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Child complainants and the court process in Australia

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Foreword | *In recent years, it has been recognised that child complainants in the criminal justice system can experience difficulties over and above those of other complainants and that children can experience the court process as extremely traumatising. This can be exacerbated if children are complainants in child sexual offence matters and if they have to give evidence against a family member. This paper has three primary aims. First, it outlines the major factors that contribute to making court processes harrowing for child complainants. Second, it outlines some of the main initiatives that have been introduced to address these factors. Finally, it weighs up the evidence about initiatives designed to assist child complainants and concludes that such initiatives have had only limited practical impact for child complainants in the criminal justice system. The limited impact is attributed to the need to balance the rights of the accused with consideration for the complainant, a failure to translate legislative changes into practice, the impact of judicial discretion and/or a focus on protecting child complainants at the expense of increasing convictions.*

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Crimes against children are most often crimes against the person. Statistics show that children comprise substantial proportions of victims of offences against the person, such as sexual offences. In 2007, the highest rate of recorded sexual assault in Australia was for 10 to 14-year-old females at 544 per 100,000 population (AIC 2008). For males, rates were also highest among children, with 95 per 100,000 population 10 to 14 year olds and 78 per 100,000 boys aged under 10 years reporting a sexual assault (AIC 2008). Although research indicates that adult male victims of sexual offences are very unlikely to report to the police, research has not yet determined whether this is also the case among male child victims. In Australia, reported crimes against children have been increasing in recent years (Sumner-Armstrong & Newcombe 2007). Child protection substantiations, for example, increased by 30 percent between 2004–05 and 2006–07 (AIHW 2009: vii).

It has been widely acknowledged that contact with the court system is especially traumatic for particular groups of witnesses, including child complainants, who may experience high levels of stress and 're-traumatisation' (Cossins 2006a). Reforms designed to address this problem have been proposed since the 1980s. Since then, a range of initiatives to minimise the stressful nature of the court process—and thus increase children's capacity to provide reliable evidence—has been introduced. These initiatives have been informed by two main tenets: that due to their age and lack of life experience, children—especially younger children—need special assistance in court and; that due to the nature of sexual offences, complainants in these matters should be afforded special assistance in court proceedings.

Consideration for child complainants must be balanced against providing a fair trial for accused persons; this tension underscores much of the debate on this topic. This paper provides an overview of the factors that contribute towards children's traumatisation in the court system, initiatives that have been introduced in Australian jurisdictions to minimise these factors and explanations for the limited effectiveness of these initiatives.

As outlined above, although children can appear in court as complainants in a range of matters, they often appear in matters related to sexual offences. Most of the initiatives developed to assist child complainants have focused on assisting complainants of offences of this kind. This paper therefore covers issues and initiatives relating primarily, but not exclusively, to child complainants of sexual offences.

Problems faced by children in the court system

Children face a variety of problems when they appear in court as complainants, including giving evidence and being cross-examined, poor perceptions of child witnesses and the low likelihood of trials resulting in conviction.

Giving evidence and being cross-examined

It has been well documented that giving evidence in criminal proceedings can be a traumatising experience for children (Davies, Devere & Verbitsky 2004; Powell 2005). Cross-examination is widely regarded as the most traumatising aspect of participating in criminal proceedings for child witnesses, particularly in sexual offence proceedings.

Studies have also shown that children find understanding legal language and answering questions in cross-examination difficult, due to being constrained in how they can answer and a lack of understanding of questions being asked (Hoyano 2007). This is likely to be the case for younger children in particular.

As Cossins (2006b) points out, Indigenous children may face additional difficulties giving evidence or being cross-examined in court proceedings for a number of reasons, including English not being their first language and/or being affected by ongoing neglect and abuse within their family. Children from culturally and linguistically diverse backgrounds may also face additional barriers in the courtroom. In *The Queen v Wad* [2008] QCA 314, for example, it was contended that the complainant's limited command of English made her evidence 'imprecise and apt to mislead'.

