

required to give evidence-in-chief at trial. Most children found the process stressful. Given that most children believed the prosecutor was there to represent them as "their" lawyer, children were also particularly sensitive to comments from prosecutors that were perceived as supportive, friendly or hostile.

All children in Western Australia were spared the ordeal of giving evidence-in-chief at both committal and trial and based on the findings, were better able to just "tell their story". Given that 70% were permitted to use CCTV at trial while the remaining 30% fully pre-recorded their evidence, this is perhaps understandable.

The pre-recording of (at least) the child's evidence-in-chief is one way of alleviating the stress of telling about the abuse. The comments of a judicial officer epitomise the problems that exist for children in Queensland and New South Wales. The judge argued that a child might have to wait two years to give evidence and "sometimes they miss the main one and I have to rule that charged be dropped… and because in that thirty seconds they couldn't remember it, that whole charged just goes. It is all so archaic."

The ability to fully pre-record a child's evidence addresses two difficulties for the child. First, pre-recording can take place many months prior to trial, thereby negating the need for the child to wait months or years to give evidence. Second, the child gives evidence-in-chief and faces cross-examination on only one occasion via CCTV. Western Australia has been able to overcome the concerns that seem to prevent Queensland and New South Wales from enacting similar legislation. Western Australia is increasingly using fully pre-recorded evidence and is also moving to abolish committals altogether.

Based on the findings, there is little doubt that talking about the intimate details of sexual abuse is embarrassing for the child. When jurisdictions may require, and often do require this evidence to be given on more than one occasion in the courtroom (such as Queensland and New South Wales), the child is subject to yet another unnecessary disturbing process of the criminal justice system.

Giving Evidence: Cross-examination

In recognition that brutal cross-examination does occur, all jurisdictions have enacted legislation to try and control the manner in which cross-examinations are conducted. This is despite the fact that judges and magistrates have always had the power to control cross-examination in the inherent jurisdiction of the court. Queensland recently amended s 21of the *Evidence Act 1977* to disallow an improper question that is offensive, intimidating, misleading, confusing, annoying, oppressive or repetitive. The New South Wales legislation (s 41 *Evidence Act 1995)* is similar but retains the qualification "unduly". Therefore it seems that New South Wales lawyers can be annoying, harassing, intimidating, offensive, oppressive or repetitive unless a judge or magistrate is willing to find it is "unduly" so. The Western Australia legislation is actually less prescriptive.

The way in which children are treated during cross-examination has been described as in itself, child abuse (Eastwood et al, 1998). Despite attempts to legislate to control cross-examination, there is overwhelming evidence that unacceptable and abusive cross-examination continues in many courts in many jurisdictions. Chrissie's case study is a disturbing example of the kind of treatment to which children are typically subject during cross-examination in the eastern jurisdictions.

There is no doubt that being subject to cross-examination both at committal and trial is damaging for the child. In the current study, children in both Queensland and New South Wales were required to face cross-examination "live" in court at both committal and trial. While some children in New South Wales were spared cross-examination at committal and allowed to be cross-examined via CCTV, every Queensland child was cross-examined in the courtroom at both committal and trial. In contrast, every child in Western Australia was cross-examined once only, and every child was able to use CCTV. Clearly, some states are unwilling to ensure the same level of protection for children that Western Australia has provided.

Children described the cross-examination process that sometimes continued for hours or days, as horrible, confusing and upsetting. The most hurtful part of the process for children in all states was being accused of lying. The use of rough cross-examination at committal to unnerve children for trial seems to be a frequent tactic employed by defence counsel, and raises the issue of the role of committals for cases involving child complainants (see Discussion p 128). Children in Western Australia were cross-examined for much shorter periods of time, benefited from knowing with certainty prior to giving evidence that they would not see the accused, and appeared to be less intimidated with the degree of separation offered by CCTV. As expressed by one child, having someone yell at you through a television is not as upsetting as someone yelling at you from five feet away.

Legal Participants

The comments by legal participants, particularly those in Queensland, revealed some quite astounding findings and provided background as to why child complainants can be so traumatised by cross-examination.

Prosecutors and judicial officers in Queensland and New South Wales confirmed that cross-examination is often about getting the bench intimidated and that junior prosecutors are frequently intimidated by senior counsel. Children frequently face a torrid time during cross-examination and a core of defence counsel use the committal to terrify the children and to "belt them up."

The comments of defence counsel in the eastern states can only be described as ignorant in the light of current knowledge about children and about sexual abuse. Comments which repeatedly implied that children are brazen little lolitas, that most

children lie about abuse, that children as young as nine who are precocious deserve to be cross-examined aggressively, suggest that many lawyers remain ignorant about the context and dynamics of child sexual abuse. In a surprising claim, a senior Queensland defence counsel who was clearly against any further reforms for child complainants, tried to argue that he has never met a lawyer who tries to intimidate child witnesses, and that savage cross-examination does not even exist. Based on the evidence from other legal participants and children, and the court transcript from the case study, such claims cannot be given any credibility. In contrast, defence counsel in Western Australia appeared to be more knowledgeable about the effects of child sexual abuse and expressed the view that even if their client wants them to bully a child, it is not ethical to do so.

Chrissie's Case Study

It is almost impossible to read the court transcript without coming to the conclusion that the cross-examination of this child was at best very aggressive, and at worst, a demonstration of abusive and unethical behaviour towards a child. Yet, it should be remembered that this committal cross-examination is not an exception. Rather, the findings from children and legal participants in Queensland and New South Wales substantiate that this kind of behaviour goes on repeatedly in courts, on a day to day basis. Based on the comments from the child, her mother, the police prosecutor, the court support person and the court transcript, a disturbing picture of the justice system emerges (see p 74). The child was repeatedly subject to intimidating, misleading, confusing, annoying, harassing, offensive and repetitive cross-examination. Despite successive warnings from the bench, defence counsel refused to be controlled and the child was subject to ongoing abuse. It is clear that this child was not treated with respect, dignity, care and humanity.

It is time that defence barristers were told that they cannot have it both ways. It is accepted within the law that confessions obtained through inappropriate questioning such as threats and/or intimidation, are inadmissible, because they are not reliable. For the same reason, it should not be legitimate for defence counsel to submit he has discredited a child's evidence if counsel obtains the answer they want to hear through threatening and intimidatory behaviour. It is clear that defence counsel in Chrissie's case was using every possible improper means to try to get her to say the words *he* wanted her to say. Comments elicited from the child under such circumstances at committal, are then presented at trial as evidence that the child is lying or is unreliable. If confessions from their clients obtained under threat or intimidation are inadmissible, then so too should comments from child complainants elicited under the same circumstances.

Despite adamant claims from defence counsel that cross-examination at committal is necessary to test the evidence, the findings in the current study support the view that cross-examination at committal is more about intimidating the child and forcing the child to make certain statements. These 'statements' will then be presented - out of context - and used to discredit the child at trial. Even if part of a

transcript is read at trial, none of the yelling, thumping and crying is conveyed to the jury. If Western Australia can protect the child from such unnecessary trauma, then the eastern jurisdictions can, and must do the same.

Acceptable Behaviour?

Any discussion on the behaviour of defence counsel during cross-examination must also consider the questionable and apparently ongoing behaviour of a Queensland defence lawyer who follows the child during breaks in cross-examination. In earlier research (Eastwood 1998) a child and parent were interviewed who described a defence lawyer, who during a three day committal followed the child outside the courtroom and put his foot in the door of the witness room whenever the child required a break and was too distressed to continue during cross-examination. The lawyer even stood outside the toilet. Another case was raised by a legal participant in the current study, about a three-day trial in which the same defence lawyer, followed the child every time there was a break. The legal participant described it as "completely intrusive and inappropriate behaviour."

There are obvious ethical issues about such conduct. There is *no* justification for such intimidating behaviour towards a child. This is clearly a tactic used to frighten and bully the child and under no circumstances is it acceptable. The fact that such behaviour is allowed to continue should be of concern to the whole legal profession in Queensland.