These issues are important to consider given, for example, that Indigenous children were more than six times as likely as non-Indigenous children to become the subjects of child protection substantiations during 2007–08 (AIHW 2009).

Poor perceptions of child witnesses

Although research has demonstrated varying juror perceptions about the quality and believability of child witness testimony, the majority of this research suggests that jurors tend to view child witnesses as unreliable (Sumner-Armstrong & Newcombe 2007).

Children often delay reporting sexual abuse for substantial periods of time. One study (cited in Lewis 2006) found that 75 percent of children waited at least a year to disclose abuse and a further 18 percent waited more than five years. Such delays in reporting child sexual abuse can affect jurors' perceptions of the credibility of child complainants. Although there are a variety of sound reasons for delays, including threats by and/or fear of the perpetrator, self-blame, shame and other psychological effects of the abuse (Lewis 2006), delays may nonetheless influence jurors' decisions. This may be particularly the case in jurisdictions in which warnings are given by judges in cases where there has been a significant delay between the abuse and reporting of the abuse.

Low likelihood of conviction

Prosecution and conviction rates in child sexual abuse cases are low in Australia in comparison with other offences (Fitzgerald 2006). There are a number of reasons for this, including low rates of reporting (Friedman & Jones 2005), the problem of obtaining corroborative evidence given the secretive nature of the offence (Oliver 2006) and juror perceptions of child witnesses. Additionally, although research by Fitzgerald (2006) has shown that in New South Wales sex offences against children have a higher conviction rate than those against adults, smaller proportions of incidents involving children resulted in the commencement of proceedings. In the local court in 2004, a higher proportion of defendants charged with a sexual offence against a child (48%) had their charges dismissed without a hearing than those charged with a sexual offence against an adult (27%; Fitzgerald 2006: 8).

Powell, Roberts and Guadagno (2007) add to this the problem of 'particularisation' of child abuse offences. In cases where child sexual abuse is alleged to have been perpetrated on multiple occasions, or when several different acts were allegedly perpetrated, most jurisdictions require that each offence be 'particularised'—that is, 'identified with reasonable precision in relation to time, place or some other unique contextual detail' (Powell, Roberts & Guadagno 2007: 64). Acts of child sexual abuse are rarely isolated events and often increase both in frequency and severity over time (Cossins 2006b). It has been recognised, however, that as a consequence of ongoing sexual abuse, child complainants may be incapable of providing evidence that distinguishes between discrete incidents of abuse (Powell, Roberts & Guadagno 2007). This may be especially the case for younger children, whose memory capacity is still developing.

Responses to problems for child witnesses

An array of initiatives has been implemented in Australia's states and territories to address the problems faced by child complainants in the criminal justice system, which aim to reduce trauma for child complainants and therefore to increase the credibility of children's evidence. Major reforms are outlined below.

Modifying the physicality of the courtroom

All jurisdictions in Australia, with the exception of Tasmania, allow for modifications of the physicality of the courtroom aimed at minimising the trauma faced by child complainants. The use of screens to block the accused from the complainant's view is a common example. Clearing the public gallery during a child complainant's testimony and requiring members of the judiciary to remove their wigs and gowns are also widely-implemented initiatives aimed at reducing the intimidating nature of the court environment for child witnesses.