Judges and Magistrates

Children frequently described judges and magistrates as grumpy, nasty, grouchy and cranky. However, whenever a judicial officer made a friendly comment such as wishing the child well for the future, or if they tried to stop badgering from defence, children noted this positively. Given there are so few supportive or friendly experiences in the justice process for children, this is perhaps understandable.

However, it is the comments of the legal participants in relation to judges and magistrates that illuminate the problem of cross-examination within the courtroom. While comments about judges from prosecution and defence in Western Australia were overwhelming positive, comments from the eastern jurisdictions raised a number of issues.

Both prosecutors and defence lawyers commented that there is a wide variation as to what judges allow during cross-examination. Many named specific members of the judiciary who are "known" to be either pro-defence or pro-prosecution. Although "judge shopping" is not permitted, it is clear that both prosecution and defence admittedly attempt to have trials adjourned in order to have a more "favourable" judge sitting on a particular case.

Other comments from legal participants noted that many judicial officers appear to possess only erroneous and limited knowledge of sexual abuse. Indeed, one defence counsel expressed gratitude that a "fair percentage" of judges realise that children frequently make stories up. Others believed that many judges are "blind to the needs of the child" and have an attitude that even if sexual abuse does happen, that it is not such a bad crime and therefore there is no reason to make a big deal out of it. Some commented that many judges are also sexist and do not like the fact women and children make complaints about sexual assaults against men. Undoubtedly, judges and magistrates who have no knowledge of child development and limited understanding about the dynamics of sexual abuse may fail to restrict damaging cross-examination, thereby contributing to the trauma suffered by the child.

Comment

It is evident that legislation to control cross-examination has not worked. The reasons for this are varied. First, many judges and magistrates would not even recognise if questioning is, for example, oppressive or intimidating for a child. Second, many judges and magistrates are unwilling to "enter the arena" particularly at committal proceedings where the unspoken assumption is that defence "own" committals and are therefore permitted "open slather". Third, even when judges and magistrates *try* to control brutal defence lawyers, a core of defence lawyers simply refuse to be controlled (as evidenced in the case study). Some defence barristers appear to consider themselves above question and not accountable in any way whatsoever. It is clear that a range of legal practitioners from both in and outside the state believe that the Queensland Bar exercises too much power. Fourth, even if defence lawyers repeatedly act in contravention of the legislation, it appears very little can be, or is being done to remedy the situation. Bar Associations seem unwilling to control or discipline even the most brutal defence barristers. Fifth, the ability of courts to restrict persons allowed to be present during proceedings was originally intended to protect the child. An unfavourable outcome however, has been that the behaviour of defence lawyers is hidden and there is a lack of openness and accountability.

Sixth, in Queensland, the defence barristers who participated in this study are frequently briefed in cases involving child sexual abuse. So the questionable behaviours and attitudes exhibited by these lawyers are repeatedly being inflicted on children who appear in court in Queensland and New South Wales. In all other professions, adults who work with vulnerable children must undertake training and abide by ethical guidelines for the treatment of children. Yet, some of the most aggressive defence barristers in Australia are continually briefed for these cases and permitted to interrogate children in the most cruel and damaging manner. Their persistent behaviour only substantiates the view that unethical behaviour is acceptable. Some barristers can, and do, successfully act on behalf of clients without destroying the child. Therefore, those who persistently bully the child should be banned, prohibited or sent into civil cases to bully adults not children. If the legal

profession cannot and will not control the abusive treatment of children in court, they leave little option except for control to be forced on them. Clearly, the opportunity to inflict such damage at *both* committal and trial must be the first bastion to go (see p 128).

The way in which legislation to control cross-examination has failed, substantiates the notion that reform must go beyond legislation, and must include a paradigm shift. It is interesting to note that although Western Australia has the least prescriptive legislation to control questioning, cross-examination in that state is more controlled and less damaging to the child. It is clear from the findings, that the *culture* and *attitudes* in Western Australia have changed – not just the legislation. There is a real recognition of the damage that can be done to a child through brutal cross-examination and willingness on the part of all parties – including defence counsel – to behave ethically in questioning children. There is no such ethical or moral perspective evident in the findings from Queensland defence counsel. Rather the findings reveal that virtually anything goes in cross-examining a child.

The right to cross-examine is not a fundamental right. Rather it is an incident of the obligation of the court to ensure a fair trial that balances the interests of the accused with those of the community (*R v McLennan* (1999) 2 Qd R 297). Defence counsel should know this. In addition, platitudes about every reform being a "threat to the accused" are rarely articulated in real terms. None were able to detail precisely how the rights of the accused would be diminished by a fair and controlled cross-examination of the child complainant. The effectiveness of the Western Australian reforms is proof that the rights of the accused can be maintained and the child protected. Judges and magistrates need to consider that the notion of a fair trial goes beyond fairness to the accused. It cannot be fair if lawyers are permitted to exploit the power imbalance in the courtroom and to deprive any witness of a fair chance to tell his or her story in as full, cogent and reliable a manner as the child is capable of. More importantly, child complainants of sexual abuse should be able to do so without suffering further abuse at the hands of adults.

For the child, the adversarial nature of lengthy cross-examination in a hostile and intimidating courtroom environment in the presence of their abuser, appears impeccably designed to reinforce feelings of powerlessness and blame. Indeed, in terms of child psychology and development, it would be difficult to come up with circumstances more inappropriate for the child who has been sexually abused. On every level, the needs of the child are ignored as the rights of the accused are considered paramount. This premise represents a major stumbling block to a more substantial and balanced focus on the needs of the child.

Dynamics which operate in the experience of childhood sexual abuse are replicated in the justice system, particularly during cross-examination. In sexual abuse, the right of the child to exercise ownership and control of their own bodies is overridden. The child loses control of their sexuality and their identity. In cross-examination, the child is forced to be physically present in the same room as the abuser, and also in the presence of a number of (usually) male adults. The sexually

assaulted child has no choice in being present, nor is the child permitted any control over who is in the courtroom. In addition, they are forced to describe intimate intrusions to their body in great detail, usually a number of times. The child has no control over the questions, nor over how they can respond. As a child who has been sexually assaulted they are not permitted to tell their story in their own words, nor are they permitted to defend themselves against accusations of lying in any way whatsoever. The child must do as they are told. The child must answer every question. The child has no right to challenge offensive treatment, or try to defend themselves. These are the precise terms in which the initial sexual abuse took place. In other words, the sexually abused child is abused all over again, though this time with the sanction of the State.

Why Committals Should be Abolished for Child Complainants

The findings from the current study confirm that "committal proceedings were exceedingly traumatic for children" (ALRC & HREOC, 1997, p 318). From the child's perspective, considerable harm is caused when children are required to give evidence both at committal and trial (as in Queensland and New South Wales). The most damaging element is the fact that the child is frequently cross-examined at committal proceedings, not always for the purpose of truly testing the evidence, but rather in order to intimidate the child and to force statements from the child which are then used to attack credibility at trial. Legislative attempts to control brutal cross-examination have failed largely due to defence counsel who refuse to be controlled, judicial officers who are intimidated by senior defence counsel, and the absence of any discipline or penalty for those defence counsel who repeatedly breach the legislation.

In Queensland, children are routinely called to give evidence-in-chief and be cross-examined at committal. Despite legislation to restrict children being called in New South Wales unless "special reasons" exist (*Evidence (Children) Act, 1997* s 48E(2)(a)), some children are still required to be examined at committal proceedings. In Western Australia, children have not been required to appear at committals since 1992. In 2001 legislation was enacted (s 69 *Justices Act 1906* (WA)) which strengthened the provision and dispensed with the discretion to permit the "affected child" to be called and cross-examined if the defence could establish special circumstances. In March 2002 a Bill was introduced to effectively abolish committals in that state (*Criminal Law (Procedure) Amendment Bill 2002*). It is clear that Western Australia alone, has fully recognised and acted on the damage done to child complainants at committal proceedings.