Closed-circuit television

The use of closed-circuit television (CCTV) to enable witnesses to give evidence and be cross-examined from a location outside the courtroom has been implemented in all Australian jurisdictions. The aim of this reform is to remove child complainants from face-to-face communication with the defendant and thereby minimise the stress

Table 1 Use of CCTV and restrictions on cross-examination by defendants in proceedings involving child complainants

	Legislation	CCTV	Cross-examination
NSW	*Criminal Procedure Act 1986*	Children who are or were aged 16 years or below at the time of the alleged offence are entitled to give evidence via CCTV, unless they choose not to do so	Complainants in sexual offence matters cannot be cross-examined by the accused, but may be cross-examined by another person appointed by the court for that purpose
Vic	*Evidence Act 1958*	In cases involving child complainants of sexual offences, the court must initiate special arrangements for the child, such as CCTV	An accused person cannot personally cross-examine a protected witness in sexual and family violence cases
Qld	*Evidence Act 1977*	If audiovisual equipment is available, child complainants must give evidence via CCTV, unless the court deems them willing and able to give evidence in the courtroom	A self-represented defendant may not cross-examine a child under 16 years or the alleged victim of prescribed offences
WA	*Evidence Act 1906*	If audiovisual equipment is available, child complainants must give evidence via CCTV, unless the court deems them willing and able to give evidence in the courtroom	A self-represented defendant cannot cross-examine a child directly, but may put any question to the child via the judge or other approved person
SA	*Evidence Act 1929*	Witnesses may give evidence via audiovisual link if the appropriate technology is available. Under amendments to this legislation (not currently in operation), the court must order that an audiovisual record be made of the evidence of sexual offence complainants aged 16 years or below	A self-represented defendant cannot cross-examine a witness who is the alleged victim in proceedings related to a serious offence against the person
Tas	*Evidence (Children and Special Witnesses) Act 2001*; *Evidence Act 2001*	Child complainants are to give evidence by audio visual link unless the child is willing and able to give evidence in the courtroom	n/a
ACT	*Evidence (Miscellaneous Provisions) Act 1991*	If audiovisual equipment is available, child complainants must give evidence via an audiovisual link, unless the court orders otherwise. The court may do so if the child prefers to give evidence in the courtroom, if proceedings will be unreasonably delayed, and/or if the court cannot ensure fair proceedings if an order is not made	A self-represented accused person must not personally cross-examine a child witness in sexual or violent offence proceedings
NT	*Evidence Act*; *Sexual Offences (Evidence and Procedure) Act*	Child complainants may give evidence via an audiovisual link if such technology is available, unless the child is willing and able to give evidence in the courtroom. The court may order that a child must give evidence in the courtroom if the urgency of proceedings dictates this, and/or it is not in the interests of justice to use an audiovisual link.	An unrepresented defendant is not entitled to cross-examine complainants directly. Questions may be put to the complainant via the judge or other person approved by the court

placed on the child and improve the quality of the child's evidence. Table 1 shows the provisions of each jurisdiction in relation to the use of CCTV in court proceedings involving child complainants.

Pre-recorded evidence

The use of pre-recorded evidence for child complainants and/or complainants in sexual offence matters has been legislated in all Australian jurisdictions (although provisions have not yet commenced in South Australia). Pre-recording the evidence of child complainants serves multiple aims, including minimising the stress placed on the child by avoiding face-to-face contact with the accused, reducing the likelihood of the child's memories fading over time and allowing the child's evidence to be captured without being corrupted by multiple interviews (Friedman & Jones 2005).

Support persons and child intermediaries

All Australian jurisdictions have implemented legislation providing for support persons to be present when children give evidence, either in court or via CCTV. Western Australia's legislation also allows for child intermediaries, whose role it is to explain difficult questions to child complainants and explain children's evidence to the court.

Restrictions on committal hearings

Most jurisdictions in Australia have placed restrictions on requiring child sexual abuse complainants to give evidence at committal hearings. These restrictions have been introduced as a result of the recognition that giving evidence is a traumatic event for a child and that having to give evidence multiple times potentially magnifies this trauma (Friedman & Jones 2005). Additionally, such restrictions remove the possibility that child complainants will be subject to cross-examination on any inconsistencies between their evidence at a committal hearing and at trial.

Restrictions on cross-examination by the accused

Due to the trauma that being cross-examined by an unrepresented accused person may inflict on child complainants, all jurisdictions except Tasmania have introduced restrictions on the rights of the accused in this regard. As Table 1 shows, in some jurisdictions these relate to child complainants only, while in others, the restrictions relate to complainants in sexual offence cases.