Understandably, the opinions of legal participants across all jurisdictions varied considerably, with an obvious difference of opinion between defence and prosecution, and between those in the eastern and western jurisdictions. There was widespread agreement that committal proceedings are a big money-earner for defence counsel and that most barristers would be reluctant to abolish committals for that reason. The use of committals as "open slather" to unnerve children prior to trial

was widely reported by prosecutors and judicial officers. Comments from defence counsel maintained that any legislation to restrict the appearance of children at committals would be a dangerous and backward step.

Despite objections from defence counsel in eastern jurisdictions that such legislation cannot work, the findings from judges, prosecutors and defence counsel in Western Australia acknowledge that not only does the legislation work, but it works very well. Although the New South Wales legislation endeavours to restrict the calling of children at committals, it is obvious that attempts to thwart the legislation persist. The end result for children in that state is more uncertainty and inconsistency.

The committal is essentially a gathering of evidence and the decision to be made is whether or not there is sufficient evidence to commit a person to trial. As a matter of law, the prima facie case exists on the statement of the child. Although it might be argued that the right to cross-examine is an important right at trial, it is not an enshrined right at committal proceedings. As eloquently explained by Justice Pigeon, the potential harm to the child must be given serious consideration.

> The proper approach is 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 (*Angus v DiLallo* (1993) 11 WAR 93)

One judge described the situation in the eastern states as being controlled by "an unbridled bar… where you have this charade of cross-examining people for three days." It is evident that in Queensland in particular, there has been a culture of not standing up to the bar. The time has come to give priority to the protection of children instead of just paying lip-service to their needs. The time has come to abolish committals for child complainants.

Other Matters

Children commented on a number of other matters including the rapport with prosecutors and the need for more follow-up after court. The difficulty in understanding legal language during court proceedings was another problem particularly in Queensland. 65% of children indicated it was hard to understand compared to 11% in both New South Wales and Western Australia. In addition, the issue of effective court support is a crucial element in addressing the needs of children in the process. In Queensland the presence of a support person is discretionary while in New South Wales the child has a right to have a support person present. Only Western Australia provides a dedicated comprehensive support service for child witnesses. The level of resources, security and protection offered to child complainants is in stark contrast to the limited facilities provided in Queensland

and New South Wales. As noted by the ALRC & HREOC (1997), the Child Witness Service in Western Australia continues to set the standard for court support for children and to receive the support of the defence, prosecution and judiciary in that state.

Verdict and Sentence

There is little doubt that in seeking justice children desire validation of their abuse experiences, affirmation of their innocence and confirmation of the guilt of their abuser. When this fails to happen and the accused is acquitted, further psychological harm to the child occurs. Children expressed anger when the perpetrator was acquitted, but also a recurring theme across all states was the importance the children placed on the verdict as an indicator of "being believed". Other problems identified were charge bargaining, and inadequate sentencing particularly in comparison with other offences (eg property offences).

However, even a conviction is not sufficient to ameliorate the damage caused by the justice system, it should be remembered that two-thirds of those who gained convictions also indicated that they would not report if sexually abused again. Such a response is a sad indictment on the justice process.

Legal Resistance to Reform

Arguments by legal practitioners against further reform for child complainants were largely based on a lack of knowledge about what goes on in other jurisdictions, on well-worn yet unsubstantiated assertions that *any* reform would be prejudicial to the accused, and a fear of "rocking the boat." Claims, for example, that the justice system in Queensland is the very best system we could have, is simply not substantiated even by current legal knowledge and practice - either nationally or internationally. The comment by one defence counsel that there have been no enormous injustices perpetrated in Australia, England and America, would be a claim profoundly disputed by *many* children and women in this country who have sought justice through the courts for sexual assault. Also, to align the Queensland justice system with the English or American system is to demonstrate ignorance about the major reforms that have taken place in those overseas jurisdictions for child complainants.

The bottom line in any discussion about the need for substantial legislative and procedural reform for child complainants has been well articulated by legal practitioners in Western Australia. The wide-ranging reforms in that state work well – and work for everybody. Judges, prosecutors and defence counsel came to the point of recognising the trauma and damage inflicted on the child and took definitive steps to address the problem. As explained by one judge, those who are fighting to protect their "turf" and who speak the loudest are not always speaking for the decent section

of the legal profession who are committed not only to the concepts of truth and justice, but also to reducing the trauma for children.

It is interesting that some lawyers consider the legal system to be so fragile, that *any* suggestion of reform is seen as a threat. Perhaps the central paradigms of traditional jurisprudence are not as unassailable as some would argue. The falsity of claims that the law is objective and neutral, that there is equal treatment of all before the law, and that the truth in any matter can be determined by legal reasoning have been exposed by numerous legal scholars (Davies, 1997; DeBeauvoir, 1988; Naffine, 1990; Smart, 1995). Such a view is self-deluding and indicative of law's over-inflated view of itself. Nevertheless, those who make the laws must be forced to hear what they have been trained to disregard (Scales, 1993). Until legislators in all Australian jurisdictions are able to embrace comprehensive reform for sexually abused children – there will be no justice for children, and abusers will continue to offend with impunity.

Principles for Reform

Given the manner in which law traditionally sets itself apart – it is no easy task to persuade every Australian jurisdiction that nothing less than substantial legislative and procedural reform will prevent the abuse of children by the justice system. Without a concomitant paradigm shift in culture, beliefs and attitudes – even reforms will have limited effectiveness.

Worthwhile, explicit and repeated recommendations have been made by a myriad of inquiries and reports. Most remain ignored and unimplemented. Therefore, the following principles are presented which, on the basis of the current study, should be considered the *minimum* basis for reform.

For the Child

- *Every* child should wait no longer than six months between reporting and giving evidence.
- *Every* child should be kept well informed on the progress of their case.
- *Every* child should be provided with dedicated and comprehensive court support from the time of reporting, and with child-friendly facilities prior to giving evidence.
- *Every* child should *not* be required to appear in court unless the *child* wishes to do so.

- *Every* child should give evidence *once* only – for the purposes of trial. Full pre-recording of the child's evidence should be available.

- *Every* child should be permitted the use of CCTV and to choose support persons.

- *Every* child should be protected from seeing the accused at *all* stages of the process.

- *Every* child should be permitted legal representation and/or a dedicated child advocate.

- *Every* child should be protected under all circumstances from aggressive cross-examination.

- *Every* child should be entitled to after-court counselling and de-briefing.

- *Every* child should be treated with dignity, respect, care and humanity.

For Legal Practitioners

- Every legal practitioner who acts in cases of child sexual abuse – including crown prosecutors and defence lawyers, needs to be trained and accredited in child development and the dynamics of sexual abuse.

- Legal counsel who breach the legislation in relation to the cross-examination of children should be disciplined. Persistent offenders should be precluded from acting in such cases. Penalties for such breaches should be enforceable and enforced – if necessary through the courts and through legislation.

- If 'closed courts' allow defence barristers to act with impunity – courts must be opened to select personnel to ensure openness and accountability of the legal process.

- Bar Associations must develop a code of ethics to eliminate offensive and unethical behaviour complete with discipline and penalties for those who breach such guidelines.

For Judges

- Every magistrate and judge who sits in cases of child sexual abuse needs to be trained in child development and the dynamics of child sexual abuse.

Courts have repeatedly denied 'fair trials' to child victims of sexual abuse and perpetuated beliefs that children lie about sexual abuse. Such a belief has no basis in

fact. Current warnings clearly disadvantage child complainants of sexual abuse in comparison to other crimes and cast unwarranted doubt on the testimony of the child. Warnings are generally only required in cases of sexual assault and clearly discriminate against women and children. Legislation must be clear and unequivocal to ensure the intent of the legislation is not continually thwarted by the courts (ALRC & HREOC, 1997; Mack 1998). Therefore it is recommended that

- Legislation is amended in relation to judicial warnings to give effect to the principles in the draft legislation as follows.