Improving interviewing techniques and child witness statements

Powell, Roberts and Guadagno (2007) argue that improving the quality of child witness statements is a crucial factor in increasing rates of conviction in cases involving child sexual abuse complainants.

Powell (2005) has made a number of recommendations for improving the reliability of child witness testimony in court via improving the techniques of investigative interviewers, including preparing child complainants for cross-examination; providing feedback to investigative interviewers on judicial reaction to their interview; and increasing training for investigative interviewers, lawyers and the judiciary in relation to the impacts that leading questions during interviews may have on the evidence obtained and the likelihood of subsequent 'contamination' of the evidence.

Table 2 New offence categories, by jurisdiction

	Legislation	Year provision introduced	Relevant section	Offence category
NSW	*Crimes Act 1900*	1998	s. 66EA	Persistent sexual abuse of a child
Vic	*Crimes Act 1958*	1991	s. 47A	Maintaining a sexual relationship with a child
Qld	*Criminal Code 1899*	1989	s. 229B	Maintaining a sexual relationship with a child
WA	*Criminal Code 1913*	2008	s. 321A	Maintaining a sexual relationship with a child
SA	*Criminal Law Consolidation Act 1935*	1994	s. 50	Persistent sexual exploitation of a child
Tas	*Criminal Code 1924*	1994	s. 125A	Maintaining a sexual relationship with a child
ACT	*Crimes Act 1900*	1991	s. 56	Maintaining a sexual relationship with young person
NT	*Criminal Code 1983*	1994	s. 131A	Maintaining a sexual relationship with a child

New offence categories

As discussed above, one problem for child complainants of sexual offences in the criminal justice system is 'particularisation', or having to identify and differentiate between multiple incidents of abuse (Powell, Roberts & Guadagno 2007). In response to this problem, a new offence has been implemented in each Australian jurisdiction. The new offence, usually described as 'maintaining a sexual relationship with a child', is charged in cases where 'an adult is alleged to have sexually offended against a child on at least three separate occasions but the individual occasions of offending or acts cannot be individually identified and particularised with precision' (Powell, Roberts & Guadagno 2007: 65). Table 2 outlines the relevant legislation in each jurisdiction.

Specialist jurisdictions and services for child witnesses

Specialist courts or specialist jurisdictions, which deal exclusively with complainants of sexual offences, have emerged in recent years in a number of locations including New South Wales, South Africa and Canada. A specialist child sexual assault jurisdiction was piloted in western Sydney in 2003, covering courts at Parramatta, Penrith and Campbelltown and trying cases involving a personal assault offence in which children aged less than 16 years were witnesses (Cashmore & Trimboli 2005). The specialist jurisdiction was characterised by a number of features, including use of judges experienced in child sexual assault trials, a remote facility from which children can give evidence and child-friendly evidence rooms and reception areas.

Have special provisions for child witnesses achieved their aims?

Special provisions for child complainants have been the focus of a substantial body of research literature in recent years. Much of this research indicates that such provisions have been limited in improving the experience of child complainants and in turn, increasing conviction rates. The following section outlines a number of special initiatives for child complainants that have not fully achieved their aims.

New offence category

The offence category of maintaining a sexual relationship with a child, designed to overcome the problem of particularisation has, in the main, 'failed to achieve this goal' (Powell, Roberts & Guadagno 2007: 65). Legislation regarding the offence of persistent sexual abuse has been narrowly interpreted by the judiciary. Although the actus reus of maintaining a sexual relationship with a child is the *relationship* itself, prosecutors have still been required to provide sufficient detail to identify multiple occurrences of abuse (Chapman 2006). As Chapman (2006) points out, if the jury is not satisfied about all three occasions of abuse, one verdict of not guilty would result. If these offences were separately charged, however, a guilty verdict might occur in relation to one or two of the incidents of abuse (Chapman 2006).

Data published by the Victoria Sentencing Advisory Council (2007) indicate that in this jurisdiction at least, the new offence category has resulted in a small number of convictions since its enactment in 2001. During the five year period from 2001–02 to 2005–06, 29 adults were sentenced in Victoria for maintaining a sexual relationship with a child. The majority of these (76%) were given a sentence of fulltime imprisonment.

Closed-circuit television

Although the use of CCTV has been implemented widely and heralded as a progressive initiative for child witnesses, Oliver's (2006) research shows that in Queensland, poor implementation of this measure has severely limited its potential impact. Oliver (2006) claims that very few courts in Queensland have the necessary technology to use CCTV in court proceedings and that when courts do have the necessary technology, it is often not in working order. Technical difficulties with equipment and court staff who were unable to operate equipment, were issues also raised by Cashmore and Trimboli's (2005) evaluation of the specialist child sexual assault jurisdiction in New South Wales.

CCTV has also been adopted in an ad hoc manner in Victoria, where despite legislative provisions for the use of this technology, a report by the Victorian Law Reform Commission found that child complainants in sexual offence matters were often required to give evidence in court (Friedman & Jones 2005).

Restrictions on committal hearings

Despite restrictions on committal hearings in most Australian jurisdictions, the Victorian Law Reform Commission found that in Victoria, this restriction had not had an impact and both adult and child complainants are routinely cross-examined at committal (Friedman & Jones 2005). Of 40 court proceedings involving sexual offence matters for which a committal hearing had been held at Melbourne Magistrates' Court during the September to December 2003 period, for example, 38 successful requests were made by the defence to cross-examine the complainant. Fourteen of these complainants were aged less than 18 years old (Friedman & Jones 2006).

Pre-recorded evidence

Although Cashmore and Trimboli (2005) found that the use of pre-recorded evidence was well supported by child complainants and their parents, concerns about its use have been raised in other jurisdictions. Corns' (2004) Victorian study on the use of video- and audio-taped evidence-in-chief in cases involving child complainants of sexual offences found that in the five years between 1999 and 2003, the use of pre-recorded evidence had formed the grounds for appeal against conviction in a number of cases. In each of the decisions, the Court of Appeal found that the trial was unfair because the jury had been given access to the video or audio tape during their deliberations (Corns 2004).

This issue has also been raised in a number of more recent cases in Victoria (*The Queen v Anders* [2008] VSCA 7), Queensland (*The Queen v GT* [2005] QCA 478; *The Queen v Siulai* [2008] QCA 382) and Western Australia (*MNO v The State of Western Australia* [2009] WASCA 59). In *Gately v The Queen* [2007] HCA 55, the High Court of Australia dismissed the appellant's claim that the trial judge's decision to allow the jury to replay the child complainant's pre-recorded video evidence during its deliberations constituted a miscarriage of justice. Although Kirby J cited Corns' (2004) study and agreed with his conclusion that allowing a jury access to the pre-recorded evidence should constitute a procedural irregularity sufficient to quash the relevant conviction, the remaining judges agreed that the appeal should be dismissed.

Specialist jurisdictions

Cashmore and Trimboli's (2005) evaluation of New South Wales' pilot specialist jurisdiction found that although many of the proposed provisions had been implemented, the jurisdiction itself had not met its aims. They found, for example, that although a presumption in favour of special measures had been introduced, many of its features were already in use in non-specialist jurisdictions.

Importantly, the overall conviction rate for the 50 cases examined during the pilot's evaluation was 56 percent. This figure is comparable with conviction rates for child sexual assault cases finalised in New South Wales higher courts during the last decade (Cashmore & Trimboli 2005).