  (1) A person may be convicted of an offence on the uncorroborated testimony of one witness.

  (2) In a proceeding for a sexual offence against a child, the trial judge is **required** to direct the jury-

    (a) that one witness, if believed, is sufficient to prove a fact.

  (3) Judges must **not** warn, in any case **-**

    (a) that children are in any way an unreliable and untrustworthy class of witness;
    (b) that complainants of sexual assault are in any way an unreliable and untrustworthy class of witness;
    (c) that the evidence of the child is to be regarded as unreliable due to the age of the child;
    (d) that delay in making a complaint makes the evidence of the child unreliable.
    (e) that corroboration is necessary or desirable in order to convict;

  (4) Subject to (2) and (3), if it is in the interests of justice to do so, a judge may

    (a) make comments to the jury about the specific evidence given; or
    (b) where there is only one witness asserting the commission of an offence, advise the jury the evidence should be scrutinised with great care.

Conclusion - Listening and Believing

The criminal justice system is “not about the child”. That is clear from both the children and the legal practitioners in this study. If some lawyers have their way – it will “never be about the child.” It is disturbing the extent to which so many in the legal profession believe children often lie about sexual abuse. This is despite national and international research which substantiates that around 1 in 4 girls and 1 in 8 boys are sexually abused. Only about half of the young victims disclose the abuse to anyone and fewer than ten percent report the abuse (Finkelhor, 1994; Fleming, 1997). It seems that the body of knowledge gathered for over half a century

about the extent and effects of sexual abuse has not yet reached the hallowed halls of justice. There is no longer any excuse for the ongoing ignorance about the sexual abuse of children. Even terms such as 'kiddy-fiddling' minimise and trivialise the crime and its impact. It is hard to imagine lawyers would refer to sexual abuse in such a derogatory way if their own child were sexually abused.

It is equally disturbing to discover how little some legal practitioners understand or even care about the damage being done to children every day in our courts. This may be because the real problem lies with the inability of the justice system to address or even conceive of the child's needs. Conventional legal knowledge and traditional jurisprudence, with its narrow entrenched mythology about sexual abuse and erroneous beliefs about children, does not allow for such a conceptualisation.

There is no doubt that children are at risk in the criminal justice system. The problem is that no-one is telling the children just how much they are at risk. No-one is telling them how even those who advocate in the system would not risk their own children. The child complainants in this study have described the damage. The children have described the damage done by the wait for trial, by being forced to see the accused, by repeated questioning and brutal cross-examination, and by being treated with inhumanity and disrespect by adults throughout the criminal justice process. The children have delivered a judgement on the criminal justice system itself and have ruled it is not worth it.

Law has little motivation to incorporate the view of the less powerful – such as the child. Nevertheless, the law is too powerful to be ignored. In the end, if both children and adults would not report sexual abuse because of the damage done to the child by the justice system, the abusers are allowed to act with impunity. The law must be redefined. It must be forced to recognise erroneous beliefs, ineffective legislation, damaging practices and the reality of sexual abuse. If the law remains deaf to the voices and needs of the children it purports to protect from harm, it fails by any measure of what constitutes 'justice'.

It is little wonder children feel that the justice system does not listen and does not believe them. Every step in the criminal justice process is impeccably designed to silence them, control them, ignore them, blame them, shame them, humiliate them, intimidate them and call them liars. It is time to go beyond legislative reform and to find new ways of ensuring children have access to true justice.