Training in child witness investigative interviewing

Snow and Powell (2007) claim that despite best practice guidelines on the investigative interviewing of child witnesses, in practice, professionals do not often use these when interviewing children. Best practice guidelines in this area suggest that interviewers focus on eliciting free narrative accounts from children, without being prompted with specific questions (Snow & Powell 2007).

Snow and Powell's (2007) analysis of transcripts from police interviews with children found that interviewers' overuse of specific, rather than open-ended, questions disadvantages younger children in particular and may result in children resorting to a 'stimulus-response' paradigm, in which they passively respond to interviewers' questions, rather than freely tell their story in their own words.

Why have child complainant provisions been ineffective?

Provisions introduced to assist child complainants have been ineffective in improving children's experiences and increasing rates of conviction for a variety of reasons. It is important to note, however, that due to the small number of cases in which initiatives designed to assist child complainants have been used—particularly in smaller jurisdictions—it is difficult to make firm conclusions about their utility. A number of broad issues that affect the potential of new provisions to have the intended impact can, however, be identified.

Balancing rights of accused with consideration for victim

As outlined above, a critical issue in relation to trials involving child complainants is balancing the rights of the accused with consideration for the complainant. Oliver (2006) argues, for example, that although some Brisbane judges accept that child complainants should be granted special consideration, others believe that any special consideration could be seen as prejudicial to the accused.

As Corns' (2004) study suggests, measures that might be seen as prejudicial to the accused may result in fewer successful convictions. This may in turn result in increased trauma for the child complainant, who may feel that they were not believed by the court.

Disjuncture between legislative changes and practical application of initiatives

As described above, in relation to a number of new provisions introduced to assist child complainants, legislative changes have not been translated into practice. This has been the case with restrictions on the cross-examination of child complainants by accused persons in Victoria (Friedman & Jones 2005) and the use of technological aids in Queensland (Oliver 2006), for example.

Impact of judicial discretion

Despite legislative and policy changes in the treatment of child complainants, judges have maintained considerable discretion on a range of matters. Oliver (2006) argues that in Queensland, for example, a range of provisions, including the use of support persons, have not been fully implemented due to the exercise of judicial discretion. Oliver's (2006: 59) research found that 'one Brisbane judge would not allow a screen to be placed between the child witness and the accused under any circumstances'. Although this incident cannot be taken as indicative of the behaviour of other members of the judiciary, it does raise a crucial point about the importance of judicial discretion in implementing changes designed to assist child complainants.

Focus on vulnerable witness protections over attempts to increase convictions

Cossins (2006b) argues that initiatives in the area of child sexual abuse trials have focused primarily on reducing the

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traumatisation faced by child complainants, rather than addressing attrition rates and the trial process. Cossins (2006b) admits, however, that the existence of such measures may have a positive affect by encouraging more victims to proceed to trial.

Conclusion

This paper has outlined some of the special problems faced by child complainants in Australia's criminal courts. Children's participation as complainants in the court system is a challenging and specialised area in which to research and it is beyond the scope of this paper to cover all aspects of this topic. Although a variety of initiatives have been introduced to address the problems faced by child complainants, evidence currently suggests that, for the reasons outlined above, these have achieved only limited success. Certainly, it appears that such initiatives are under-utilised. Their increased acceptance and use may, in the future, result in more positive outcomes.

This paper has identified the following areas for future research on child complainants:

- whether and how judicial perceptions of children's evidence have changed since the publication of Cashmore and Bussey's (1995) research in this area
- whether and how adult perceptions of child complainants affect children and their evidence and the implications of this
- whether child intermediaries can more effectively assist children to give evidence than child support persons
- how initiatives introduced to assist child complainants are experienced by children. For example, do children prefer that members of the judiciary adopt civilian clothing?

Finally, it is important to consider whether technologies introduced on an ad hoc basis to amend the court process for children can be effective, given that the western adversarial model of criminal justice is essentially unsuited to child complainants. In this context, a consideration of alternative approaches, such as therapeutic jurisprudence, might also form the focus of future research.

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