APPENDICES

APPENDIX A Complainant Demographics

APPENDIX B Child Complainants Report Again

APPENDIX A

Complainant Demographics

Case	Gender	Age At Int	Relationship to the Accused	Mths from Reporting To trial	Conviction
QLD					
CC1	F	14	Father	18	No
CC2	M	10	Uncle	11	No
CC3	F	11	Mothers boyfriend	N/A*	No
CC4	F	10	Neighbour	12	No
CC5	F	15	Father	30	No
CC6	F	14	Family friend	08	Yes
CC7	F	13	Step-father	13	Yes
CC8	F	13	Neighbour	11	Yes
CC9	F	12	Neighbour	11	Yes
CC10	F	15	Friend's father	18	Yes
CC11	F	16	Family friend	24	Yes
CC12	F	11	Family friend	34	Yes
CC13	F	14	Family friend	34	Yes
CC14	F	13	Stranger	36	No
CC15	F	11	Family friend	17	No
CC16	F	09	Father	24	No
CC17	F	14	Neighbour	30	Yes
CC18	F	13	Neighbour	23	Yes
NSW					
CC1	F	16	Stranger	09	No
CC2	F	13	Step-father	24	No
CC3	F	16	Step-father	24	No
CC4	F	14	Step-father	13	Yes
CC5	F	11	Mothers boyfriend	24	Yes
CC6	F	16	Family friend	14	Yes
CC7	F	15	Neighbour	12	Yes
CC8	F	15	Uncle	12	Yes
CC9	F	16	Boss	16	No
WA					
CC1	F	14	Father	15	Yes
CC2	F	16	Stepfather	24	No
CC3	F	17	Family friend	19	Yes
CC4	F	16	Brother in law	19	No
CC5	F	17	Father	24	Yes
CC6	F	12	Father's de facto	26	Yes
CC7	F	17	Family friend	20	Yes

CC8	M	16	Mother	18	Yes
CC9	F	16	Stranger	27	Yes
CC10	F	16	Neighbour	23	Yes
CC11	F	17	Family friend	13	Yes
CC12	F	09	Great grandfather	11	Yes
CC13	F	16	Family friend	11	Yes
CC14	F	11	Uncle	24	No
CC15	F	14	Uncle	24	No
CC16	F	09	Neighbour	24	Yes
CC17	F	17	Uncle	11	Yes
CC18	F	17	Family friend	24	Yes
CC19	F	15	Uncle	11	Yes
CC20	F	16	Uncle	11	Yes
CC21	F	14	Friend	18	No
CC22	F	14	Family friend	15	Yes
CC23	F	17	Stranger	14	No
CC24	F	17	Friend	20	Yes
CC25	F	16	Neighbour	15	No
CC26	F	15	Family friend	09	Yes
CC27	F	08	Family friend	14	Yes
CC28	F	17	School Employee	22	Yes
CC29	F	17	Stranger	18	No
CC30	F	13	Family friend	20	No
CC31	F	15	Family friend	20	No
CC32	F	16	Friend’s father	14	Yes
CC33	F	14	Step-father	15	Yes
CC34	F	11	Cousin	13	No
CC35	F	12	Uncle	13	Yes
CC36	F	14	Step-father	12	Yes

* case QLDCC4 was not committed for trial.

APPENDIX B

Child Complainants: Report Again

Jurisdiction	No	Not Sure	Yes
QLD (18)	39% (7)	17% (3)	44% (8)
NSW (9)	56% (5)	11% (1)	33% (3)
WA (36)	17% (6)	19% (7)	64% (23)
TOTAL (63)	29% (18)	17% (11)	54% (34)

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TABLE OF LEGISLATION

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Criminal Code

Criminal Law Amendment Act 1945

Criminal Law Amendment Act 2000

Criminal Law (Sexual Offences) Act 1978

Evidence Act 1977

Justices Act 1886

Juvenile Justice Act 1992

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Children (Care and Protection) Act 1987

Crimes Act 1900

Criminal Legislation Amendment Act 2001

Criminal Procedure Act 1986

Criminal Procedure Amendment (Justices and Local Courts) Act 2001

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Justices and Legislation Repeal and Amendment Act 2001

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Acts Amendment (Evidence of Children and Others) Act 1992

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Criminal Law (Procedure) Amendment Bill 2002

Evidence Act 1906

Justices Act 1906

International

International Covenant on Civil and Political Rights

United Nations Convention on the Rights of the Child